



THE GUIDEBOOK TO MASSACHUSETTS LAND USE

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American Planning Association
Massachusetts Chapter

Creating Great Communities for All

The Guidebook to Massachusetts Land Use – 2021

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GENERAL DISCLAIMER – The authors¹ are responsible for the accuracy of the content of the material in the Guidebook. The information, statements, and other content of the Guidebook are not specifically ratified or endorsed by the American Planning Association-Massachusetts Chapter.

LAND USE & LEGAL DISCLAIMER – This Guidebook cannot possibly cover all land use situations that may arise and all questions for which land use officials may seek answers. This Guidebook does not provide legal advice. Legal advice should be sought from, and provided by, the municipal attorney.

While every effort was made to assure that the information provided in this Guidebook is consistent with the constitution and laws of the Commonwealth, the purpose of the Guidebook is to provide some helpful – rather than all necessary – land use and legal commentary meant to assist the reader to be reasonably well informed on the topics covered.

The Guidebook should equip the user to have a more focused and efficient discussion of land use matters with board members, planning staff, building commissioners, and the municipal attorney, among others. It is very much recommended that local officials seek the advice of their municipal attorney and planning staff whenever a question regarding land use statutes or regulations arises.

A WORD OF CAUTION – The Guidebook was finalized when a variety of changes were being made to many state laws and regulations. These include the adoption of Chapter 358 of the Acts of 2020 (“The Housing Choice” bill). The Guidebook was updated to reflect those changes but as of time of publication, there were continuing advisories coming from the State on interpretation of the changes.

There were also various “emergency” orders of the Governor related to the COVID-19 situation, many of which were associated with land use statutes of the Commonwealth. Some of the emergency orders were temporary and several resulted in more permanent changes to the statutes. In certain cases, adjustments of legal timelines and deadlines were made, as well as changes to requirements of the open meeting and public records laws. The text of this Guidebook underwent final review early in this emergency period and thus does not reflect the final outcomes of the emergency orders.

For these reasons it is all the more important that the reader consult with their municipal attorney and reference Massachusetts state website resources when in doubt about the currency of Guidebook text related to the changes noted above.

GUIDEBOOK ERRORS – Readers are encouraged to contact the Chapter about any errors identified or corrections suggested. The nature of the error and the location in the Guidebook where the error occurs should be stated.

APA-MA CHAPTER CONTACT INFORMATION – Contact information for the Chapter can be found on the Chapter’s website. www.APA-MA.org or email communications@apa-ma.org

¹ The word “author” is to be understood as Bob Mitchell, FAICP and Bob Ritchie, Esq. with respect to Guidebook content submitted to APA-MA by them in October 2021, but not subsequent substantive changes in the Guidebook text authored by others.

The Guidebook to Massachusetts Land Use

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THE GUIDEBOOK TO MASSACHUSETTS LAND USE 2021

CHAPTER ONE

INTRODUCTION & GUIDE TO THE GUIDEBOOK

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American Planning Association
Massachusetts Chapter

Creating Great Communities for All

Chapter One

Introduction & Guide to the Guidebook

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Section 1-01

Introduction & Purpose

1.0 – Overview

1.1 – PURPOSE – The Guidebook to Massachusetts Land Use was commissioned by the American Planning Association – Massachusetts Chapter (APA-MA). It is intended for planning professionals, local boards, officials, and others who write, interpret, administer, enforce, explain, or who otherwise need information regarding federal, state, and local laws, regulations, and supporting court decisions relating to planning, zoning, subdivision control, and associated land use topics. The Guidebook is not meant to be a “tools & techniques” or “best practices” guidebook of planning and zoning, nor is it a legal treatise.

1.2 – ELECTRONIC & PAPER USE – The Guidebook is structured for use as an on-line digital document. Federal and state statutes, regulations, and court decisions are, whenever possible, hyperlinked to the source documents. When used with the hyperlinks, the reader is able to click on those hyperlinks to read the statute, regulation, or court case cited in the text. More information about this topic can be found in Section 1-04, “Hyperlinks”, of this Chapter.

At the time of the release of this Guidebook by the APA-MA Chapter in October 2021, it will only be available electronically. At such time that the document may become available in print it would be able to be used effectively off-line, but without the enhanced utility of hyperlinks to the many referenced resources available on-line.

1.3 – WARNING RE. OUTDATED INFORMATION AND GUIDEBOOK UPDATES – Due to the often-changing nature of the subject matter of this Guidebook, some content may become outdated, or even outdated quickly. It is anticipated that the Guidebook will be updated by the APA-MA Chapter from time to time to conform the text with changes in the law and newer relevant court decisions.

More specifically, the Guidebook was finalized during a period when a variety of changes were being made to many state laws and regulations. These include the adoption of Chapter 358 of the Acts of 2020 (“The Housing Choice” bill). The Guidebook was updated to reflect those changes but as of time of publication, there were continuing advisories coming from the State on interpretation of the changes.

There were also various “emergency” orders of the Governor related to the COVID-19 situation, many of which were associated with land use statutes of the Commonwealth. Some of the emergency orders were temporary and several resulted in more permanent changes to the statutes. In certain cases, adjustments of legal timelines and deadlines were made, as well as changes to requirements of the open meeting and public records laws. The text of this Guidebook underwent final review early in this emergency period and thus does not reflect the final outcomes of the emergency orders.

For these reasons it is all the more important that the reader consult with their municipal attorney when in doubt about the currency of Guidebook text related to the changes noted above.

Furthermore, it is important to note that, over time, the information and text in the Guidebook may lag behind new court decisions and new or revised state and federal statutes and regulations. Readers should check to verify the date of any revised versions of the Guidebook as to the relevancy of its text to the most recent source material.

2.0 – Legal References & Home Rule Amendment

2.1 – LEGAL OVERVIEW & CAUTION – Although the Guidebook includes numerous references to the Massachusetts General Laws (G.L.), the Code of Massachusetts Regulations (CMR), court decisions, and other secondary resources, it is important to understand that this Guidebook is not meant to be a legal treatise nor a substitute for consultation with the municipal attorney. Rather, its goal is to provide the zoning and planning community with the “big picture” – an overview of the core subject matter relating to planning, zoning, subdivision control, and selected other areas of the law while also providing necessary details to inform the reader. It is meant to supplement – not to substitute for – traditional resources. It is organized to assist the user by providing an extensive perspective on local land use regulation, and a launch pad for deeper inquiry elsewhere.

2.2 – THE HOME RULE AMENDMENT/SPECIAL ACTS/CHARTERS – The topics covered in the Guidebook are set forth and explained in the context of the Home Rule Amendment, state laws, and regulations applicable to cities and towns generally. It is important to note that any city or town, by charter or under a Special Act of the Legislature, has constitutional and statutory authority to prescribe alternatives to many provisions of the General Laws that otherwise govern their official functions.

For example, where the General Laws might assign certain legal functions to a designated body or official, a charter provision by charter amendment, or Special Act might reassign those functions to a different body or official. So long as what state law requires is done, it is often left to individual municipalities by charter or Special Act to prescribe who does it.

The Guidebook was written with the assumption that the default provisions of state law relating to local governance apply. It is beyond the scope of the Guidebook to cover alternative options available to the municipality by a Special Act or municipal charter provisions.

The reader is advised to consult with the municipal attorney and municipal clerk to confirm whether or not there are any charter provisions or Special Acts that affect the applicability of the General Laws or Code of Massachusetts Regulations (CMRs) or that confer upon cities and town powers beyond those provided therein.

Section 1-02

Organization

1.0 – Introduction

1.1 – GUIDEBOOK TOPICS – The Guidebook is organized in the following order around the following broad topics.

- Chapter 1 – Introduction & Guide to the Guidebook
- Chapter 2 – Good Government Laws – Open Meetings, Public Records, Conflict of Interest
- Chapter 3 – Planning
- Chapter 4 – Zoning
- Chapter 5 – Subdivision Control Law
- Chapter 6 – Massachusetts – Selected Other Land Use Topics
- Chapter 7 – Federal – Selected Other Land Use Topics
- Chapter 8 – Administration and Meetings
- Appendices:
 - Appendix A – Article 89 of the Articles of Amendment to the Massachusetts Constitution – Home Rule Amendment
 - Appendix B – Purposes of Zoning – Section 2A of Chapter 808, Acts of 1975
 - Appendix C – List of Guidebook Court Cases
 - Appendix D – List of Guidebook Tables
 - Appendix E – Regional Planning Agencies

2.0 – Guidebook Information

2.1 – GUIDEBOOK CHAPTER SEQUENCES – Chapters begin with an introduction and then offer a sequence of numbered sections and subsections with information pertinent to that chapter. Chapter Three – Planning, Chapter Four – Zoning, and Chapter Five – Subdivision, include a progression of the relevant sections of the Massachusetts General Laws governing that chapter's topic. There are, however, chapters and sections that cover topics not found in the General Laws, such as site plan review.

2.2 – COURT DECISION LINKS – Where appropriate, links to both United States and Massachusetts court decisions that illustrate the points discussed are included.

2.3 – UNDERLINING – Certain words or phrases that provide key information on the topic of that section are underlined.

Section 1-03

Conventions

1.0 – Introduction

1.1 – OVERVIEW – In writing the Guidebook, the authors have adopted certain conventions as to how particular words and terms are used, including how references are made to statutes and regulations and how court decision citations are treated. The information listed below covers these conventions.

2.0 – Convention Guidance

2.1 – GENERAL LAWS/SESSION LAWS – Reference to the Massachusetts General Laws follows the format: “G.L. c. 40A, § 3”, where “c” stands for chapter and “§” stands for section. References to the Massachusetts Legislature are variously to “the General Court” or the “Legislature.” These terms are used interchangeably in the Guidebook text. Enactments of the Legislature are published in the Acts and Resolves, many of which are then published as parts of the General Laws. The General Laws are publicly accessible on the website of the Massachusetts Legislature, in searchable format at: <https://malegislature.gov/Laws/GeneralLaws>.

State laws not incorporated into the General Law but having in general the same force and effect – and often referred to as Session Laws – adhere to the format illustrated as follows: Chapter xxx (the Chapter number), Acts of xxx (the year).

2.2 – CODE OF MASSACHUSETTS REGULATIONS – Reference to the Code of Massachusetts Regulations, abbreviated in this Guidebook as “CMR”, follows the format: “111 CMR 222”, where the first number is the chapter and the second number is the section. Links are available only to the CMR chapter, and not to its individual sections. When a reader links to a CMR chapter, they then must scroll down to find the referenced section of that chapter. The CMRs of state agencies are publicly accessible on the State website at: <https://www.mass.gov/code-of-massachusetts-regulations-cmr>.

Note that hyperlinks to the CMRs over time may not work. Some state agencies, as they change or update information related to CMRs, also change the URL (Uniform Resource Locator, or web address) for a specific chapter of the CMRs. In that case, the reader should go to the Legislature’s Home Page (www.mass.gov/legis) or the state agency’s website home page for updated hyperlinks to specific CMR chapters and sections.

2.2 – ORDINANCES AND BYLAWS – The term used for local legislation by towns is sometimes referred to as “by-laws” (in hyphenated format) and sometimes referred to as “bylaws” (without the hyphen). The authors have opted to use “bylaws” in non-hyphenated format, except when the term is within a direct quote, notwithstanding that the General Laws and the Code of Massachusetts Regulations generally use the hyphenated format. The term conventionally used for local legislation by municipalities with a city form of government is “ordinance.”

2.3 – REGISTRY OF DEEDS & LAND REGISTRATION OFFICE – Where reference in text is made to “Registry of

Deeds,” it should be understood that land whose title is registered in the Land Court may instead require filing with the Land Registration Office, which generally operates out of the same location as the County Registry of Deeds.

2-4 – REFERENCE TO LOCAL BOARDS – When reference is made in the text of the Guidebook to specific local boards and officials, it might well be that a city or town, by charter or Special Act, has re-assigned statutory functions to a board or official whose title and functions differ from the statutory default. This would result, for example, where the city or town has revised its charter or where the city or town has obtained a Special Act under which such changes are made. As a general caveat, the reader should always refer back to the municipal charter and Special Acts relating to the municipality to ascertain whether variations from default statutory roles and responsibilities are in effect.

In the text of this Guidebook you will see reference made to “city council”, “town council”, “board of selectmen”, or “select board”; but the important thing to remember is that while the General Laws may designate the “city council” as the chief legislative body of a city and “board of selectmen” as the chief executive body of a town, other terms may be used for these functions in any given city or town depending on its charter, special act, local law, policy, or custom.

In addition, while almost all cities and towns have a “planning board”, a number of municipalities have a board, that while it functions as the planning board, uses another title. All references to “planning board” in this Guidebook should be assumed to include those boards that operate as a planning board but use a different title.

2-5 – COURT DECISION CITATIONS – Reference to Massachusetts state court cases is by reference to their formatted citation. Most court cases cited in the Guidebook are to decisions of the Supreme Judicial Court and the Massachusetts Appeals Court. Citation to the decisions of the SJC are in the form “999 Mass. 999 (date)” and citations to the decisions of the Appeals Courts are in the form “999 Mass. App. Ct. 999 (date)”.

Reference to United States court decisions include links to various other formats that conform to the conventions of those courts, such as the Federal 1st Circuit Court of Appeals, whose jurisdiction includes Massachusetts, or to the United States Supreme Court.

2.6 – UNPUBLISHED COURT DECISIONS – Occasionally the most relevant guidance on a topic derives from a decision that is not published on a publicly accessible website; but the unlinked citation is nevertheless included so that the reader can obtain access to the case at the county law library or from the municipal attorney. Unpublished decisions may not have the same value as “precedent” decisions but are often of high educational value, and are often a good clue as to what the courts may do in later, published decisions.

2.7 – SEARCHING FOR DECISIONS OF THE SJC AND APPEALS COURT – In addition to the hyperlinks which the authors have added to many cited court decisions of the SJC and Appeals Court, the reader may wish to search for other decisions as well. Public access to the Mass Trial Court Library databases is available to the reader. The general link to the Trial Court Library is: [Massachusetts Trial Court Library](#); however another – a much easier route to navigate – is available at: www.masscases.com. This link brings you to a much more intuitive page of further links to the decisions.

Section 1-04

Hyperlinks

1.0 – Introduction

1.1 – OVERVIEW – This Guidebook is designed to be more informative and user friendly through the use of hyperlinks to external sources of information, such as state statutes and regulations, court cases, and other resources. In addition, internal hyperlinks are provided to allow a more efficient navigation within the Guidebook itself. Details of how these hyperlinks work are covered below.

2.0 – Internal Hyperlinks

2.1 – INTERNAL NAVIGATION – Subsection references in the Table of Contents of each Guidebook Chapter are hyperlinked to the corresponding subsection of Guidebook text. Additionally, and from any page, the reader can return to the Table of Contents of the Chapter by clicking on the hyperlink in the page footer: “Go to Chapter # Table of Contents”. Alternatively, pressing Ctrl/Home on the device keyboard will bring the reader to the cover page of the Chapter document. Internal hyperlinks move the reader to a different location in the same window. Do not close the window by clicking on the “X” (in the upper right corner of your browser) but rather click the footer hyperlink to navigate back to the top of the Table of Contents

Internal hyperlinks have been provided for two purposes:

- One (as mentioned above) is as a means of navigating between the Table of Contents at the beginning of each chapter and the text of the Chapter’s subsections. Clicking on a hyperlinked subsection number in the Table of Contents will take the user to the appropriate subsection text. This does not open a new browser window, but (as mentioned above) merely relocates the user to a different place in the same browser window.
- Two, in addition to the hyperlinks between the Table of Contents and subsection text, other internal hyperlinks are occasionally inserted within the text redirecting the user to a different location within the Guidebook, in the same browser window, where more detail is provided on the topic. Here also you will find a reciprocal hyperlink provided so that the user can return to the hyperlinked text that had initially re-directed the user.

2.2 – INTERNAL NAVIGATION SEARCH FOR SPECIFIC TERMS – At the time of release of the Guidebook by the APA-MA Chapter, standard “search” functions are not available in the Guidebook. Thus, clicking on the little magnifying glass icon (or pressing the Ctrl-F keys) to “find” a particular word or phrase will yield the anomalous message “*match not found*” or its equivalent. This is because the PDF document on display is an image file of a type referred to as an “embedded” PDF, not the usual PDF in which the standard search function is enabled.

3.0 – External Hyperlinks

3.1 – EXTERNAL HYPERLINKS – Unlike internal hyperlinks, all external hyperlinks to statutes, cases,

regulations, and other web resources are opened in a second, separate browser window. After navigating to any such site, you may close the second window (“X” out of the site) to return to the main document.

3.2 – “OFFICIAL” LINKS – Be aware that the “official” versions of all state statutes and regulations (and many of the state policies) are only available through the State Bookstore or from the Secretary of State’s Code of Massachusetts Regulations (CMR) Subscription Service. The links provided in the Guidebook to state statutes and Code of Massachusetts Regulations (CMRs) and other state regulations are not “official”. However, the links are to the mass.gov website and in most or almost all cases the documents are the same as the “official” versions. Nevertheless, it would be wise to consult with your municipal attorney, or purchase the “official” version of the document you are reviewing to obtain the “official” versions, if you feel that is necessary.

3.3 – BROWSERS – A word of caution here. Default settings for website navigation often differ among various available web browsers (Edge, Firefox, Chrome, etc.). Opening an external hyperlink in one browser may open up a new window with new content, while in another it might simply substitute the content of the window you are in. Be sure to understand how your own web browser works in this regard so that you can be sure of returning to where you were in the Guidebook prior to executing the hyperlink.

3.4 – THE GENERAL LAWS – Throughout the text, hyperlinks have been provided to the Massachusetts General Laws. These links re-direct the reader to the website of the Massachusetts General Court (the “Legislature”) (www.mass.gov/legis), or to those chapters and sections of the General Laws that relate to the topics being discussed. The user should note that hyperlinks to the General Laws are to web addresses that are dynamic – that is, not static – and thus they are frequently changed to reflect any amendments and revisions adopted by the Legislature.

It is important to understand that while the hyperlink should always bring you to the General Laws, over time any updates to those laws may not be immediately reflected in revised text of the Chapter.

3.5 – COURT DECISIONS – Hyperlinks to Massachusetts court decisions re-direct the user to web pages on the Trial Court website (<http://www.mass.gov/courts/case-legal-res/law-lib>) and directly to the cases search page at www.masscases.com. Hyperlinks to masscases.com are to static rather than dynamic web pages, and are not expected to change over time. There are also a small number of hyperlinks to federal court cases.

3.6 – OTHER EXTERNAL LINKS – Hyperlinks to other on-line resources are also included when appropriate, including federal laws, federal court cases, and the websites of selected state agencies.

3.7 – USING THE TRIAL COURT LIBRARY FOR LEGAL RESEARCH – The reader will have public access to the databases of the [Massachusetts Trial Court Library](#). There you will find links to a wealth of legal source material, including websites for state agencies, local ordinances and bylaws, court cases, and more.

The Trial Court Library website was designed for relatively straightforward and intuitive use by the non-lawyer. The reader is encouraged to log on there and explore the world of legal research or to use it as a resource by which to inquire further into the topics covered in the Guidebook. In Appendix C of the Guidebook, there is a brief description of how to navigate to cases decided by the Supreme Judicial Court, the Appeals Court, and the Land Court.

Section 1-05

Disclaimer

1.0 – Overview

1.1 – LAND USE & LEGAL DISCLAIMER – The Guidebook cannot possibly cover all land use situations that may arise and all questions to which planners, local land use boards, and officials may seek answers. The Guidebook does not provide legal advice. Legal advice should be sought from, and provided by, the municipal attorney.

While every effort was made to assure that the information provided in the Guidebook is consistent with the Constitution and laws of the Commonwealth, the purpose of the Guidebook is to provide some helpful – rather than all necessary – commentary meant to assist the reader to be relatively well informed on the topics covered.

Similarly, the substantive content of the Guidebook is not meant to be encyclopedic, covering all subject matter and every topic that the planning community may well encounter. Rather, the authors selected topics, and focused on those areas within those topics, that can reasonably be anticipated to be regularly encountered in the life of the planning community.

The Guidebook should equip the user to have a more focused and efficient discussion of land use matters with board members, planning staff, building commissioners, and the city solicitor or town counsel, among others. It is very much recommended that local officials seek the advice of their municipal attorney and planning staff whenever a question regarding the interpretation of land statutes or regulations arises.

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1.3 – GUIDEBOOK ERRORS – Readers are encouraged to contact the APA-MA Chapter about any errors identified or corrections suggested that the reader may propose. The nature of the error and the location where the error occurs should be stated. Contact information for the Chapter can be found on the Chapter's Website: www.APA-MA.org or email communications@apa-ma.org.

¹ The word “author” is to be understood as Bob Mitchell FAICP and Bob Ritchie Esq. with respect to Guidebook content they submitted to the APA-MA Chapter in October 2021, but not substantive changes in Guidebook text subsequently authored by others.

Section 1-06

Acknowledgements

1.0 – Introduction & Sponsor

1.1 – OVERVIEW – As in any endeavor such as writing a guidebook, it would not have been possible to complete the task without the assistance of many others. The authors acknowledge all of their support and assistance received in this undertaking.

1.2 – SPONSOR – The genesis for the Guidebook came from the many requests heard from the Massachusetts planning community for a comprehensive resource to planning, zoning, subdivision, and other land use regulations. The Board of Directors of the Massachusetts Chapter of the American Planning Association voted to sponsor the creation of a new comprehensive guide to these topics and engaged the authors to write the Guidebook.

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The Guidebook, on the other hand, makes no pretense of being similarly comprehensive. The target readers are primarily non-lawyers who would benefit from a review of the major topics that appear on planners' day-to-day work schedule. In short, the Guidebook is not meant to be a substitute for either of the above two legal resources, nor as an alternative to discussions with the municipal attorney by local officials.

In addition, the former Massachusetts Federation of Planning and Appeals Boards produced *The Planners Handbook* during the time period from the 1970s to 1994. Edited by Madelyn A. McKie, this book had been an important resource to local boards.

The authors also referenced the *Land Use Manager* series, produced by Don Schmidt from 1984 to 1999, at the former Massachusetts Executive Office of Communities and Development.

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THE GUIDEBOOK TO MASSACHUSETTS LAND USE 2020

CHAPTER TWO GOOD GOVERNMENT LAWS

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American Planning Association
Massachusetts Chapter

Creating Great Communities for All

Chapter Two

Good Government Laws

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Section 2-01

“Good Government” Laws – Introduction

1.0 – The Three “Good Government” Laws

1.1 – THE LAWS – The OPEN MEETING Law, the PUBLIC RECORDS Law, and the CONFLICT OF INTEREST Law are known as the “Good Government” laws. They combine to require openness, transparency, and integrity in public service.

Public officials represent the public, who have a right to know what officials do and how they do it, with only a few exceptions provided by law. The public also has a right to expect undivided loyalty, and that officials will not have “two masters” in the performance of their official duties.

1.2 – THREE-LEGGED STOOL – Imagine every action taken by public officials as resting on a three-legged stool, where each leg represents one of these 3 state laws. If one leg fails, the table will fail along with the actions resting upon it.

1.3 – THE PUBLIC TRUST – Most all ethics laws, regulations, codes, and principles have language regarding the responsibility of boards, commissions, committees, and public officials to preserve and protect the public trust. One of the missions of the Massachusetts Ethics Commission is to “... *foster integrity in public service in state, county and local government and to promote the public’s trust and confidence in that service...*” Public officials’ actions and behavior and their understanding, knowledge, and adherence to land use and other laws within which they operate, will determine in large part how well they meet the aspiration of protecting and preserving that public trust.

If public officials show a commitment not only to the letter but to the spirit of these 3 laws, they more likely will be able to gain the public’s trust and confidence and may then rightly expect the “benefit of the doubt” in challenging cases. If, on the other hand, officials gain a reputation of adhering only to the minimum requirements of these 3 laws, the public may be less inclined to give boards, commissions, and committees the benefit of the doubt.

Remember – these 3 laws establish minimum standards of conduct. Every public official would do well to aspire to service beyond these minimum standards.

1.4 – DETAILED INFORMATION ON THE THREE LAWS – On the following pages the 3 laws are individually covered in separate sections. They are addressed in the following sequence – Open Meeting La,; Public Records Law, and Conflict of Interest Law.

Section 2-02

The Open Meeting Law

1.0 – Introduction

1.1 – THE OPEN MEETING LAW (OML) – Prior to 2010, Open Meeting Law enforcement was vested in the 14 district attorneys in the State. Since that time, the Attorney General has had primary regulatory authority to interpret and enforce the OML. The Division of Open Government has been established to implement these enforcement powers.

Effective July 1, 2010, the Legislature repealed the 3 separate Open Meeting Laws (state, county, local), and enacted a new consolidated statute – [G.L. c. 30A, §§ 18–25](#) – applicable to all 3 levels of government. In addition, under the authority conferred by the new statute, the Attorney General promulgated regulations which can be accessed from the [Attorney General’s Division of Open Government web portal](#).

1.2 – ALL PUBLIC BODY MEETINGS MUST BE OPEN – Except for properly entered executive sessions, “*all meetings of a public body shall be open to the public*”. The Open Meeting Law recognizes the necessary balance between government accountability and government efficiency. It ensures transparency by public bodies in requiring notice, open deliberations, and public access. It ensures efficiency by providing that certain deliberations may take place in executive session and by maintaining confidentiality of certain records of executive sessions.

Meetings must be posted in a manner that satisfies enhanced notice requirements. Meetings must be open to the public unless the board enters a properly convened executive session. The public body is subject to the Public Records Law ([G.L. c. 66, § 10](#)); additionally, the minutes of the meeting must be created and maintained pursuant to [G.L. c. 30A, § 22](#).

1.3 – KEY TERMS – The key terms to understand are “public body”, “meeting”, and “deliberation”.

2.0 – Public Body

2.1 – PUBLIC BODY – A public body is any multiple-member board, commission, committee, or sub-committee, however created or otherwise constituted, established to serve a public purpose. This term does not include:

- the Legislature;
- the judicial branch;
- bodies created by a constitutional officer as an advisor;
- bodies that do not serve a public purpose;
- groups that are not established with the “jurisdiction” to make decisions or recommendations collectively.

2.2 – CERTIFICATE OF RECEIPT of OML MATERIALS – Within 2 weeks of becoming a member of a public body, or of taking an oath of office, whichever occurs later, the member must complete a Certificate

of Receipt of Open Meeting Law materials on a form prescribed by the Attorney General. The Certificate must be retained where the public body maintains its official records, thus making it available if a request is made by the Attorney General or by others under the Public Records Law.

The Certificate is not filed with the Attorney General or, in the absence of a local law so requiring, with the town clerk or other local office.

3.0 – Meeting = Deliberation

3.1 – MEETING – A meeting is any deliberation by a public body with respect to any matter within the body's jurisdiction. A meeting does not include:

- an on-site inspection, so long as members do not deliberate;
- attendance by a quorum of the body at a public or private gathering or social event, so-long as the members do not deliberate;
- attendance and participation by a quorum of the body at a meeting of another public body that has complied with the notice requirements of the OML, communicating only by open participation on matters there under discussion and not privately among themselves;
- a session of Town Meeting, under [G.L.c. 39, § 9](#); or
- meetings of certain quasi-judicial state bodies held for the sole purpose of making a decision.

3.2 – DELIBERATION – Deliberation is any oral or written communication through any medium, including e-mail, between or among a quorum of a public body on any matter within the body's jurisdiction. Deliberation does not include distribution of:

- a meeting agenda;
- scheduling or procedural information; or
- reports or documents that may be discussed at an upcoming meeting, so long as the material does not express the opinion of a member of the body.

3.3 – QUESTIONS TO ASK – The key questions to ask in order to determine if you are deliberating as defined by the OML are:

- Is the communication between members of the body?
- Does the communication constitute a deliberation?
- Does the communication involve a matter within the body's jurisdiction?
- Does the communication fall within one of the exceptions listed in the OML?

3.4 – REMOTE PARTICIPATION – In 2011, the Attorney General announced new regulations (link available at the [Attorney General's web portal](#)) under the Open Meeting Law that permit, in certain circumstances, remote meeting participation. The regulations allow the adoption and use of remote participation under the procedures and conditions listed below:

- may be approved by city or town chief executive officer for use by all city or town boards, commissions and committees (the chief executive officer may be the board of selectmen, the city or town council, or the mayor, depending on the municipality);
- chief executive officer determines the amount and source of payment for any costs associated with remote participation, and may decide to fund the practice only for certain public bodies;
- may be revoked by chief executive officer;

- a quorum must be physically present at the meeting location;
- members both participating remotely and at the meeting must be audible to each other;
- remote members may vote and shall not be deemed “absent”; and
- the Chair must determine and announce it would be “unreasonably difficult” for a member to be physically in attendance.

3.4.1 – Adoption Requirements & Procedures – Adoption, revocation procedures, and costs for remote participation include the following:

- If it is to be adopted, it must first be approved by the city or town chief executive officer (CEO) for use by all city or town boards, commissions, and committees.
- The CEO may be the board of selectmen, the city/town council, the mayor, or other municipal officer designated by the CEO under local charter.
- The CEO must authorize or, if a board of selectmen or city/town council, by a simple majority authorization vote, to allow remote participation in accordance with the requirements of [940 CMR 29.10](#).
- Approval is for all local public bodies within that municipality.
- Cities and towns may adopt ordinances or bylaws that prohibit or restrict the use of remote participation.
- The CEO determines the amount and source of payments for any costs related to remote participation and may fund the practice only for certain public bodies.
- The person or entity with the authority to adopt remote participation pursuant to 940 CMR 29.10(2) may revoke that adoption in the same manner.

3.4.2 – Remote Participation Procedures – For a public body to use the remote participation procedure, several criteria must be met. They include:

- A quorum must be physically present at the meeting location, including the chair or acting chair.
- Any member of a public body may participate remotely if physical attendance would be “unreasonably difficult.”
- The chair must announce the name of a member who is participating remotely and include this in the meeting minutes, but need not include any detail about the reason for the member’s remote participation.
- Remote members can vote and shall not be deemed “absent” (although not treated as “physically present” for purposes of the first bullet point above).
- Members of the public body who participate remotely and all persons present at the meeting locations must be clearly audible to each other. Although video technology is not required, if it is used, the remote participant must be clearly visible to all persons present in the meeting location. (See [940 CMR 29.10](#) (6)(b).)
- If the connection is lost, the chair should halt deliberations, which must be reflected in the minutes, announce the problem, and then continue the hearing with the quorum of members in attendance.

3.4.3 – Technology – The media acceptable for use under the statute include: telephone; internet; satellite enabled audio or video conferencing; and any other technology that allows remote participants and all persons present to hear each other. With video technology, the remote participants must be visible to all persons present at the meeting location. Accommodations must be made for any public body member who requires TTY service, video relay service, or other form of adaptive telecommunications.

The board determines which of the remote technologies may be used. The chair decides technical difficulty issues. Meeting suspension is encouraged if there are such difficulties. If a connection is lost, meeting minutes must reflect that fact and the time of occurrence.

3.4.4 – Voting – Voting considerations include the following:

- Where remote participation is used, all votes – even in open sessions – must be roll call votes.
- The remote member is part of the quorum and can vote, but there must be a “quorum number” present at the meeting location.

3.4.5 – Executive Sessions – Remote members may participate in an executive session but must state that no other person is present or able to listen in to the discussion unless the public body has approved the presence of that individual.

3.5 – NOTICE & POSTING – Except in an emergency, a public body must post notice at least 48 hours in advance of the meeting, excluding Saturdays, Sundays, and legal holidays. The notice must:

- include the date, time and location of the meeting;
- include a listing of the topics that the Chair reasonably anticipates to be discussed;
- include whether the board intends to go into Executive Session;
- be filed with the municipal clerk;
- be posted in a manner conspicuously visible to the public, including persons with disabilities;
- be posted at all hours in or on a municipal building where the clerk’s office is located; and
- include the date and time that the notice was posted, either on the notice itself or in a document or website accompanying the notice.

The municipal clerk must inform the Attorney General of the selection of alternative posting options. A description of the alternative posting method must also be posted on or adjacent to the main and handicapped accessible entrances to the building where the clerk's office is located.

Note that an emergency means a sudden, unexpected occurrence demanding immediate action. In an emergency, the public body must post notice as soon as reasonably possible.

3.6 – ALTERNATIVE POSTING OPTIONS – As alternative notice options, public bodies may:

- post notice of meetings on the municipal website;
- post notice of meetings on cable television, and post notice or provide cable television access in an alternate municipal building (e.g., police or fire station) where the notice is accessible at all hours;
- post notice of meetings in a newspaper of general circulation in the municipality, and post notice or a copy of the newspaper containing the meeting notice at an alternate municipal building (e.g., police or fire station) where the notice is accessible at all hours;
- place a computer monitor or electronic or physical bulletin board displaying meeting notices on or in a door, window, or near the entrance of the municipal building in which the clerk's office is located, in such a manner as to be visible to the public from outside the building; or
- provide an audio recording of meeting notices, available by telephone at all hours.

3.7 – NOTICE DOS AND DON'TS - To avoid running afoul of the notice requirements of the OML consider

the following:

- Update the notice when new topics arise during the 48-hour notice period.
- Do not post notices so far in advance that new topics are likely to arise.
- Establish good posting arrangements with the municipal clerk.
- Meeting cancellations do not require 48-hour notice.
- Rescheduling a cancelled meeting requires full notice compliance.

3.8 – ACCESSIBLE MEETINGS – Although it is not an express requirement of the OML itself, all meetings of a public body must comply with federal and state accessibility requirements. This would include the Americans with Disabilities Act. The Civil Rights Division of the Attorney General’s Office is available to assist public bodies on this issue.

3.9 – PUBLIC PARTICIPATION – The public may attend open sessions, but may not address the board without the chair’s permission. However, the public does have the right to speak at a public hearing. Members of the public may make an audio or video recording upon notification to the chair, subject to reasonable conditions. The chair must announce that the meeting is being recorded.

3.10 – MEETING MINUTES – Meeting minutes should be created and approved in a timely manner for both open meetings and executive sessions. The meeting minutes must state the date, time, and place of meeting, and the members who are present or absent.

The minutes must include:

- a summary of the discussion of each subject;
- decisions made, actions taken, and votes recorded (no secret ballots permitted); and
- a list of documents and other exhibits used by the body at the meeting.

A response is required within 10 days of a public records request, and minutes must be provided to the requester whether in draft or final form. Executive session minutes must be disclosed unless they would defeat the purpose of the meeting or they are otherwise exempt from disclosure,

3.11 – EXECUTIVE SESSION MINUTES – For an executive session, public bodies are not required to disclose the minutes, notes, or other materials used in an executive session where that disclosure would defeat the lawful purposes of the session. Once disclosure would no longer defeat the session purposes, minutes and other records from that session must be disclosed unless they are within an exemption to the Public Records Law ([G.L. c. 66, § 10](#), and [G.L. c. 4, § 7, cl. 26](#)) or where the “attorney-client privilege” applies. The public body is also required from time to time to review the executive session minutes to determine whether continued non-disclosure of those minutes is warranted and that determination must be included in the minutes of the next meeting.

A public body must respond to a request to inspect or copy executive session minutes within 10 days of request and must promptly release the records if they are subject to disclosure. If the board has not decided as to whether the minutes are subject to disclosure or not, it must do so prior to its next meeting or within 30 days, whichever is sooner.

3.12 – MEETING RECORDS – Documents and exhibits must be retained but need not be physically stored with the meeting minutes. Public bodies should check for the most recently updated records retention schedule (See the Secretary of the Commonwealth’s [Municipal Records Retention Manual](#).)

4.0 – Executive Session

4.1 – INTRODUCTION – Executive Sessions are covered by [G.L. c. 30A, § 21](#). Before a public body can go into an executive session there are several criteria that must be met and very specific procedures that must be followed for the executive session to conform to the OML.

4.2 – PURPOSES – There are 10 purposes for the use of an executive session. In general, most land use boards will likely only need to use executive sessions for 3 of those purposes. Those purposes are:

- to discuss strategy with respect to collective bargaining or litigation if an open meeting may have a detrimental effect on the bargaining or litigation position of the public body and the chair so declares;
- to consider the purchase, exchange, lease, or value of real property if the chair declares that an open meeting may have a detrimental effect on the negotiating position of the public body; and
- to consider or interview applicants for employment or appointment by a preliminary screening committee if the chair declares that an open meeting will have a detrimental effect in obtaining qualified candidates; provided however, that this clause shall not apply to any meeting, including meetings of a preliminary screening committee, to consider an interview with applicants that have passed a prior preliminary screening.

4.3 – PROCEDURES – For a public body to go into, act within, and exit an executive session, it is obliged to comply with the following procedures:

- must first convene in open session beforehand;
- must state the purpose(s) of executive session;
- must have roll-call majority vote to go into executive session;
- must announce if open session will reconvene afterward;
- must maintain exhibits and documents used;
- must only discuss the matters cited in announcing the session; and
- all votes taken in executive session must be by roll-call.

5.0 – OML Violations

5.1 – COMPLAINTS OF OML VIOLATIONS – There are several steps that must be taken to file an OML complaint. They are:

- STEP 1 – The complaint must be filed with the public body within 30 days of the alleged violation or of the date by which the violation should reasonably have been discovered. A [Complaint Form](#) is available from the Attorney General's Division of Open Government website. The completed form must be sent to the chair of the public body.
- STEP 2 – The chair distributes the complaint to the public body's members. The body has 14 days within which to respond and inform the Division of Open Government of that response. The Director of the Division may extend the time period for a response for good cause.
- STEP 3 – The public body may request additional information from the complainant within 7 business days of receiving the complaint. The Complainant then has 10 business days to respond; the public body will then have an additional 10 business days after receiving the complainant's response to review the complaint and take remedial action.

- STEP 4 – The public body may also request an extension of time to respond to the complaint, and that request should be made within 14 business days of the body's receipt of the complaint. This request for extension is directed to the Attorney General's Division of Open Government and should include a copy of the complaint and the reasons for the requested extension.
- STEP 5 – After 30 days of Step 1, if the complainant is not satisfied with the body's proposed resolution, the complainant may file a complaint within 90 days of the alleged violation with the Division of Open Government.

5.2 – ATTORNEY GENERAL'S RESPONSE – The Attorney General (AG) will acknowledge the complaint and may request or require documents and interviews. The AG may determine whether there has been a violation, and if so whether it is intentional. The AG may determine if the action taken or proposed by the body is adequate. Resolution of the matter may be informal, formal, or possibly by court action. The public body may appeal the decision of the AG.

The following are the remedies available to the Attorney General:

- compel immediate and future compliance;
- compel attendance at OML training;
- compel public release of minutes or documents;
- nullify the action taken by the body in violation of OML;
- reinstatement of employee;
- civil penalty of up to \$1,000 on a body for intentional violation; and
- other appropriate relief.

5.3 – ALTERNATIVE COMPLAINT PROCEDURE – As an alternative to the foregoing, the Attorney General or 3 or more registered voters may initiate a civil action to enforce the OML. The action must be filed in the Superior Court in any county in which the public body acts or meets.

6.0 – Resources

6.1– OPEN MEETING LAW RESOURCES AND CONTACT INFORMATION:

- Attorney General's Open Meeting Law Website: <http://www.mass.gov/ago/openmeeting>
- Open Meeting Law:
 - [G.L. c. 30A, §§ 18–25](#)
 - Code of Massachusetts Regulations, which can be found at the Division of Open Government [Attorney General's Division of Open Government web portal](#)
- Office of the Attorney General
 - Division of Open Government
 - One Ashburton Place
 - Boston, MA 02108
 - (617) 963-2540
 - openmeeting@state.ma.us

Section 2-03

The Public Records Law

1.0 – Introduction

1.1 – THE PUBLIC RECORDS LAW (“PRL”) –The Secretary of the Commonwealth has primary regulatory authority regarding the Public Records Law. The PRL and its Regulations provide that each person has a right of access to public information, including the right to inspect, copy, or have copies provided upon payment of a reasonable fee.

The Public Record Law and its Regulations were updated with changes effective January 1, 2017. Among other matters, the updated law sets limits on fees, provides deadlines for the provision of records, and requires the designation of a “Records Access Officer”. The updated law also distinguishes between “agencies” and “municipalities” and assigns certain duties to each entity.

The Public Records Law is covered by clause (26) of [G.L. c. 4, § 7](#), (Definitions), and the provisions of [G.L. c. 66](#), (Public Records). A “public record” is broadly defined as including material, regardless of physical form or characteristics, made or received by a public officer or employee (the “custodian”), unless specifically exempted by the Public Records Law. A “custodian” is any public officer or employee who in the normal course of duty has access to or control of public records. In addition to these statutes, the Code of Massachusetts Regulations, at [950 CMR 32](#), also governs the public records of both state agencies and municipalities.

1.2 – MUNICIPAL & STATE REQUIREMENTS – Section 2-03 focuses primarily on the requirements for municipalities. Although fundamentally similar in their application to state agencies and cities and towns, there are several salient ways in which the PRL and the CMR apply differently to state agencies. These differences are noted in subsection 3.3.

1.3 – DISCLAIMER – The Public Records Law, including its 2017 revisions, is a complex statute. The information in this Guidebook is an overview of the elements of that law and the regulations implementing the law. If the reader requires more detailed information, or is the designated Records Access Officer (RAO) or custodian of records in their community, the authors recommend referring to the statute and the regulations. A helpful source of detailed information on public records is available at the Secretary of the Commonwealth Office website – [Public Records Division](#) – where information and guidance is available about public records generally, records access, and records management.

2.0 – Public Records

2.1 – COMPUTER RECORDS – The statutory definition of “public records” does not distinguish between paper records and digital records. Custodians of records are not required to create a computer record in response to a request, except where reprogramming is required to comply with a specific request.

2.2 – RECORDS MANAGEMENT & MAINTENANCE – The PRL requires that public records be retained, well organized, and readily accessible. The records custodian must ensure safekeeping and availability of

public records. The [Municipal Records Retention Schedule Guide](#) (revised April 6, 2020) lays out the retention periods for all municipal records. This provides a basic introduction to records management, and establishes the records retention periods and specific parameters for various “records schedules.” [See [Statewide Records Retention Schedules](#) for state agencies.]

Of importance to the users of this Guidebook are the following series in the Manual:

- Series 1 Records in Common
- Series 3 Zoning Board of Appeals
- Series 15 Planning Board

The Guide provides a helpful catalogue of the various records series ranked in accordance with their escalating retention periods ranging from those to be retained “*until administrative use ceases*,” to those to be retained for durations of days, months, and years, and those that are to be retained permanently or to the occurrence of some designated event.

2.3 – PROTECTING PERSONAL INFORMATION – In 2007, [G.L.c. 93H](#) was enacted. It imposes obligations on the acquisition, handling, and disclosure of personal information. Strict notification requirements apply to any security breach. “Personal information” is defined as a resident’s first & last name or first initial & last name in combination with any of the following personal data:

- Social Security number;
- driver’s license number or state-issued identification card number; or
- financial account number, or credit or debit card number, with or without any required security code, access code, personal identification number or password, that would permit access to a resident’s financial account.

However, “Personal information” shall not include information that is lawfully obtained from publicly available data, or from federal, state, or local government records lawfully made available to the public.

It is important to be critically selective when asking for personal information, and to do so only when there is a legitimate programmatic reason to have it. Once obtained, the information must be retained in a secure place with access limited to only those with a programmatic need to know. Report any security breach as required by [G.L.c. 93H, § 3](#).

2.4 – RECORDS IN EXISTENCE – Requests may not be made for records that do not exist when the request is made, or that no longer exist. That said, the Records Access Officer may choose to be more accommodating than the PRL requires, and honor requests for records that did not exist when the request was made.

The response to a PRL request may be limited to information physically existing – that is, embodied in an existing record – and in the custody of the public entity or official at the time of the request. There is no obligation for the custodian to create a record, but the custodian should identify existing records that contain the requested information.

“Information” alone is not a public record; only a record that contains information is a public record. Because of the custodian’s superior knowledge of public records, every effort should be made to assist the requester in identifying records with the desired information in custody, or to direct the requester elsewhere where such records may be found.

3.0 – The 2016 Public Records Law Changes

3.1 – OVERVIEW – [Chapter 121, Acts of 2016](#) (the “Public Records Act”) was enacted by the State Legislature and signed into law by Governor Baker on June 3, 2016. Most of its provisions became effective on January 1, 2017. The Public Records Act inserts a new section ([G.L. c. 66, § 6A](#)) that requires for the first time that each municipality designate one or more Records Access Officers (RAOs). The main responsibilities of the RAO are:

- to assist records requesters;
- to coordinate responses to requests; and
- to prepare guidelines for access to public records held by the municipality.

The municipal clerk, the clerk’s designees, and any other persons appointed by the Chief Executive of the municipality, may serve as RAOs for the municipality.

The revised Public Records Law is to be read in conjunction with regulations promulgated by the Secretary of the Commonwealth at [950 CMR 32](#). This Guidebook focuses on the PRL as applicable to municipalities, although the main areas where state agencies are subject to different provisions will be noted.

3.2 – TYPES OF RECORDS – All records, including paper and electronic, are covered by this law. Where records are available on a public website, it suffices to provide access information to that site. In addition, if the records are electronic, then the records are to be provided to the requester in the requested electronic format or in a standard electronic searchable format, unless the requester is unable to receive or access electronic records. RAOs are urged to assist the requester, as necessary, on how to navigate to target locations on the public website, since websites differ greatly in their structure and navigability.

3.3 – PUBLIC RECORDS REQUEST PROCESS – The elements that comprise the public records request process can be rather detailed. The subsections below provide information on each aspect of that process. (Go to [Table - Public Records Law – Compliance Timetable for Municipalities & Table - Administrative Appeals](#) for more information.)

3.3.1 – Public Records Requests – Records made or received by municipal boards and officials, and that continue to exist, may become the subject of a public record request. That request triggers a series of dates and duties of the public records custodian and RAO. Requests may be by hand, by mail, or by email; but the Supervisor of Records (“Supervisor”) interprets the statute to include oral requests as well, and that is reflected in the regulations at 950 CMR 32:06(1)(a). It is very important that the custodian and the RAO establish efficient lines of communication lest the expiration of mandatory deadlines translate into penalties to the city or town.

3.3.2 – Municipality’s Response & Timeline – Upon receipt of a public records request, the RAO has 10 business days to review the request to determine if records are “reasonably described,” or whether clarification is needed from the requester. The RAO will then determine whether the requested records exist and are within the possession, custody, or control of the city or town; and then the RAO will determine and record the due date for production of records. The RAO must also consider whether requested records are shielded from disclosure under the Attorney-Client privilege or under any of the exemptions provided

for in the statute, and whether redaction is necessary.

If no additional time beyond 10 business days will be needed nor the records withheld or redacted, the RAO will inform the requester not later than the 10th business day following receipt of the request that records are ready for inspection, retrieval or delivery.

3.3.3 – Option to Extend Response Time – The municipal RAO has the right to an additional 15 business days (an additional 5 business days for a state agency) after the initial 10 business days if the magnitude or difficulty of the request, or multiple requests, from the same requester unduly burdens the other responsibilities of the municipality and therefore the municipality is unable to produce the records within 10 business days of the request.

When additional time beyond the 10 business days is needed to produce the records, or records are to be withheld or redacted, the RAO will send a letter to the requester by mail, email, or facsimile within the 10th business day after receipt of request. That letter may claim up to 15 additional business days and shall:

- confirm receipt of the request;
- identify records possessed or controlled by the municipality;
- identify which records (or portions thereof) are to be withheld and the reasons for being withheld;
- explain why and how the difficulty or burden imposed upon the city or town by the request requires additional compliance time;
- provide an itemized, good faith estimate of the fees to be charged, if any; and
- include a statement of the requester's right to appeal to the Supervisor.

The response letter may also suggest a reasonable modification of the request that might facilitate compliance in a more efficient manner. Caveat: it is an absolute requirement of the PRL that a response must be provided within 10 business days of the request. Failure to do so deprives the municipality of the right to assess fees or costs.

3.3.4 – Requests for Further Extension to Respond – If more than 25 business days (or 15 business days for a state agency) will be needed to comply with the request, the RAO will make that determination not later than the 20th business day after receipt of the request (or within 10 business days of a determination by the Supervisor of Records that a withheld record must be produced). The RAO will then draft and submit a written petition to the Supervisor (with a copy to the requester) not later than the 20th business day. Factors to be considered in that request may include:

- the time estimated to search for, collect, examine, and redact records;
- the scope of redaction required to prevent unlawful disclosure;
- the capacity and normal hours of business of the municipality to fulfill the request without the extension of time;
- efforts already undertaken to fulfill the current and previous requests;
- whether the current and any previous requests are frivolous or intended to harass or intimidate the municipality; and
- the public interest, or absence thereof, in producing the documents more quickly.

Upon a showing of "good cause," the Supervisor is authorized to grant a single extension not to exceed 30 days (20 days for a state agency).

3.3.5 – Extensions Beyond 55 days – If the Supervisor finds that: *“the request is part of a series of contemporaneous requests that are frivolous or designed to intimidate or harass and are not intended for the broad dissemination of information to the public about actual or alleged government activity”*, then the Supervisor may either grant an extension longer than the single 30-day extension referenced in Section 3.3.4 above, or relieve the municipality of its obligation to provide copies of the records sought.

3.3.6 – Documenting the Request – G.L. c. 66, § 6A(e) sets forth a list for documenting every request for public records. While this is mandatory for state agencies, it is recommended that municipalities follow this list to the extent feasible. The list includes the following:

- the nature of the request and the date received;
- the date of the response letter;
- the date the record was provided;
- the number of hours required to fulfill the request;
- the fees (if any) charged to the requester;
- petitions submitted to the supervisor relating to limitations on fees and redaction;
- appeals requested under G.L. c. 66, § 10A;
- the time required to comply with the Supervisor’s orders under § 10A; and
- the final adjudication of any court proceedings under § 10A.

3.4 – FEES AND COSTS – The RAO must determine whether to require a fee or to waive the fee, including a best estimate conforming to the schedule laid out in the statute. In addition, the RAO will track the number of hours of all municipal employees and board members required to fulfill the request and the municipality’s costs for which fees, if any, are to be assessed. Fees and costs may be allowed in accordance with the information listed in subsections 3.4.1 through 3.4.7 below.

3.4.1 – Costs That May be Included in Fees for Records Production:

- cost of storage device;
- a charge of \$.05/page of materials printed in black and white, *“both single and double-sided”* (The Supervisor interprets this to mean a single piece of paper, whether single or double-sided.);
- the hourly rate of the lowest paid employee with the necessary skills to compile and reproduce records, not to exceed \$25/hour unless approved upon petition by the RAO to the Supervisor of Records; and
- employee time may include outside vendor time.

3.4.2 – Costs That May Not be Included in Fees for Records Production:

- municipalities with a population over 20,000 may not charge for the first 2 hours of staff time (the first 4 hours for a state agency); and
- staff time for segregation and redaction unless required by law or approved by the Supervisor.

3.4.3 – Fee Adjustment – Fee adjustment requests may be made by the RAO by petition to the Supervisor of Records. Adjustment requests include:

- for hourly rates that exceed \$25/hour; and
- for time spent for segregation and redaction when not required by law (which

significantly, does not include redactions “permitted” by law)

The grounds by which the Supervisor may grant fee adjustments are:

- for requests that are commercial in nature; and
- when the proposed fee is an actual good faith cost of compliance, the request could not have been prudently completed without redaction or an increase in the hourly rate, and the fee is reasonable and not designed to limit access to the records.

Custodians should be prepared to explain, with specificity, the need to adjust fees. For example, if time is needed to redact and the custodian wishes to assess a fee to do that, the custodian or RAO must explicitly state the exemptions that apply and explain how the exemptions apply to the portions of the records that need redaction. If the Supervisor finds that the exemptions have not been properly applied, the request will likely be denied. There does not appear to be an appeal available from the Supervisor’s denial of the request.

The Supervisor shall also consider the public interest in limiting fees charged and the financial ability of a requester to pay additional fees.

3.4.4 – Waiver of Fees – The RAO may waive fees based on the following:

- if disclosure of records is in the public interest;
- if the records request is not primarily commercial in nature; and
- upon a showing of financial hardship of the requester to pay the full fee.

3.4.5 – Denial of Records – The RAO may deny records, with a written denial itemizing the fees owed, to someone who has failed to pay for previously produced records.

3.4.6 – Forfeiture of Fees – If a court awards attorney’s fees to a requester who successfully obtains judicial relief in litigation, the municipal fees to produce the records are forfeited.

3.5 – Enforcement and Appeals – There are several sections of the revised Public Records Law that cover the issues of enforcement and appeals. These are noted in the subsections below.

3.5.1 – Administrative Appeal – If the municipality fails to comply with provisions governing public records requests or gives a response the requester believes to be a violation of the law, the requester may petition the Supervisor of Records for a formal determination. The Supervisor is then empowered to inspect any record *in camera* (privately), except for records where the Attorney-Client privilege has been asserted. In that case, the municipality shall provide a detailed description of the record, the names of the author and recipient, the date and substance of the record, and the grounds upon which the privilege is claimed.

It should be noted that *in camera* inspection is an option of the municipality, and cannot be ordered by the Supervisor. It is with respect only to records withheld under the Attorney-Client privilege. The Supervisor is permitted to order *in camera* review of other records.

The Supervisor must act on the petition within 10 business days of its receipt and must order appropriate relief in case of a violation. The requester may file a [G.L. c. 249, § 4, certiorari](#) appeal from either the Supervisor’s determination or a failure to act timely on the petition. Where the municipality refuses, or fails to comply with, the Supervisor’s order, the Attorney

General's office may undertake further enforcement. The PRL regulations require that the requester provide a copy of the appeal to the records custodian.

3.5.2 – Judicial Enforcement – Notwithstanding the administrative procedures outlined above, a requester may alternatively opt to initiate a civil action in Superior Court for enforcement of the public records law. The Superior Court has broad power to enjoin municipal action, determine the propriety of any municipal action, expedite the court appeal, and determine all issues *de novo* (i.e., not a “record” appeal but an entirely new proceeding). The municipality has the burden of demonstrating that the requested record may lawfully be withheld, and there is a rebuttable presumption that it may not be so withheld..

3.5.3 – Attorneys’ Fees and Costs – The court may in its discretion award reasonable attorney fees and costs where the requester has prevailed under a court order or consent decree or has been given the requested records after the filing of the court complaint. There is a presumption in favor of an award of fees and costs, which presumption can be rebutted by the municipality by establishing one or more of the following:

- that the Supervisor found that the municipality did not violate the public records law;
- that the municipality reasonably relied on a published opinion of a state appellate court based on substantially similar facts or published opinion of the Attorney General on substantially similar facts;
- that the request was intended to harass or intimidate; or
- that the request “*was not in the public interest and made for a commercial purpose*” unrelated to disseminating information to the public about actual or alleged government activity.

Because the award of attorneys’ fees and costs is discretionary while enjoying a presumption in favor of them being awarded, the statute requires a judge who denies fees and costs to issue written findings specifying the reasons for denial.

3.5.4 – Waiver of Charges / Punitive Damages – An award of attorneys’ fees and costs compels the court to order the municipality to waive any fees or costs for producing the public record as provided for in Section 10(d) of the Public Records Law; but even where attorneys’ fees have not been ordered, the court may still order the waiver.

In either case, the court is required to issue findings specifying the basis of its decision with respect to the waiver. In addition to any award of attorneys’ fees and costs, the court has discretion to order punitive damages – not less than \$1,000 nor more than \$5,000 – where the requester establishes that the municipality did not “*act in good faith.*”

3.5.5 – Attorney General’s Right to Sue or Intervene – The Attorney General has the right to initiate court action to ensure compliance, as well as the right to intervene in any action already commenced under the PRL Public records ordered by the court in either case shall then be provided without fees being assessed to the requester by the municipality.

3.6 – ELECTRONIC RECORDS – Section 19 of Chapter 121 addresses electronic record keeping. It requires, to the extent feasible, that electronic records be maintained in a system or database that can provide data in a commonly available electronic, machine readable, and searchable format. State agencies are required – although municipalities are only urged – to provide, on a searchable website accessible in commonly available format, copies of certain records, including opinions, decisions,

orders, votes, reports, hearing notices, winning bids, Open Meeting Law minutes, budgets, and assorted other types.

4.0 – Exemptions

4.1 – EXEMPTIONS TO THE PRL – The “Public Records” definition contains 20 exemptions that may serve as the basis for withholding a record, in whole or in part. Exemptions are strictly and narrowly construed. Where exempt information is intertwined with non-exempt information, the non-exempt portions must be disclosed and the exempt portions redacted. Other laws may impose a legal obligation to withhold certain information such as laws relating to personal privacy and personal identifying information. A record is presumed “public” unless an exemption applies.

Clause (26) of [G.L. c. 4, § 7](#), and [G.L. c. 66, § 10](#), identify and explain all 20, but the following 5 are the ones likely to be most relevant to the needs of the users of this Guidebook.

4.1.1 – The “Statutory” Exemption – Exemption (a) – applies to 2 categories of records that are *“specifically or by necessary implication exempted from disclosure by statute.”*

- Category 1 – where a statute expressly states that the record *“shall be kept confidential”* or that a record *“shall not be a public record”*.
- Category 2 – where a statute expressly limits dissemination of records to a defined group of individuals or entities.

4.1.2 – The “Privacy” Exemption – Exemption (c) – the most frequently invoked exemption, contains 2 categories:

- Category 1 – “personnel and medical files or information”.
- Category 2 – “other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy,” such as intimate details of a highly personal nature.

4.1.3 – The “Personal Notes” Exemption – Exemption (e) – personal notes, and other materials prepared by an employee that are not part of the official files of the employee or a board on which the employee serves. The exemption isn’t available where these materials are shared with board members or are being maintained as part of the board’s official files.

4.1.4 – The “Appraisal of Real Property” Exemption – Exemption (i) – appraisals of real property acquired/to be acquired until: (1) a final agreement is entered; or (2) appraisal litigation is terminated; or (3) the time within which to commence litigation has expired.

4.1.5 – The “Security & Safety” Exemption – Exemption (n) – records relating to layout, structure, emergency preparedness, and the security or safety of persons, buildings, facilities, transportation, or other infrastructure, the disclosure of which, in the judgment of the custodian – subject to review by the Supervisor of Records – is likely to jeopardize public safety. This exemption is the only one in which the status or motivation of the requester can be inquired into by the custodian, and where disclosure is conditionally discretionary.

4.2 – THE ATTORNEY-CLIENT PRIVILEGE – Confidential communications between government entities and their legal counsel undertaken to obtain legal advice or assistance are protected under the

Common Law “attorney-client privilege.” “Work product” documents of the government attorney are not exempt from disclosure under the Public Records Law.

The Supreme Judicial Court issued a decision in [Suffolk Construction Co., Inc. vs. Division of Capital Asset Management](#), 449 Mass. 444 (2007), confirming that the “attorney-client” privilege applies to governmental entities and officials. The privilege protects confidential communications between governmental entities and their legal counsel undertaken to obtain legal advice or assistance. The Supervisor may determine whether records may be withheld as privileged documents.

Although “attorney work product” is not expressly exempt from disclosure under the PRL ([General Elec. Co. v. Department of Environmental Protection](#), 429 Mass. 798, 801 (1999)), where litigation is pending or anticipated, “opinion” work product as codified in Mass. R. Civ. P. 26(b)(3), “prepared in anticipation of litigation or for trial by or for (a) part or ... that ... party’s representative” falls within the scope of exemption (d) and therefore falls outside the definition of “public records”. “Fact” work product under Mass. R. Civ. P. 26(b)(3) prepared in anticipation of litigation or trial is within the scope of exemption (d), and therefore is outside the definition of “public records”, where it is not a reasonably completed study or report or, if it is reasonably completed, where it is interwoven with opinions or analysis leading to opinions. ([DaRosa v. City of New Bedford](#)), 471 Mass 446 (2015).

5.0 – Resources

5.1 – HELP IS AVAILABLE - SECRETARY OF THE COMMONWEALTH – PUBLIC RECORDS DIVISION

[Guide to the Massachusetts Public Records Law](#)
<http://www.sec.state.ma.us/preidx.htm>

- Records Management Unit - 617-727-2816
- Supervisor of Records Office Attorney of the Day - 617-727-2832

6.0 – Compliance Timetable; Administrative Appeals

6.1 – COMPLIANCE TIMETABLE – This table indicates the 4 basic statutory timeframes for a public records request response. (See Tracks A-D details on the next page.) It assumes the requester hasn’t begun an administrative appeal to the Supervisor of Records, in which case compliance requirements and timeframes would be adjusted accordingly. ([Return to Guidebook - Subsection 3.3](#))

Public Records Law Compliance Timeline for Municipalities					
Business Day	Action	Track A	Track B	Track C	Track D
0	Request Received	√	√	√	√
10	Response	Comply	√	√	√
20	Petition to Supervisor			Petition to Supervisor	Petition to Supervisor
25	Extended Compliance Date		Comply	Petition Granted	Petition Granted
55	30-day Extension Date			Comply	
55+	Enhanced Extension Date				Comply

Track A (See § 3.3.2)

- The RAO responds within 10 business days of the request.
- The RAO complies within 10 business days of the request.

Track B (See § 3.3.3)

- RAO responds within 10 business days of the request.
- RAO claims up to an additional 15 days to comply with the request.
- RAO complies with the request within the claimed extended compliance date (not more than 25 business days of the request).

Track C (See § 3.3.4)

- RAO responds within 10 business days of the request.
- Within 20 business days of the request, the RAO petitions the Supervisor for an extension of the compliance date beyond the 25-day extended compliance date.
- Within 5 business days of receipt of the RAO's petition, the Supervisor rules on the petition.
- If the petition is granted, the RAO complies with the request within the timeframe ordered by the Supervisor, not more than a single extension of up to 30 days beyond the 25-day extended compliance date.
- If the petition is not granted, the RAO complies with the request within the 25-day extended compliance date.

Track D (See § 3.3.5)

- Same as Track C, except that the Supervisor's order, supported by statutory findings, may include an extension beyond the 55 days indicated for Track C.

6.2 – ADMINISTRATIVE APPEALS – Under 95 CMR 32.08(1)(b), a requester may petition the Supervisor for failure of the RAO to comply with any requirement of the Public Records Regulations (950 CMR 32.00). Petitions for appeal of a response by the RAO must be made within 90 calendar days of the RAO's response (950 CMR 32.08(1)(d), or within 90 calendar days of the request for a failure to respond (950 CMR 32.08(1)(e)). ([Return to Guidebook text - Subsection 3.3](#)). The Table below provides additional information on this topic.

Public Records Law		
ADMINISTRATIVE APPEALS BY REQUESTER		
Business Day	Action	Possible Outcomes
0	Appeal petition filed with Supervisor	
-	Requester provides RAO copy of petition	
-	Supervisor may schedule a hearing or conferences	
10 th business day	Supervisor issues written decision	Supervisor may either deny the appeal, or "order timely and appropriate relief."

Section 2-04

Conflict of Interest Law

“Always do right. This will gratify some people and astonish the rest” - Mark Twain

1.0 – Introduction

1.1 – STATE ETHICS COMMISSION – The State Ethics Commission is an independent State agency that administers and enforces provisions of the Conflict of Interest Law and Financial Disclosure Law. Section 2-04 focuses on the Conflict of Interest Law (COI). The Commission provides advice to all public employees on the Conflict of Interest Law. Public employees can contact the agency to obtain legal advice, file a complaint, obtain a statement of financial interest or conflict of interest law disclosure form, or complete the statutory conflict of law requirements.

Public agencies are required to distribute the conflict of interest summary to employees and collect the acknowledgments from them. In addition, all public employees must complete the conflict of interest law online training program and provide a completion certificate to their public employer.

1.2 – THE LAW – The COI imposes restrictions on what the employee does on-the-job, after hours, and after leaving public service. The COI is governed by [G.L.c. 268A](#) and [930 CMR 5.00](#) & [6.00](#). The Conflict of Interest Law is designed to:

- prohibit and prevent conflicts between private interests and public duties;
- foster integrity in public service; and
- promote public trust and confidence in government

1.3 – PENALTIES – The statute of limitations applicable to violations of the COI is 5 years. It runs from the date the Ethics Commission learned of the alleged violation – but not more than 6 years from the date of the last conduct relating to the alleged violation. The Commission has this time to issue an Order to Show Cause, which starts public proceedings against an individual. Penalties for violating the COI law include:

- a civil penalty of up to \$10,000 and up to \$25,000 for bribery cases;
- an order to repay the economic advantage gained by the violation;
- restitution to injured parties;
- criminal prosecution.

2.0 – “Municipal Employee”

2.1 – “MUNICIPAL EMPLOYEE” – The COI law applies to “municipal employees,”. This is a term that is broadly defined and means anyone performing a service or services for a city or town or holding a municipal position, whether paid or unpaid, full-time or part-time. It includes: elected and appointed officials, municipal staff, volunteers, consultants, an employee of a private firm under contract to a city or town.

2.2 – “SPECIAL MUNICIPAL EMPLOYEE” – This designation recognizes the need not to unduly restrict volunteers and part time employees. The designation may be made by the Board of Selectmen, City or Town Council or by charter. (See definition in [Section 6.1 \(n\)](#) below.)

A municipal employee is eligible for special municipal employee status if they are: unpaid, part-time but allowed to have another job during normal working hours, or not paid for working more than 800 hours during preceding 365 days.

If so designated, the special municipal employee may be paid by others, act on behalf of others, and act as attorney for others on matters before boards other than their own.

The employee must not have participated in the matter as part of their municipal position, and the matter must not have been, or within the past year had been, under their official responsibility.

2.3 – MANDATORY EDUCATION & TRAINING – There are mandatory education and training requirements for public employers and public employees. Each year the municipal employee must be given a summary of the conflict of interest law prepared by the Ethics Commission and, every 2 years, the employee must complete an online training program prepared by the Commission.

Every municipality must designate a liaison to the Commission. Records of compliance with these requirements must be retained for 6 years. The requirements apply to all public employees. For detailed information on this, see [Ethics Commission Website on Mandatory Training](#).

3.0 – On-the-Job Restrictions

3.1 – ON THE JOB RESTRICTIONS – On-the-job restrictions include the following:

- bribes
- misuse of position
- false claims
- confidential information
- gifts & gratuities
- self-dealing & Nepotism
- appearance of conflict

3.1.1 – Bribes – A bribe means giving, offering, receiving, or asking for anything of value in exchange for the employee’s official actions. It includes both the “asking” and the “giving” of something, accompanied by a corrupt intent. This can mean the employee asking for or receiving something of value, or the employee’s acting or refraining from acting in their official capacity. Either or both parties can be found to have violated the COI law.

3.1.2 – Gift and Gratuities – The following restrictions apply to accepting gifts and gratuities:

- not accepting anything valued at \$50 or more;
- not accepting gifts because of your official position;
- not being rewarded for past official actions; and
- not receiving gifts to influence future official actions.

This restrictions include accepting or being reimbursed for meals, entertainment, event tickets, travel expenses, and the like, that others typically pay themselves. Certain travel expenses and fees for educational programs, however, are covered by regulatory exemption. Violations can be cumulative; a number of gifts together worth more than \$50 can be a

violation of the COI law.

3.1.3 – Misuse of Position – This means using your official position to secure for yourself or another something you are not entitled to, or causing this to happen.

3.1.4 – Self-Dealing and Nepotism – This means participating as a municipal employee in a matter in which employee or employee’s family or business organization has a direct or foreseeable financial interest. For purposes of the COI law:

- “Family” includes the employee’s spouse, and the parents, children, and siblings of both employee and their spouse.
- “Employer” includes a current or prospective employer, and businesses in which the employee is a director, officer, trustee, or employee.
- “Participation” includes discussing, voting, or delegating.
- “Financial interest” can be large or small, positive or negative. However, it does not include financial interests that are remote, speculative, or not sufficiently identifiable.

In many cases the municipal employee may be able to comply with the COI by simply abstaining, without having to give a reason for not participating.

3.1.5 – False Claims – This means presenting a false claim to your employer for a payment or benefit, or causing someone else to do so.

3.1.6 – Appearance of Conflict – [G.L. c. 268A, § 23\(b\)\(3\)](#) prohibits the employee from acting in a way that would cause a reasonable person having knowledge of the relevant circumstances to conclude that the employee can be improperly influenced, and relationships and affiliations could prevent the employee from acting fairly and objectively in official duties.

This conclusion can be dispelled if the officer or employee discloses in writing to their appointing authority or, if no appointing authority – as is often the case for planning board members – discloses in a manner which is public in nature, the facts which would otherwise lead to such a conclusion. It would be wise to consult with the municipal attorney in fashioning any disclosure.

3.1.7 – Confidential Information – This means improperly disclosing or personally using confidential information obtained through the job.

4.0 – After Hours Restrictions

4.1 – AFTER-HOURS RESTRICTIONS – These include holding a second paid job, acting with divided loyalties, and taking unfair advantage of an inside track not generally available to others.

4.1.1 – Second Paid Job – With certain exceptions, an employee generally may not have a direct or indirect financial interest in a contract made by the municipality and is prohibited from having a direct contract or deriving any financial benefit from a contract which the municipality has with another person or entity. Outside employment contracts are included.

4.1.2 – Divided Loyalties – This means:

- Receiving pay from anyone other than the city or town to work on a matter involving the city or town is a violation of the COI law.
- Acting as agent or attorney for anyone other than the city or town in a matter involving the city or town is prohibited, whether paid or not. This includes contacting the municipality by phone, in person, in writing, serving as spokesperson, or acting as a liaison. However, employees may always represent their own interests, even before their own boards.

4.1.3 – Inside Track – This is being paid by a city or town, directly or indirectly, under a second arrangement in addition to your primary job, unless an exemption applies. It includes having an interest in a municipal contract, having a second municipal job, and having an indirect interest in a contract that the city or town has with someone else. In short, the COI prohibits taking advantage of an “inside track” to further financial opportunities not available to others.

5.0 – After Employment Restrictions

5.1 – AFTER LEAVING MUNICIPAL EMPLOYMENT – From the date of separation from municipal employment in general and with respect to matters outside of the employee’s area of official responsibility, a former employee may represent and be paid by a third party without limitation, unless one of 2 major restrictions apply. They are often referred to as the “Forever Ban” and the “Cooling-Off Period/One Year Ban” both of which apply to matters that had been within the employee’s area of official responsibility. Business partners of municipal employees are subject to restrictions both during employment and after service ends.

- **GREEN** light – Matters Outside Area of Official Responsibility – From the date of separation, a former employee may represent and be paid by a third party without limitation.
- **YELLOW** light – Matters Within Area of Official Responsibility – If the former employee did not participate in the matter, although under their area of responsibility, the employee is banned for one year on any matter within their official responsibility during the 2 years prior to the date of separation.
- **RED** light – Matters Within Area of Official Responsibility – If the employee did participate in the matter, the former employee is banned forever.

6.0 – Selected Definitions

6.1 – DEFINITIONS – There are several selected definitions below that are pertinent to municipal employees (including boards and commissions). The following words (among others) have been defined in G.L. c. 268A, § 1, unless a different meaning is required by the context or is specifically prescribed: [Note that the letters (a), (e), (g) etc. correspond to the letters of G.L. c. 268A, § 1.]

(a) "Compensation" – any money, thing of value or economic benefit conferred on or received by any person in return for services rendered or to be rendered by him or herself or another.

(e) "Immediate family" – the employee and spouse, and their parents, children, brothers and sisters.

(g) "Municipal employee" – a person performing services for or holding an office, position, employment, or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis, but

excluding (1) elected members of a town meeting and (2) members of a charter commission established under Article LXXXIX of the Amendments to the Constitution.

(i) "Official responsibility" – the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action.

(j) "Participate" – participate in agency action or in a matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise.

(k) "Particular matter" – any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property.

(n) "[Special municipal employee](#)" – a municipal employee who is not a mayor, a board of aldermen member, a city council member, or a selectman in a town with a population in excess of ten thousand persons and whose position has been expressly classified by the city council, or board of aldermen if there is no city council, or board of selectmen, as that of a special employee under the terms and provisions of this chapter; provided, however, that a selectman in a town with a population of ten thousand or fewer persons shall be a special municipal employee without being expressly so classified.

All employees who hold equivalent offices, positions, employment or membership in the same municipal agency shall have the same classification. However, no municipal employee shall be classified as a "special municipal employee" unless he or she occupies a position for which no compensation is provided or which, by its classification in the municipal agency involved or by the terms of the contract or conditions of their employment, permits personal or private employment during normal working hours, or unless he or she in fact does not earn compensation as a municipal employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days.

For this purpose, compensation by the day shall be considered as equivalent to compensation for seven hours per day. A special municipal employee shall be in such status on days for which he or she is not compensated as well as on days on which he or she earns compensation.

All employees of any city or town wherein no such classification has been made shall be deemed to be "municipal employees" and shall be subject to all the provisions of this chapter with respect thereto without exception.

7.0 – Untying the “Nots” of the COI Law

7.1 – PROHIBITED ACTIONS - On its website, the Ethics Commission has provided a very concise list of prohibited actions that municipal employees should not carry out in their duties. This list is worth repeating here:

- You may not ask for or accept anything (regardless of its value), if it is offered in exchange

for you agreeing to perform or not perform an official act.

- You may not ask for or accept anything worth \$50 or more from anyone with whom you have official dealings. Examples of prohibited "gifts" include: sports tickets, costs of drinks and meals, travel expenses such as hotels and plane fare, conference fees, gifts of appreciation, entertainment expenses, free use of vacation homes, and complimentary tickets to charitable events.
- If a prohibited gift is offered:
 - you may refuse or return it;
 - you may donate it to a non-profit organization, provided you do not take the tax write-off;
 - you may pay the giver the full value of the gift;
 - in the case of certain types of gifts, it may be considered "*a gift to your public employer*", provided it remains in the government office and that you never take it home with you.
 - you may not accept honoraria for a speech that is in any way related to your official duties, unless you are a state legislator.
- You may not hire, promote, supervise, or otherwise participate in the employment of your immediate family or your spouse's immediate family.
- You may not take any type of official action that will affect the financial interests of your immediate family or your spouse's immediate family. For instance, you may not participate in a permitting, licensing or inspection process involving a family member's business.
- You may not take any official action affecting your own financial interest, or the financial interest of a business partner, private employer, or any organization for which you serve as an officer, director or trustee. For instance: you may not take any official action regarding an "after hours" employer, or its geographic competitors; you may not participate in licensing, inspection, zoning, or other issues that affect a company you own, or its competitors; if you serve on the Board of a non-profit organization (that is substantially engaged in business activities), you may not take any official action which would impact that organization, or its competitors.
- Unless you qualify for an exemption, you may not have more than one job with the same municipality or county, or more than one job with the state.
- Except under special circumstances, you may not have a financial interest in a contract with your public employer. For example, if you are a full-time town employee, a company you own may not be a vendor to that town unless you meet specific criteria, the contract is awarded by a bid process, and you publicly disclose your financial interest.
- You may not represent anyone but your public employer in any matter in which your public employer has an interest. For instance, you may not contact other government agencies on behalf of a company, a business, an association, a friend or relative, or even a charitable organization.
- You may not ever disclose confidential information, data or material which you gained or learned as a public employee.
- Unless you make a proper, public disclosure in writing - including all the relevant facts of your situation - you may not take any action that could create an appearance of impropriety, or could cause an impartial observer to believe your official actions are tainted with bias or favoritism.
- You may not use your official position to obtain unwarranted privileges, or any type of special treatment, for yourself or anyone else. For instance: you may not approach your subordinates, vendors whose contracts you oversee, or people who are subject to your official

authority to propose private business dealings.

- You may not use public resources for political or private purposes. Examples of "*public resources*" include: office computers, phones, fax machines, postage machines, copiers, official cars, staff time, sick time, uniforms, and official seals.
- You may not, after leaving public service, take a job involving public contracts or any other matter in which you participated as a public employee.

8.0 – Resources

8.1 – WHERE TO FIND HELP

- Ethics Commission Website - www.mass.gov/ethics
- State Ethics Commission
 - One Ashburton Place, Room 619
 - Boston, MA 02108
 - Phone (617) 371-9500
 - Fax (617) 723-5851
- Attorney of the Day: (617) 371-9500



THE GUIDEBOOK TO MASSACHUSETTS LAND USE 2021

CHAPTER THREE PLANNING

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American Planning Association
Massachusetts Chapter

Creating Great Communities for All

Chapter Three

Planning

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Section 3-01

Introduction

1.0 – Background and History

1.1 – BACKGROUND – Chapter Three covers the topic of planning, as well as planning boards. This chapter is substantially, but not entirely, based on G.L. c. 41, §§ 81A-J. Sections 81A-D relate primarily to planning boards and planning as follows:

- 81A – Establishment, Members, Terms
- 81B – Powers & Duties
- 81C – Studies and Reports
- 81D – Master Plans

Sections 81E-I pertain to Official Maps, and § 81J pertains to the Exterior Lines of Rights of Way.

1.2 – HISTORY – Planning functions originally derived in part from the authority given to municipalities relating to public ways. In 1907 towns, and in 1916 cities, were authorized to establish boards of survey that were required to prepare plans showing the location of streets and ways. Planning boards were established in 1913 and were known as “Section 70 planning boards” after the section of Chapter 41 that authorized them. Planning boards were required to make plans and studies of the community, particularly with reference to the proper housing of the inhabitants.

A version of G.L. c. 41, § 81A, adopted in 1936, provided for the establishment of planning boards, with planning powers, for Massachusetts cities and towns. Once a city or town created a “Section 81A planning board”, any then-existing “Section 70 planning board” ceased to exist. The 1936 act enumerated some powers and duties of planning boards. Additional information on these can be found in this Chapter.

2.0 – Additional Information

2.1 – ROLES & RESPONSIBILITIES – Section 81A-J includes only a partial reference to the many roles and responsibilities of planning boards. Planning boards are responsible for carrying out the provisions of the Subdivision Control Law – G.L. c. 81, §§ K-GG. (See Guidebook Chapter Five.) There are a number of provisions throughout the Zoning Act – G.L. c. 40A – that reference planning boards. (See Guidebook Chapter Four.)

In addition, there are references to planning board roles and responsibilities throughout other chapters of the General Laws. For this reason, Chapter Three includes a section on Planning Board Roles & Responsibilities. Table 3-A has information on those references as well as hyperlinks to those additional sections of the General Laws.

2.2 – REGIONAL PLANNING AGENCIES (RPAs) and Metropolitan Planning Organizations (MPOs) – Section 3-09 of this Chapter includes information on RPAs with supplementary material on MPOs that are responsible for transportation planning throughout the Commonwealth.

Section 3-02

Planning Boards - Establishment & Membership [G.L. c. 41, § 81A]

1.0 – Introduction

1.1 – PLANNING BOARD – [G.L. c. 41, § 81A](#), governs the establishment and organization of planning boards throughout the state. This includes their establishment, membership, appointment or election, terms, removal, vacancies, and towns without planning boards.

1.2 – SECTION 70 PLANNING BOARD – Note that prior to January 1, 1937, planning boards were established under [G.L. c. 41, § 70](#). All planning boards established since that date have been established under G.L. c. 41, § 81A.

2.0 – Establishment

2.1 – PLANNING BOARD ESTABLISHMENT – Except for the City of Boston, any city or town may establish a planning board.

2.2 – TOWNS WITHOUT PLANNING BOARDS – If a town does not have a planning board, upon attaining a population of 10,000, it shall establish a planning board. If a town has less than 10,000 inhabitants and no planning board it may, by vote of town meeting, authorize the board of selectmen to act as the planning board.

3.0 – Membership & Appointment

3.1 – MEMBERSHIP – A planning board shall consist of not less than 5 members and not more than 9 members.

3.2 – APPOINTMENT – In cities planning boards shall be appointed by the mayor subject to confirmation by the city council. In towns planning boards may either be appointed or elected, depending on how the boards were originally established by town meeting, town charter, or town bylaw. If appointed, the appointing authority may be the board of selectmen or town manager, again depending on town charter or bylaw.

4.0 – Holding Office

4.1 – LENGTH OF TERMS – Terms of office shall be for either 3 years or 5 years, as determined by the city council in cities and by town meeting in towns.

4.2 – OVERLAPPING TERMS – Members shall be appointed or elected for terms of office so that the term of at least one member shall expire each year.

4.3 – REMOVAL – Any planning board member in a city (a position held by appointment under the statute) may be removed from office for cause, after a public hearing, by the mayor with the approval of the city council. In towns, the default is that the planning board members are elected. However, in those towns in which the members are appointed, the charter should be referenced for provisions governing removal.

4.4 – VACANCY – In a city a vacancy shall be filled for the unexpired term in the same manner as the original appointment. In a town, if the members are appointed, then the vacancy shall be filled for the unexpired term in the same manner as the original appointment. In a town where the board members are elected, the vacancy shall be filled until the next annual election by a joint appointment of the board of selectmen and the planning board. The member elected at the next annual election shall serve the remainder of the unexpired term.

In towns, any appointment to fill a vacancy shall be done so in accordance with [G.L. c. 41, § 11](#). The planning board has one month from the time of vacancy to notify the board of selectmen of a vacancy.

4.5 – CHAIR AND CLERK ELECTIONS – A planning board shall annually elect a chair and a clerk from among the members.

4.6 – EMPLOYEES – A planning board may employ a planner and clerical help, and may contract with experts, subject to local authority and appropriation.

4.7 – APPOINTMENTS – A planning board may appoint a custodian of its plans and records who may be the city engineer or town clerk.

4.8 – CONFLICT OF INTEREST – No member of a planning board shall represent any party of interest in any matter pending before that board. For more detailed information on Conflict of Interest, see Section 2-04, Conflict of Interest, of Chapter Two of this Guidebook.

5.0 – Other Considerations

5.1 – LOCAL ACTIONS ON ESTABLISHMENT OF A PLANNING BOARD – Once a city or town has taken action under G.L. 41, § 81A, it may not rescind its action. The statute precludes any local bylaw or ordinance on the establishment of planning boards except as specifically authorized by the Legislature.

The Legislature has preempted local action relating to the establishment, powers, and duties of the planning board. Other than by the adoption or amendment of its charter under the Home Rule Amendment, the city or town is powerless to specify the statutory powers and duties of the board in any manner that deviates from those established by this statute or that in any way impairs its operation or effect. [Del Duca v. Town Administrator of Methuen](#), 368 Mass. 1 (1975).

Nevertheless, the planning board may still be assigned duties and responsibilities under purely local law – in ordinances and bylaws – totally separate and apart from the duties and responsibilities deriving from state statute.

Section 3-03

Planning Board - Roles & Responsibilities

1.0 – Introduction

1.1 – OVERVIEW – [G.L. c. 41, § 81A](#), establishes planning boards and includes language as to appointment, size, officers, and other similar issues. However, specific roles and responsibilities of planning boards are to be found in various sections of the General Laws.

2.0 – Roles & Responsibilities

2.1 – PLANNING BOARD ROLES & RESPONSIBILITIES – Table 3-A below provides an overview of many of the planning board’s statutory responsibilities found in G.L. c. 41 and in a variety of other chapters of the General Laws. In addition, Site Plan Review is also listed. Even though this is not found in the statutes, the planning board typically is assigned the responsibility for site plan review.

The table is divided into 4 columns. The first column is the topic where a reference to the planning board is found. The second column provides information on that topic. The third column provides the statutory reference (if any) to General Laws. Each reference is hyperlinked to the statute. The fourth column identifies the Guidebook chapter where more information about the topic can be found. A number of these topics are not covered in any further detail in the Guidebook.

Planning Board Roles & Responsibilities			
Topic	Information	Statute	Guidebook Chapter
Agricultural Incentive Areas	Planning board role in the establishment of such areas.	G.L. 40L, § 4	
Annual Report	Includes other studies or reports by the planning board.	G.L. c. 41, § 81C	Three
Community Development Department	A city or town may provide, by ordinance or bylaw, for a consolidated department of community development which may include the redevelopment authority, the planning board, the industrial development commission, and the industrial development financing authority or any other municipal office or agency exercising or authorized to exercise any community or economic development activities.	G.L. c. 43C, § 12	
Community Preservation Act	The CPA Committee shall include one member of the planning board.	G.L. c. 44B, § 5	
Development Zones	The role of the planning board in the establishment of development zones is covered.	G.L. 23L, §§ 1-10	

Planning Board Roles & Responsibilities			
Topic	Information	Statute	Guidebook Chapter
Establishment of Planning Board	Membership, tenure, vacancies, elected, or appointed, term length.	G.L. c. 41, § 81A	Three
Historic District Reports	Planning Board reviews and makes recommendations on the required report proposing to establish any historic district.	G.L. c. 40C, § 3	Six
Low and Moderate Income Housing (Chapter 40B)	The ZBA is the local permitting authority for 40B developments, including when subdivision plans are filed. The planning board may review and make recommendations to the ZBA on 40B applications.	G.L. c. 40B, §21	Four
Master Plan	Contents, elements, and adoption of the plan.	G.L. c. 41, § 81D	Three
Official Map	Purpose of map, laying out, alteration, or relocation of public ways.	G.L. c. 41, §§ 81E-H	Three
Overhead Wires	The Planning Board role in the prohibition or removal of overhead wires and poles is covered.	G.L. c. 166, §§ 22A-F	
Park Commissioners	Planning board may serve this function.	G.L. c. 41, § 81C	Three
Parties in Interest	Planning board is a party of interest for notices of public hearings on appeals, variances, and special permits.	G.L. c. 40A, § 11	Four
Powers & Duties	General overview.	G.L. c. 41, § 81B	Three
Public Ways	Laying out of ways (streets)	G.L. c. 41, § 81I	Three
Repetitive Petition	Planning board consent required.	G.L. c. 40A, § 16	Four
Scenic Roads	Removal of street trees & stonewalls on a designated scenic road requires the approval of a planning board.	G.L. c. 40, § 15C	Five
Shade Trees	Removal of public shade trees on designated scenic roads requires a joint hearing with the board and tree warden.	G.L. c. 87, § 3	Five
Site Plan Review	This is variously called Site Plan Review or Site Plan Approval. This is a common land use tool used for development review. It is traditionally a planning board responsibility.	No statutory provision governs site plan review.	Four
Special Permits	The planning board may be the special permit granting authority (SPGA). There are numerous sections of c. 40A regarding special permits. The primary ones are listed in the Statute column.	G.L. c. 40A, § 9 and G.L. c. 40A, § 11	Four
Street Names	The planning board may have authority to approve street names. Section 3 refers to the board or officer having jurisdiction, which could be the planning board. Sections 3A & 3B refer to Boards of Survey. Today most planning boards serve that function thus the language of these sections applies to planning boards.	G.L. c. 85, § 3 G.L. c. 85, § 3A G.L. c. 85, § 3B	

Planning Board Roles & Responsibilities

Topic	Information	Statute	Guidebook Chapter
Subdivision Control	Powers under these sections are delegated to the planning board. They include adoption of subdivision regulations, review, and action on preliminary, definitive, and approval not required plans, performance guarantees, and amendment or rescission of plans, among others.	G.L. c. 41, §§ 81K-81GG	Five
Tax classification of Forest Land (c. 61), Agricultural Land (c. 61A) & Recreational Land (c. 61B)	Notice to planning board is made upon request to the city or town to remove such lands from tax classification.	G.L. c. 61 G.L. c. 61A G.L. c. 61B	
Urban Redevelopment Corporations	Plans proposed under this statute shall be submitted to the planning board who holds public hearings and makes determinations about zoning, subdivision, blight, public use, etc. The board may recommend approval, disapproval, or disapproval with suggested changes to the city council or board of selectmen.	G.L. c. 121A, § 6	
Urban Renewal	Planning board shall find that a proposed urban renewal plan conforms to the local comprehensive plan.	G.L. c. 121B, § 48	Six
Waterways – Application for License	Any application requiring a Chapter 91 license, with certain exceptions, submitted to the Massachusetts Department of Environmental Protection (DEP), shall also be submitted to the local planning board for its review and recommendation to DEP regarding the proposed use.	G.L. c. 91, § 18	
Waterways – Docks & Piers	Any application to DEP under Chapter 91 for a license for a non-commercial dock, pier, or similar structure that is an accessory to a residential use shall also be submitted to the planning board of that city or town for review and recommendation to DEP.	G.L. c. 91, § 18C	
Zoning Adoption & Amendments	Draft, review, and recommend zoning amendments to the city or town council or town meeting.	G.L. c. 40A, § 5	Four

Section 3-04

Planning Board – Powers & Duties

[G.L. c. 41, § 81B]

1.0 – Introduction

1.1 – OVERVIEW – [G.L. c. 41, § 81B](#), primarily references circumstances regarding the establishment of a planning board under G. L. c. 41, § 81A, when there had been a previous planning board established under G.L. c. 41 § 70, and the transfer of powers and duties from the old board to the new board.

In addition, § 81B provides that planning boards may enter onto private lands and that both the Superior Court and Land Court may enforce the provisions of §§ 81A - J.

2.0 – Old Boards to New Boards

2.1 – DISCONTINUANCE OF OLD PLANNING BOARD – If a city or town has a planning board established under [G.L. 41, § 81A](#), and where there had previously been a planning board established under [G.L. 41, § 70](#), or a board of survey established under [G.L. c. 41, § 73](#), or a board of selectmen acting as a planning board, then all powers and duties that those boards exercised as a planning board shall cease to exist when the members of the newly constituted planning board under § 81A take office. Thereafter the newly constituted board shall have all of the powers and duties conferred and imposed by general law upon planning boards as well as the powers imposed by § 81A, and §§ 81C to 81GG inclusive.

2.2 – TRANSFER OF RECORDS – The officer or person having custody of the plans and records of the former board shall turn them over to the officer or board entitled to custody of the records and plans of the newly established planning board.

3.0 – Entry onto Private Lands & Enforcement

3.1 – ENTRY ONTO PRIVATE LAND – Planning boards established under § 81A, and their officers and agents, may, so far as they deem it to be necessary in carrying out §§ 81A - J, enter upon any lands and make examinations and surveys, and place and maintain monuments and marks. Prior to entry onto private land under this authority, however, planning boards would be advised to give notice to and obtain consent from the private property owner, who could possibly bring an action to recover damages resulting from such entry under the state's eminent domain laws. ([G.L. c. 79](#)).

3.2 – ENFORCEMENT OF SECTIONS 81A-81J – The Superior Court for the county in which the land affected by any of the provisions of §§ 81A - J lies, and the Land Court, shall have jurisdiction on a petition of the planning board established under § 81A, to enforce any of the provisions of those sections and any ordinances or bylaws made in accordance with these sections and may obtain an injunction to address violations of the ordinance or bylaw.

Section 3-05

Studies & Reports of the Planning Board & Planning Board as Park Commissioners

[G.L. c. 41, § 81C]

1.0 – Introduction

1.1 – OVERVIEW – [G.L. c. 41, § 81C](#), provides direction and recommendations to planning boards regarding the preparation of, and follow-up to, the creation of studies and plans. It also includes a provision related to a planning board acting as park commissioners.

2.0 – Studies & Plans

2.1 – CREATION OF PLANS – This section provides that planning boards shall from time to time make careful studies and, when necessary, prepare plans of the resources, possibilities, and needs of the city or town.

2.2 – REPORTING OF PLANS & STUDIES – The planning board shall, upon completion of any study, submit it to the city council or board of selectmen with the Board's recommendations. A copy of the study shall also be submitted to the Massachusetts Department of Housing and Community Development.

2.3 – ANNUAL REPORT – The planning board shall annually report to the city council or town meeting, giving information regarding the condition of the city or town and any plans or proposals for its development and estimates of the cost thereof. A copy of the annual report shall also be furnished to the Department of Housing and Community Development.

3.0 – Planning Board as Park Commissioners

3.1 – PARK COMMISSIONERS IN TOWNS – Under [G.L. c. 40, § 81C](#), any town planning board established under [G.L. c. 41, § 81A](#), may be authorized by a vote of town meeting to act as park commissioners and may be vested with all of the powers and duties of park commissioners.

Section 3-06

Master Plan [G.L. c. 41, § 81D]

1.0 – Introduction

1.1 – MASTER PLAN – [G.L. c. 41, § 81D](#), is titled the Master or Study Plan. It was originally adopted into the state statutes in 1947, with amendments in 1954, 1973, 1990, and 1998. It provides that a planning board established under [G.L. c. 41, § 81A](#), shall make a master plan of a city or town or parts thereof that the board may deem advisable. From time to time the board may extend or perfect the plan.

The terms “Master Plan” and “Comprehensive Plan” are used synonymously in this Guidebook.

1.2 – MASTER PLAN AUTHORITY – The planning board is responsible for adopting a master plan by a simple-majority vote. It is not required by statute that the local legislative body approve the plan, although some boards do present the plan, or an executive summary, to the legislative body for approval or “acceptance”. Other communities may present the plan for informational purposes only while others may not present the plan at all. It may also be the situation that the local city/town charter requires approval by the legislative body.

1.3 – MASTER PLAN & ZONING – In a number of states it is required that zoning be consistent with the master plan. However, in Massachusetts, although zoning decisions typically depend on planning considerations being taken into account, [G.L. c. 41, § 81D](#), itself does not require that zoning be in strict accordance with the municipality’s master plan. See [Rando v. Town of North Attleborough](#), 44 Mass. App. Ct. 603 (1998). That said, consistency with the municipality’s master plan – especially one recently adopted or revised – should be an objective of the planning in carrying out its duties and responsibilities.

Nonetheless, the Appeals Court in [National Amusements, Inc., v. City of Boston](#), 29 Mass. App. Ct. 305 (1990) commented that “zone changes which have no roots in planning objectives . . . are considered arbitrary and unreasonable.”

2.0 – Contents of the Master Plan

2.1 – PURPOSE – The plan shall be a statement, with text, maps, illustrations, or other communication forms, designed to provide a basis for decision making for the long term future of the community. It shall be internally consistent in its policies, forecasts, and standards.

2.2 – ECONOMIC DEVELOPMENT SUPPLEMENT – A city or town with an 81D master plan that applies for a state grant shall be required to prepare and keep on file an economic development supplement. The supplement shall contain the goals of the city or town with respect to industrial or commercial development, affordable housing, and preservation of parks and open space.

2.3 – ELEMENTS – Section 81D enumerates the following 9 elements that are to be included in the

master plan:

- GOALS – An interactive public process shall be conducted to determine community values and goals.
- LAND USE PLAN – Identify the present land use and designate proposed distribution of public and private lands. Relate the population and building densities to the capacity of the land and planned services and facilities. A land use map shall be included.
- HOUSING – Identify and analyze existing and forecasted housing needs and objectives. Identify policies and strategies to provide a balance of housing opportunities for all citizens.
- ECONOMIC DEVELOPMENT – Identify policies and strategies for the local economic base and the promotion of employment opportunities.
- NATURAL RESOURCES – Provide an inventory of significant natural, cultural, and historic resources. Identify policies and strategies for the protection and management of such areas.
- OPEN SPACE – Provide an inventory of open space and recreational resources. Identify policies and strategies for the management and protection of these resources.
- SERVICES – Identify and analyze existing and forecasted needs for facilities and services used by the public.
- CIRCULATION – Provide an inventory of existing and proposed circulation and transportation systems.
- IMPLEMENTATION – Provide a program which defines and schedules specific actions necessary to achieve the objectives of the plan. Identify scheduled expansion or replacement of public facilities and circulation systems components and costs and revenues associated to accomplish such activities. Specify the process by which local regulations shall be amended to be consistent with the master plan.

3.0 – Adoption and Amendment

3.1 – PROCESS – The planning board may, by a simple majority vote, adopt a master plan and, by a simple majority vote, amend an existing master plan. There is no language in § 81D as to what process (for example, holding a public hearing or not) the planning board should use; however, the board should conduct an open and transparent public process in proposing, reviewing, and adopting a master plan and any adopting amendments to that master plan.

4.0 – Notification to the State

4.1 – NOTIFICATION OF PLANS AND AMENDMENTS – Upon completion of a master plan or upon the adoption of an amendment of the plan, the planning board shall provide a copy of the plan or plan amendment to the state Department of Housing and Community Development.

5.0 – Other Considerations

5.1 – ADDITIONAL COMPREHENSIVE PLAN ELEMENTS – It is quite common for communities to include additional elements (or topics) when adopting a master plan. The choice of what topics to include is up to the municipality. Topics should include issues that are deserving of study with recommended strategies and actions as they relate to the community's circumstances. Among topics that are sometimes included beyond those specified in § 81D are:

- Arts & Culture
- Neighborhoods/Villages
- Energy

- Agriculture
- Climate
- Historic Preservation
- Sustainability
- Environment
- Education
- Public Health
- Community Design
- City/town Center

5.2 – CASE LAW – There are a few court cases, in addition to the ones regarding zoning consistency noted in subsection 1.3 above, that are particularly relevant to master plan issues.

5.2.1 – Master Plan & Subdivision Regulations – Having a master plan can be an important factor cited by the planning board in weighing an application for a waiver of the subdivision regulations. In [*Lakeside Builders, Inc. v. Planning Bd. of Franklin*](#), 56 Mass. App. Ct. 842 (2002), the town was found to have acted properly in taking the master plan into consideration when weighing a request for a waiver of regulations governing dead-end streets.

5.2.2 – Existence of a Master Plan – The validity of regulations can sometimes depend on whether the municipality has adopted a master plan and, if so, whether by cross-referencing to the plan, landowners or developers will know what standards apply to them. See [*Canter v. Planning Bd. of Westborough*](#), 7 Mass. App. Ct. 805 (1979). In this case Westborough's regulation requiring that areas for open space, parks, or playgrounds be set aside in accordance with recommendations and intents of the master plan were found to be invalid where no master plan existed.

5.2.3 – Master Plans and Chapter 40B Comprehensive Permits – Consistency with a city or town's master plan is a matter that may be taken into account by the courts in appeals from the denial of a comprehensive permit under G.L. c. 40B, although the resulting decision may not necessarily be favorable to the town's denial of the comprehensive permit. Upholding the decision of the Housing Appeals Committee (HAC) directing the ZBA to issue a comprehensive permit, the SJC in [*Zoning Board of Appeals of Lunenburg vs. Housing Appeals Committee*](#), 464 Mass. 38 (2013), found that substantial evidence supported the HAC's findings and conclusion that the proposed project was not inconsistent with the town's master plan and would not undermine that plan.

In another case the SJC noted that a very high standard is required for the municipality to show that an element of the master plan is a valid basis to rebut the strong presumption that there is a substantial housing need which outweighs local concerns. In [*Zoning Bd. of Appeals of Sunderland v. Sugarbush Meadow, LLC*](#), 464 Mass. at 171 (2013), the Court agreed with the Housing Appeals Committee which found that, even though the town had a *bona fide* affordable housing plan, the town had not met its "heavy burden" of demonstrating to the HAC that the town's master plan adequately promoted the creation of affordable housing.

The courts have held that municipal and regional planning issues are valid local concerns. In evaluating such concerns, the HAC considers: 1) a municipality's master plan, housing plan, housing production plan, community development plan, and the regional policy plan; and 2) the results of the municipality's efforts to implement such plans.

These, then, are subject to a three-prong test that effectively weighs planning concerns against the need for regional housing. Under the standard adopted by Housing Appeals Committee, a board must present sufficient evidence to establish that:

- (1) there is a bona fide plan;
- (2) the plan promotes affordable housing; and
- (3) the plan has been implemented in the area of the project.

Only if these 3 elements are met by the municipality will the master plan and its effectiveness be then weighed against the regional housing need.

A plan that has not actually resulted in the construction of a substantial amount of affordable housing shall not be given considerable weight in the balancing test. [760 CMR 56.07\(3\)\(g\)](#). See [Scituate Zoning Board of Appeals v. Herring Brook Meadows](#), 20 CLR 376 (2012). The HAC in that case determined that Scituate's plan failed adequately to promote affordable housing.

Section 3-07

Official Map [G.L. c. 41, §§ 81E – I]

1.0 – Introduction

1.1 – OFFICIAL MAP – The adoption of an official map by a city or town and the various requirements and actions related to adoption are found in [G.L. c. 41, §§ 81E-I](#). Each of these 5 sections of Chapter 41 is addressed individually below.

2.0 – Official Map – Purposes & Recordation – [G.L. c. 41, § 81E](#)

2.1 – PURPOSE & CREATION – Every city and town having a planning board may create and adopt an official map, prepared under the direction of the planning board, by a vote of the city council or town meeting. The map is intended to conserve and protect the public health, safety, and general welfare. The map may show the public ways and parks laid out and established by law and the private ways then existing and used in common by more than 2 owners.

2.2 – FILING REQUIREMENTS – Upon adoption of an official map and upon adoption of any subsequent change, the city or town clerk shall file with the appropriate registry of deeds a certificate of such action and a copy of the map as adopted or changed. A copy of the official map shall be provided to the Department of Housing and Community Development.

2.3 – SUBDIVISION PLANS – After a subdivision plan, approved and endorsed by the planning board and accompanied by a certificate as provided for in the Subdivision Control Law, has been recorded, the ways shown on that plan shall become part of the official map.

2.4 – MUNICIPAL SERVICES – No public water supply or sewer or other municipal utility or improvement shall be constructed on any public or private way in any city or town with an official map other than through a subdivision approved under the Subdivision Control Law unless the way has been made part of the official map.

2.5 – BUILDING PERMITS – In a city or town having an official map, no building permit shall be issued for a building unless either: a) the building is on a lot shown on a subdivision plan approved under G.L. c. 41, § 81K-GG, the Subdivision Control Law, or b) the street (way) providing access to the lot on which the building is proposed to be constructed has been made part of the city or town official map. An applicant who has been denied a building permit under this section shall have the same remedies as a person whose building permit application has been denied under section [G.L. c. 41, § 81Y](#).

If G.L. c. 41, § 81Y, is not in effect in a city or town with an official map then the city or town shall provide a board of appeals in the manner as established in [G.L. c. 41, § 81Z](#). The board of appeals shall have jurisdiction over appeals under this section in the same manner as provided for in G.L. c. 41, §§ 81Y-AA.

3.0 – Official Map – Map Changes & Damages – [G.L. c. 41, § 81F](#)

3.1 – MAP CHANGES – Any city or town with an official map may change or add to the map by placing lines or notations showing the existing or proposed locations of new or widened public ways or new or enlarged parks or the proposed total or partial discontinuances of existing mapped public ways and parks. Changes may be made by a two-thirds vote of the city council or town meeting.

Changes or additions to an official map that have not been previously recommended by the planning board shall not be adopted until after a report from the board. In addition, no variance from a plan prepared or approved by a planning board shall be made except by a two-thirds vote of all members of a city council or by two-thirds vote of a town meeting. Where the matter has been referred to the planning board for a report and the board has failed to provide a report within 30 days then the two-thirds voting requirement shall be waived.

3.2 – PUBLIC HEARING – No change on an official map shall become effective until after a public hearing is held by the city council or board of selectmen. At least a 10-day notice of the public hearing shall be given by advertisement in an official publication of a city or town or in a newspaper of general circulation. In addition, a copy of the notice shall be mailed to all owners of property abutting the proposed improvement or discontinuance.

3.3 – PRIVATE WAYS – Any way that is not a public way and shown on the official map may be modified or removed from the official map by the planning board acting in accordance with § 81W. However, no such way may be removed if there is any objection to that at the public hearing by any person in interest.

3.4 – DAMAGES – Any person injured in their property by a change in the official map under this section may recover damages caused by the map change under the provisions of the state's eminent domain statute ([G.L. c. 79](#)).

4.0 – Official Map – Public Ways & Parks – [G.L. c. 41, § 81G](#)

4.1 – POWERS NOT ABRIDGED – G.L. c. 41, § 81A – J shall not abridge the powers of a city council, board of selectmen, or of any other municipal officer in regard to public ways and parks except as provided therein. In addition, these sections shall not authorize the taking of land, or the laying out or construction of a way or park, or the alteration, relocation, or discontinuance thereof, except in accordance with the laws governing the same.

4.2 – ALTERATION, RELOCATION, OR DISCONTINUANCE – In any city or town with an adopted official map under [G.L. c. 41, § 81E](#), no public way shall be laid out, altered, relocated, or discontinued if that action is not in accordance with the official map, unless the action has been referred to the planning board. The planning board may either report on the action or allow 45 days to elapse without submitting a report.

4.3 – OPENING WAYS TO PUBLIC USE – After a city or town has adopted an official map, no person shall open a way for public use, except as provided in the Subdivision Control Law, unless the location of the way is in accordance with the official map or has been approved by the planning board under the provisions of this section, and the grading, surfacing, and drainage of the way has been approved by the planning board.

4.4 – DAMAGES – Nothing in these sections alone shall render a city or town liable for damages, except as may be sustained by the entry upon the land and other acts under [G.L. c. 41, § 81B](#), by reason of changes to the official map under § 81F, or by reason of the establishment of exterior lines under [G.L. c. 41, § 81J](#).

5.0 – Official Map – Ways & Parks Shown on the Official Map – [G.L. c. 41, § 81H](#)

5.1 – INCLUSION OF WAYS & PARKS ON OFFICIAL MAPS – Upon final action by the authorities for any of the actions listed below, the lines and notations showing the improvement, discontinuance, or closing shall, without further action by the city council or town meeting, be made part of the official map.

- laying out, altering, or relocating a public way;
- discontinuing in whole or part of any public way;
- establishing or enlarging a public park; or
- closing a public park in whole or in part.

6.0 – Municipalities Having No Official Map – [G.L. c. 41, § 81I](#)

6.1 – NO OFFICIAL MAP & PUBLIC WAYS – In a city or town that has a planning board but no official map, no public way shall be laid out, altered, relocated, or discontinued unless the proposal has been referred to the planning board and either the board makes a recommendation thereon or a period of 45 days has elapsed without a board report.

6.2 – PLANNING BOARD REVIEW – Under [§ 81I](#) and [§ 81B](#), if a city council in a city having no official map elects to take action to lay out a public way without having received a report from the planning board, the board itself may take action to compel reference of the matter to the planning board. This section is designed principally to ensure that each municipal planning board will have opportunity to make recommendations concerning every significant highway change in the city so that overall city plans will not be adversely affected. [Poremba v. City of Springfield](#), 354 Mass. 432 (1968).

6.3 – REFERRAL OF OTHER MATTERS TO THE PLANNING BOARD – G.L. c. 41, § 81 also provides that a city or town with a planning board may, by ordinance, bylaw, or vote, refer any other matter to the planning board before taking final action. This may be done with or without a provision that final action may not be taken until the planning board reports on the matter or has had a reasonable amount of time to report. The planning board has the power to make investigations, maps, reports, and recommendations, on any matter referred to it.

6.4 – PLANNING CONSIDERATIONS – There is an unreported Land Court case in which the judge explained the importance of [G.L. c. 41, § 81I](#), and the need for planning board review of a proposal to discontinue a street. The following is excerpted from that decision:

This statute seeks to insert rational, broad-based planning considerations into the decision by Town Meeting, the legislative organ of municipal government, whether or not to discontinue a public way. Nothing in § 81I suggests that Town Meeting must yield to the expert views of the Planning Board. But Town Meeting must seek and

obtain those views before acting. Those who advocate for a street's discontinuance, and cause a warrant article to be framed to obtain Town Meeting's acceptance, must first see to it that a referral to the Planning Board is made, and that the Planning Board is afforded sufficient time to deliberate and submit its report. The Planning Board is charged with this responsibility because it has not only expertise, but also the town and region-wide knowledge essential to full understanding of the ramifications of the laying out or discontinuance of a particular way. The Planning Board is expected to evaluate whether or not discontinuance of public rights in a street will leave land landlocked, for example, thereby exposing the Town to eminent domain damages. The Planning Board can best say whether or not a discontinuance will cut off opportunities for development of land reached over the street, and can consider whether or not that land lends itself to a type of development vital to the Town's pressing needs or long-range interests. The Planning Board can study and report whether the discontinuance of a public way might force the need to lay out another public street, perhaps at great cost or over a less-advantageous route. These issues are vital components of well-planned land use in a municipality, and the Planning Board's statutory responsibility to weigh in on them ought not be short-circuited. Carricorp Industries, Ltd. v. Town of Westport, Mass. Land Court, 2005 WL 3541194 (2005).

Section 3-08

Exterior Lines of Certain Public Ways

[G.L. c. 41, § 81J]

1.0 – Introduction

1.1 – OVERVIEW – [G.L. c. 41, § 81J](#), provides for the establishment, regulation, and discontinuance of the exterior lines of a public way.

2.0 – Establishment, Regulations, Discontinuance

2.1 – ESTABLISHMENT – A city or town with a planning board may establish the exterior lines of any public way. The location of the public way must have been approved either under [G.L. c. 41, § 81G](#), or under the Subdivision Control Law.

2.2 – REGULATIONS – After exterior lines are established no structure shall be erected or maintained between the exterior lines as established, except that buildings or parts of buildings existing at the time of establishment of the lines may remain and be maintained to an extent and under conditions as may be prescribed by the planning board.

2.3 – DISCONTINUANCE – Exterior lines may be discontinued in the same manner as provided for a highway or city or town way.

2.4 – OFFICIAL MAP – Exterior lines created under this section shall be placed on the official map of the city or town, if any, without any further action by the city council or town meeting. Exterior lines shall be removed from the official map if they are discontinued.

3.0 – Damages

3.1 – DAMAGE RECOVERY – Any person injured in their property by the establishment of exterior lines may recover damages caused under [G.L. c. 79](#). (Eminent domain).

Section 3-09

Regional Planning Agencies & Metropolitan Planning Organizations

1.0 – Introduction

1.1 – BACKGROUND – Section 3-09 covers both regional planning agencies (RPAs) and metropolitan planning organizations (MPOs). There are 13 RPAs, 10 MPOs, and 3 rural Transportation Planning Organizations in Massachusetts. Each RPA is comprised of representatives of its member cities and towns and is governed by a board (or council or commission) formed of representatives of member communities. A complete list of the RPAs and their contact information, including website addresses, can be found in Appendix E. The 13 RPAs in turn are part of a statewide organization known as the Massachusetts Association of Regional Planning Agencies (MARPA).

RPAs are covered in subsection 2.0 through 4.0 below. MPOs are discussed in subsection 5.0 below.

1.2 – STATUTORY AUTHORITY – RPAs, with some exceptions noted in Section 4.0 below, are governed by Chapter 40B of the General Law (the Regional Planning Law). Specifically, the following sections of Chapter 40B apply to regional planning commissions: [G.L. c. 40B, §§ 1-19](#), and [§§ 24-30](#). [Note that §§ 20-23 of Chapter 40B comprise the Low and Moderate Income Housing Law, often what is meant when “40B” is mentioned in the context of affordable housing.]

MPOs are not covered by state statutes but rather are found in the U.S. Code. Federal statutes for MPOs include:

- [23 U.S. Code 1](#) – Federal Aid Highways
- [23 U.S. Code § 134](#) – Metropolitan transportation planning
- [23 U.S. Code § 135](#) – Statewide and nonmetropolitan transportation planning

1.3 – HISTORY – In 1955, Massachusetts became one of the first states to enact legislation that authorized the creation of regional planning agencies. Within 15 years, all 13 RPAs had been legally established. Today, the RPAs cover the state from the Berkshires to Cape Cod and the Islands and all 351 cities and towns belong to an RPA.

2.0 – Regional Planning Agencies - Purpose

2.1 – OVERALL PURPOSE – While each RPA has multiple responsibilities, in general RPAs serve to advocate for regional collaboration, to promote the region’s interests, and to develop policies, plans, and projects that address regional issues. Although some RPAs are governed by the provisions of Special Acts (see Section 4.0 below), [G.L. c. 40B, § 2](#), is the statute under which most of the RPAs operate. This purpose section includes the following language:

... to permit a city or town to plan jointly with other cities and towns to promote with

the greatest efficiency and economy the coordinated and orderly development of the areas within their jurisdiction and the general welfare and prosperity of their citizens.

2.2 – SERVICES – The RPAs provide a number of services to their regions and members. Those services can vary from RPA to RPA, but they generally include research and analysis, technical assistance, and plan-making and implementation on issues that include housing, economic development, land use, energy, sustainability, rural development and protection, transportation and transit, and more. Increasingly the RPAs have also been administering grant programs available to their members on a variety of municipal issues.

2.3 – TECHNICAL SERVICES – The RPAs provide a wide variety of technical services. These can include GIS mapping, tool kits for land use planning and zoning techniques, data information and development, graphic services, and individualized assistance to member communities.

3.0 – Chapter 40B – The Regional Planning Law

3.1 – STATUTORY PROVISIONS – The Regional Planning Law – [G.L. c. 40B, §§ 1-19](#), and [§§ 24-30](#) – provides the authority for the establishment of regional planning commissions. Section 3 authorizes their establishment and, in general Sections 3-4C, cover administrative issues (membership, meetings, executive committees etc.). Section 5 provides information on the powers and duties of the RPAs. These include the authority to make studies, to prepare a regional or sub-regional comprehensive plan, to assist municipal planning boards in applying the regional plan and recommendations to local actions, and to prepare an annual report.

Section 5A allows an RPA to conduct water studies in cooperation with a water resource commission. Section 5B allows an RPA to be designated as the regional economic development commission. Section 6 provides that the RPAs and state agencies share information. Sections 7-8 relate to financial matters for the RPAs (budgets, borrowing etc.).

Finally, Section 30 requires that all RPAs have a technical assistance center to deliver services to their members for the purpose of expedited permitting, in accordance with [G.L. c. 43D](#). In addition, the Massachusetts Association of Regional Planning Agencies (MARPA) was tasked with creating a statewide permitting model, also in accordance with [G.L. c. 43D](#).

3.2 – SPECIFIC PROVISIONS OF C. 40B FOR SRPEDD AND MAPC – While much of Chapter 40B pertains to most of the RPAs, 2 RPAs are covered by their own specific sections of that Chapter. They are the Southeastern Regional Planning & Economic Development District (SRPEDD) and the Metropolitan Area Planning Council (MAPC).

[G.L. c. 40B, §§ 9-19](#) relate specifically to SRPEDD. [G.L. c. 40B, §§ 24-29](#) relate specifically to MAPC. These sections cover the establishment, membership, administrative, financial responsibilities, powers, and duties of SRPEDD and MAPC, and other matters.

4.0 – Special Acts

4.1 – BACKGROUND – Special legislation enacted by the Legislature in the 1970s and 1980s gave 2 Massachusetts RPAs – the Martha's Vineyard Commission and the Cape Cod Commission – special land use regulatory powers not then accorded elsewhere in the Commonwealth. In addition, the

Nantucket Planning & Economic Development Commission (NPEDC) was created by a special act of the Legislature in 1973 and has been the subject of a series of additional special acts since then including legislation in 2011 that also granted NPEDC additional land use powers.

While G.L. c. 40B authorizes the establishment of RPAs and provides for the administration and powers and duties, certain other RPAs, in addition to those noted in the paragraph above, have been the subject of their own special acts. Three in particular – the Franklin Regional Council of Governments, the Northern Middlesex Council of Governments, and the Old Colony Planning Council – are noted in sections 4.5, 4.6, and 4.7, below.

4.2 – CAPE COD COMMISSION (CCC) – The CCC was created by the enactment of [Chapter 716 of the Acts of 1989](#). This act was intended to provide additional protections to Cape Cod and the municipalities located on the Cape due to the unique natural, coastal, historical, recreational, architectural, archeological, and cultural values and characteristics of this area. Among the numerous responsibilities and powers assigned to the CCC, 3 of the most significant are:

- to prepare and oversee the implementation of a regional land use policy plan for Cape Cod;
- to recommend the designation of specific areas of Cape Cod as Districts of Critical Planning Concern (DCPC) requiring special protection; and,
- to review and regulate Developments of Regional Impacts (DRIs) that meet minimum criteria pertaining to size, location, or character and effect on more than one town.

4.3 – MARTHA’S VINEYARD COMMISSION (MVC) – The MVC was created by the adoption of [Chapter 637 of the Acts of 1974](#) by the Legislature. The Vineyard was identified as possessing unique natural, historical, ecological, scientific, and cultural values and characteristics, accompanied by a regional and statewide interest in preserving and enhancing those values. The values were seen as being threatened and could be irreversibly damaged by uncoordinated or inappropriate uses of the land.

In 1977, the Legislature enacted Chapter 831 of the Acts of 1977, which further clarified the responsibilities and powers of the Commission. This authorized the Commission to adopt regulations for Districts of Critical Planning Concern (DCPC) and for the review of Developments of Regional Impacts (DRIs).

4.4 – NANTUCKET PLANNING & ECONOMIC DEVELOPMENT COMMISSION – The NPEDC was originally created by [Chapter 561 of the Acts of 1973](#) as a planning agency that would plan for the orderly and coordinated development and protection of the physical, social, and economic resources of the island. It was responsible for the preparation of a comprehensive plan for Nantucket. Subsequently the Legislature enacted [Chapter 98 of Acts of 1981](#) and [Chapter 458 of the Acts of 1991](#), both of which modified the membership requirements, and [Chapter 81 of the Acts of 2011](#). This action required that developments on Nantucket that exceed certain stated criteria must receive approval from the NPEDC of a Development of Regional Economic Impact (DREIP) Permit prior to construction.

4.5 – FRANKLIN REGIONAL COUNCIL OF GOVERNMENTS – The Franklin Regional Council of Governments (FRCOG) was created by Section 567 of [Chapter 151 of the Acts of 1996](#). This section included a provision that all of the powers and functions of a regional planning agency authorized under Chapter 40B were the responsibility of FRCOG.

4.6 – NORTHERN MIDDLESEX COUNCIL OF GOVERNMENTS – [Chapter 420 of the Acts of 1989](#) authorized

NMCOG to enter into agreements with its member communities to provide any service to those member communities that it is authorized to perform individually.

4.7 – OLD COLONY PLANNING COUNCIL – The OCPC was established by [Chapter 332 of the Acts of 1967](#).

5.0 – Metropolitan Planning Organizations

5.1 – BACKGROUND – A Metropolitan Planning Organization (MPO) is a regional body made up of state, regional, and local officials and is responsible for conducting transportation planning and programming. In Massachusetts, each MPO traditionally has at least 4 members: the Secretary of Transportation and CEO of the Massachusetts Department of Transportation (MassDOT), who acts as the MPO's chair; the Administrator of MassDOT's Highway Division; the Chair of the Regional Planning Agency; and the Chair of the Regional Transit Authority.

Virtually all MPOs have expanded to include elected local officials such as mayors, town councilors, and select board members. The Federal Highway Administration and the Federal Transit Administration serve as non-voting members of MPOs.

5.2 – PURPOSE & RESPONSIBILITIES – MPOs were created to ensure that existing and future expenditures for transportation projects and programs were based on a “3-C planning process.”

- Continuing – Planning must be maintained as an ongoing activity and should address both the short-term needs and long-term vision for the region.
- Cooperative – The process must involve a wide variety of interested parties through a public participation process.
- Comprehensive – The process must cover all transportation modes and be consistent with the regional and local land use and economic development plans.

The MPO uses this process to develop a vision for the region and then decides how to allocate federal and state transportation funds to programs and projects – roadway, transit, bicycle, and pedestrian – which support that vision. This vision is integral to each of the regional certification documents that are required by the U.S. Department of Transportation including – a Long Range Regional Transportation Plan, a Transportation Improvement Program, and a Unified Planning Work Program.

5.3 – MPOS AND RPAS – The MPOs and the RPAs are often confused because they encompass either the same or very similar geographical boundaries. For most of the regions of the state, RPAs, working under contract with MassDOT's Office of Transportation Planning, conduct transportation and other planning activities in their respective regions. These RPAs are the lead planning agencies for the MPOs and as such routinely conduct much of the staff work for, and are a voting member of, their region's MPOs.

In the Boston area there is the Boston Region MPO staffed by the Central Transportation Planning Staff. The Boston Region MPO includes 97 cities and towns. The Metropolitan Area Planning Council (MAPC) is the RPA for the Boston region and it includes 101 cities and towns.

5.4 – STIP & TIP – The [State Transportation Improvement Program](#) (STIP) is a compilation of the 13 regional Transportation Improvement Programs prepared annually by the state's Metropolitan Planning Organizations. It is essentially an inventory of priority transportation projects (highway

and transit) listed by funding category and fiscal year. The STIP is reviewed and approved by state and federal transportation and environmental agencies.

Every year, each region must prepare and update its Transportation Improvement Program (TIP), a staged multi-year program of capital improvements that reflects the needs of the regional transportation system. Under federal regulations, the TIP must be constrained to available funding, consistent with the Long Range Regional Transportation Plan, and include an annual element, or listing, of projects to be advertised in the first year of the TIP. Like the STIP, the regional TIP has a highway component and a transit component.

For more information about MPOs go to the [Massachusetts Department of Transportation](https://www.mass.gov/info-details/massachusetts-department-of-transportation) website.



THE GUIDEBOOK TO MASSACHUSETTS LAND USE 2021

CHAPTER FOUR ZONING

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American Planning Association
Massachusetts Chapter

Creating Great Communities for All

Chapter Four

Zoning

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Section 4-01

Introduction, Purpose & Organization

1.0 – Introduction

1.1 – BACKGROUND – POWER TO ZONE/HOME RULE AMENDMENT – SECTION 6 – As discussed in more detail in the Section on “Home Rule & the Origins of Zoning” (Section 4.02 of this Chapter), the power to zone is solidly grounded in Section 6, Governmental Powers of Cities and Towns, of the Home Rule Amendment (Article 89 of the Articles of Amendment to the Massachusetts Constitution) and is implemented as part of the municipality’s “police power.” (See Appendix D for the language of Article 89)

1.2 – SECTION 8 OF THE HOME RULE AMENDMENT – Although zoning has been held to be squarely within the constitutional power of cities and towns, Section 8 of the Home Rule Amendment provides the General Court (the State Legislature) with authority to preempt any area of regulation by the enactment of general laws. One of those “general laws” is the Zoning Act – General Laws Chapter 40A which establishes restrictions and exemptions on certain aspects of zoning bylaws and ordinances as well as regulates certain zoning processes.

1.3 – HOME RULE AMENDMENT & CHAPTER 40A – It is important to understand that the Home Rule Amendment empowers local zoning. Chapter 40A does not authorize or enable zoning by cities and towns.

1.4. – LINKS – Please be aware that the “official” versions of all state statutes and regulations (and many of the state policies) are only available through the State Bookstore or from the Secretary of State’s Code of Massachusetts Regulations (CMR) Subscription Service. The links provided in the Guidebook to state statutes and Code of Massachusetts Regulations (CMRs) and other state regulations are not “official”. However, the links to the mass.gov website to the documents in most all cases are the same as the “official” versions. Nevertheless, it would be wise to consult with your municipal attorney, or purchase the “official” version of the document you are reviewing to obtain the “official” versions, if you feel that is necessary.

2.0 – Purpose

2.1 – THE PURPOSES OF ZONING – CHAPTER 40A – When the Legislature enacted [Chapter 808 of the Acts of 1975](#), creating the new “Zoning Act”, a “purpose” section was not included within Chapter 40A itself. (This contrasted with the old Chapter 40A which did have one.) Nor were the purposes incorporated within any other General Law.

However, the purposes and objectives of the Zoning Act can be found in Section 2A of Chapter 808 of the Acts of 1975, and are discussed in Section 2.2 and 2.3 below. These purposes and objectives should not be read as placing finite boundaries around the local adoption and amendment of zoning ordinances and bylaws.

2.2 – SECTION 2A – INTRODUCTION – The purposes for which a municipality may enact zoning measures

are constrained only by the limits imposed by the constitution of the Commonwealth, or reserved to the General Court under Section 8 of the Home Rule Amendment. However, to make explicit what the General Court wished to confirm as being rightly within the zoning authority of cities and towns, Section 2A of Chapter 808 of the Acts of 1975, created an illustrative – but not limiting – list of purposes:

2.3 – SECTION 2A – LANGUAGE – Excerpts from this Chapter are noted below.

The purposes of this act are to facilitate, encourage, and foster the adoption and modernization of zoning ordinances and by-laws by municipal governments in accordance with the provisions of Article 89 of the Amendments to the Constitution and to achieve greater implementation of the powers granted to municipalities thereunder.

This act is designed to provide standardized procedures for the administration and promulgation of municipal zoning laws. This section is designed to suggest objectives for which zoning might be established which include, but are not limited to, the following:

- *to lessen congestion in the streets;*
- *to conserve health;*
- *to secure safety from fire, flood, panic, and other dangers;*
- *to provide adequate light and air;*
- *to prevent overcrowding of land;*
- *to avoid undue concentration of population;*
- *to encourage housing for persons of all income levels;*
- *to facilitate the adequate provision of transportation, water, water supply, drainage, sewerage, schools, parks, open space, and other public requirements;*
- *to conserve the value of land and buildings, including the conservation of natural resources and the prevention of blight and pollution of the environment;*
- *to encourage the most appropriate use of land throughout the city or town, including consideration of the recommendations of the master plan, if any, adopted by the planning board and the comprehensive plan, if any, of the regional planning agency; and*
- *to preserve and increase amenities by the promulgation of regulations to fulfill said objectives.*

These regulations may include but are not limited to restricting, prohibiting, permitting, or regulating:

- *uses of land, including wetlands and lands deemed subject to seasonal or periodic flooding;*
- *size, height, bulk, location and use of structures, including buildings and signs except that billboards, signs and other advertising devices are also subject to the provisions of sections twenty-nine through thirty-three, inclusive, of chapter ninety-three, and to chapter ninety-three D;*
- *uses of bodies of water, including water courses;*
- *noxious uses;*
- *areas and dimensions of land and bodies of water to be occupied or unoccupied by uses and structures, courts, yards and open spaces;*

- *density of population and intensity of use;*
- *accessory facilities and uses, such as vehicle parking and loading, landscaping and open space; and*
- *the development of the natural, scenic and aesthetic qualities of the community.*

(Note: The bullets and underlining above are added and are not part of Section 2A of Chapter 808 of the Acts of 1975)

3.0 – Organization of Chapter Four

3.1 – THE ZONING ACT – Chapter Four covers the topic of zoning. This chapter is substantially, but not entirely, based on [G.L. c. 40A, §§ 1-17](#).

3.2 – SEQUENCE OF SECTIONS – This Chapter is not organized in the same exact sequence as its statutory provisions (§ 1– § 17), but in a sequence reflecting – to the extent possible – a “from the beginning to the end story” of zoning, starting with purpose, origins, and adoption of zoning through and to enforcement and appeals related to zoning.

3.3 – ORGANIZATIONS OF SECTIONS – Where logic and ease-of-use dictated, some sections of Chapter 40A were combined. For example, § 4-08, “Board of Appeals,” combines language from Chapter 40A, §§ 1A, 12, and 14, as all of those cover aspects of the Board of Appeals. On the other hand, Chapter 40A, § 9 – “Special Permits” – covers so many different topics related to special permits that it has been divided into Part 1 (§ 4-14) and Part 2 (§ 4-15) for the purposes of this Chapter.

3.4 – ADDITIONAL SECTIONS – In addition to the chapter sections covering each statutory section from § 1 through § 17, there are a few additional topics included beyond what is found in those sections. Examples of these are Site Plan Review, Expedited Permitting, Smart Growth Zoning, Chapter 40B – Comprehensive Permits, and a brief description of zoning for the City of Boston which is not subject to Chapter 40A.

Section 4-02

Home Rule & the Origins of Zoning

1.0 – Introduction

1.1 – BACKGROUND – The power to zone is solidly grounded in the 1966 Home Rule Amendment Article 89 of the Articles of Amendment to the Massachusetts Constitution (See Appendix D) and is implemented as part of the municipality’s “police power.” The police power provides the authority of government to protect the public’s health, safety, and welfare; and zoning is one of those protections. Zoning by its very nature exercises that authority by imposing restrictions on what the owners of property may do with their buildings land. In implementing the Home Rule Amendment, the Legislature enacted the Home Rule Procedures Act – [G.L. c. 43B](#) – which focuses on how cities and towns adopt and amend their local charters.

1.2 – THE EARLIER “ZONING ENABLING ACT” – Prior to the adoption of the Home Rule Amendment in 1966, cities and towns operated under the old Chapter 40A, called the “Zoning Enabling Act”. Under that statutory scheme local zoning powers derived from – that is, these powers were “enabled by” – an authorization of the General Court. (Note: Where the term “General Court” is used, it refers to the State Legislature.) The provisions of any zoning ordinance or bylaw would have to be expressly authorized, or “enabled;” hence, unlike the current Chapter 40A (the “Zoning Act”), the old Chapter 40A was appropriately referred to as an “enabling” statute.

2.0 – Zoning – The Early Years

2.1 – ZONING –THE EARLY YEARS – One of the first comprehensive zoning codes adopted in the United States was by New York City in 1916. As additional communities throughout the country began adopting similar zoning codes, it was inevitable that such regulations would be challenged in the courts. Thus, the power to zone underwent early scrutiny to reconcile the rights of property owners with the exercise of a municipality’s police powers to protect the public and to secure the appropriate level of a community’s right to plan its future. The key court decision establishing these principles is [Euclid v. Ambler Realty Co.](#), 272 U.S. 365 (1926), a case from which the expression “Euclidean zoning” was derived. In *Euclid*, the United States Supreme Court upheld the constitutionality of the concept of zoning as a reasonable use of a community’s police power.

As more and more local jurisdictions adopted zoning, there was an effort to achieve uniformity as to how zoning codes are used. As a result, the U.S. Commerce Department in 1922 drafted a model zoning act, which became known as the [Standard State Zoning Enabling Act](#). The contents of this act were subsequently adopted by most states.

2.2 – MASSACHUSETTS – THE EARLY YEARS – One of the antecedents of the concept of zoning was the adoption of regulations regarding buildings. The state had adopted a number of regulations for buildings in the late 19th century and early 20th century. Chapter 333 of the Acts of 1904 adopted legislation authorizing the City of Boston to regulate building heights by districts (different height limits for different districts). A property owner challenged this distinction; the Massachusetts Supreme Judicial Court upheld the regulations; and an appeal was taken to the U.S. Supreme Court.

In [*Welch v. Swasey*](#), 214 U.S. 91 (1909), the United States Supreme Court upheld the regulations, noting that limiting the heights of buildings in Boston and prescribing different heights in different sections of the city is based upon reasonable grounds, is a proper exercise of the police power of the state, and is not unconstitutional under the equal protection and due process clauses of the Fourteenth Amendment.

In 1920, the Legislature adopted 1920 Mass. Acts 601, entitled “*An Act to Authorize Cities and Towns to Limit Buildings According to Their Use or Construction in Specified Districts.*”

This legislation included a number of the provisions found to this day in Chapter 40A, the Zoning Act. These include:

- delegation to cities and towns the power to divide the community into districts;
- the requirement to hold a public hearing for zoning enactment;
- authority to withhold permits if the structure would be in violation of local regulations;
- exemptions for existing nonconforming structures; and
- availability of judicial review of local regulations and decisions.

Even then, the principle of uniformity currently stated in [G.L.c. 40A, § 4](#), was foreshadowed when the Supreme Judicial Court confirmed that the Legislature’s delegation to cities and towns of the power to zone must be exercised with due regard for the characteristics of the community, with the rules applicable within zoning districts to be applied uniformly throughout the district.

In 1925, the Legislature expanded the narrow focus of the 1920 legislation to authorize what now have become traditional zoning regulations. The General Laws were subsequently amended in 1933, 1954, and 1975. The 1933 amendments to the Massachusetts Zoning Act were based in large part on the Standard State Zoning Enabling Act.

The 1933 legislation introduced many zoning concepts that remain in use today. Among those are special permits, variances, zoning freezes, the establishment of the powers of the board of appeals, and procedures for appeals to the superior court.

[3.0 – Zoning – The Later Years – Chapter 40A](#)

3.1 – CHAPTER 40A – ZONING ENABLING ACT (1954) – A major revision to zoning legislation occurred in 1954 and resulted in the codification of the then Zoning Enabling Act as Chapter 40A. Additional provisions were later added to Chapter 40A, including the exemption for religious and educational uses, authorization to regulate land subject to flooding, and the 2-year waiting period for failed zoning amendments, variances, and special permits.

The old Chapter 40A contained key statutory provisions that prohibited, regulated, or restricted a municipality’s exercise of its “police power” in zoning, or that prescribed procedures and set minimum standards that applied to all cities and towns (except Boston) in the local exercise of those powers.

3.2 – CHAPTER 40A – THE ZONING ACT (1975) – In the early 1970’s the Planning Division of Massachusetts Department of Commerce and Development produced a study of the existing act, identifying its problems and inconsistencies. It prepared a wholesale redraft which was adopted, with amendments, by the Legislature in 1975 as [Chapter 808 of the Acts of 1975](#). This legislation

assigned “The Zoning Act”, not the “Zoning Enabling Act”, as the title of Chapter 40A, which in effect flipped the power to zone 180 degrees. Chapter 40A no longer “enabled” municipalities to adopt zoning bylaws and ordinances and amendments. With the adoption of the Home Rule Amendment (HRA – see Section 4.0 below) it is now the presumption that local zoning laws are lawful unless they conflict with or in any way frustrate the constitution and laws of the Commonwealth, or where some provision of the state law expressly or impliedly preempts them.

It is very important to note that Chapter 40A does not authorize or enable zoning. The authorization for zoning derives from the Home Rule Amendment adopted by the voters of Massachusetts in 1966, and no longer by the superseded “Zoning Enabling Act” of 1954. The HRA’s expressed intent (Section 1) is “*to grant and confirm to the people of every city and town the right of self-government in local matters.*”

However, having said that, Section 8 (see section 4.3 below) of the Home Rule Amendment reserved to the Commonwealth the right to be both prescriptive and proscriptive as to how cities and towns exercise their home rule power to zone. In other words, the default presumption in matters of zoning is that the city or town possesses the right to regulate in any manner it chooses, but they must conform to limitations and requirements enacted by the Legislature in the General Laws, most especially in G.L. c. 40A.

4.0 – The Home Rule Amendment (HRA)

4.1 – ZONING – In November 1966, the citizens of the Commonwealth voted to adopt the Home Rule Amendment. After it’s the adoption, local zoning laws are presumed lawful unless they conflict with the constitution and laws of the Commonwealth, or where some provision of the Zoning Act preempts the measure.

4.2 – SECTION 6 OF THE HRA – Section 6 of the HRA confers upon cities and towns the power “*to adopt, amend, or repeal local ordinances or bylaws*” even in the absence of a specific grant of such powers by the General Court, provided that the same are not inconsistent with “*the constitution and laws of the Commonwealth,*” and that are not denied expressly or implicitly by the municipality’s charter.

4.3 – SECTION 8 OF THE HRA – Section 8 of the HRA equips the General Court with the power to enact “*general laws*” that are applicable to all cities and towns, or to a class of more than one city or town. It may also enact laws affecting a single city or town upon petition of the city or town approved by its legislative body. These are called “Home Rule petitions.”

Although zoning has been held to be squarely within the constitutional power of cities and towns, Section 8 of the Home Rule Amendment empowers the General Court to preempt any area of regulation by the enactment of general laws.

Preemption has been described as either “field preemption” or “conflict preemption”.

- Field preemption – when the state expressly or impliedly elects to “occupy the field” (for example, the state Pesticide Act expressly prohibits cities and towns from regulating the use and application of pesticides).
- Conflict preemption – when the state enacts laws that leave the field of regulation open for cities and towns to adopt measures that are in harmony with the state law and do not conflict with state law or that otherwise frustrate state legislative intent.

4.4 – CHAPTER 40A LANGUAGE CONFUSION – It is unfortunate, however, that when the Legislature enacted the new Chapter 40A in 1975 (Chapter 808 of the Acts of 1975) it did not make clear that its provisions no longer enabled local zoning, but only restricted what a city or town now has the constitutional right to do, or how they must do it. Under HRA Section 8, the power to restrict, but not permit or authorize, local zoning power was reserved to the General Court.

Nevertheless, the continuing presence in Chapter 40A of words that purport to permit or authorize, and the continued reference to Chapter 40A as an “enabling” statute by lawyers and the courts, has only served to perpetuate the mistaken belief that what cities and towns do by zoning must be specifically authorized by Chapter 40A. Zoning regulations, tools, and techniques adopted by cities and towns do not have to be authorized by Chapter 40A.

Section 4-03

Government Exemptions from Zoning

1.0 – Introduction

1.1 – BACKGROUND – There is no single, simple answer to the question of when government entities – federal, state, regional, local – are subject to local zoning.

1.2 – HIERARCHY OF LAWS AND CONSISTENCY – Under the “hierarchy of laws,” the constitution and laws of the Commonwealth must not be inconsistent with the constitution and laws of the United States, and the charters and laws (ordinances and bylaws) of cities and towns must not be inconsistent with the constitution and laws of the Commonwealth. In a similar vein, the regulations of municipal agencies must not be inconsistent with the charter and laws of the city or town; and the decisions of those charged with the interpretation, implementation, and enforcement of local laws and regulations must not be inconsistent with all laws above them in the hierarchy.

A corollary of the above principles is that the United States government enjoys sovereignty over government entities lower on the hierarchical pyramid, such as state and local government, as does the Commonwealth over its cities and towns.

1.3 – SOVEREIGNTY – Sovereignty is different from sovereign immunity. Sovereign immunity insulates the state from lawsuits and claims unless its “sovereignty” is waived. Sovereignty relates to the fundamental exemption enjoyed by the sovereign from the unconditional applicability of the laws of governments lower in the governmental pecking order. Sovereignty prevents a city or town from adopting ordinances and bylaws – including zoning ordinances and bylaws – that regulate the state government unless a provision of state law allows for that adoption. Sovereign immunity, on the other hand, bars an injured party from suing the state for negligence, except to the extent that the state’s sovereign immunity has been waived by statute, as under the Massachusetts Tort Claims Act ([G.L. c. 258](#)).

State sovereignty bars the applicability of local ordinances and bylaws - including zoning – to the state and state agencies unless the Legislature has expressly consented.

2.0 – Government Entities

2.1 – STATE GOVERNMENT – State entities are generally exempt from local zoning ordinances and bylaws but there could be instances when they may be subject to local laws. Two illustrations are:

- when an exemption has been specifically waived;
- when a state entity acts in ways that are not in the exercise of its governmental capacity or not in furtherance of its governmental purposes – that is, when it acts in a “proprietary capacity” – it may have subjected itself to local jurisdiction.

When state entities act to carry out the state legislative mandate and act in their governmental

capacity, they are generally beyond the reach of local zoning.

It can be difficult to determine under which capacity a state entity acts, but a number of considerations have been advanced by the courts, such as:

- the nature and scope of the state legislative mandate
- the public purposes for which state action has been mandated
- the specifics of the land use involved
- the local impacts of state action on legitimate local interests

2.2 – COURT DECISIONS – There are 2 cases that are particularly of interest regarding this issue.

- The first case is [*Greater Lawrence Sanitary District v. Town of North Andover*](#), 439 Mass. 16 (2003), where the town sought to regulate the activities of the District, a corporation created by the state legislature. The activities included dust, blasting, odor, noise, traffic, and related problems. The Supreme Judicial Court (SJC) held that a state-created entity will not be totally exempt from local regulations and would be subject to them to the extent that the regulations do not “*interfere with its ability to fulfill its essential governmental purposes and have only a negligible effect on its operations.*” This analysis, however, does not expose the state itself or its agencies to local jurisdiction, as distinct from being a mere creation of the Legislature, such as the sanitary district in the case cited above.
- The second case is [*Town of Boxford v. Massachusetts Highway Department*](#), 458 Mass. 596 (2010), where the SJC considered a conflict between the town and the state highway department regarding the department's salt storage facility in the town. The town sued the state in Superior Court to cause the operation of the facility to cease, on the ground that the state highway department was in violation of the town's board of health regulations adopted under the authority of [G.L.c. 111, § 31](#) and [§ 122](#). The SJC then reviewed the case and determined that, in considering whether a municipality can regulate an operation of a state agency, the most important and relevant inquiry is not whether there is express authorization for a municipality to apply its regulation to a state agency, but whether such application will impede or limit in some way the agency's ability to fulfill its legislative mandate.

The case was remanded to Superior Court for “*further proceedings consistent with this opinion.*” It should be noted that the authority of the board of health derives in large part from state statute, while zoning bylaws and ordinances are purely local in origin.

The key point to consider here is that there is no clear boundary beyond which the applicability of local land use regulations to state entities are either prohibited or conditionally permitted. Here, consultation with the municipal attorney is indispensable.

2.3 – LOCAL GOVERNMENT – At the local level, city and town governments do not stand as sovereigns over their citizens. They are themselves subject to local laws no less than the people they exist to serve. Local general and zoning laws are applicable to local governments and citizens alike, unless expressly exempted by local law. Cities and towns may also regulate municipal uses and structures, short of prohibiting them, by requiring site plan review or special permits for such uses.

In [*Drummey v. Falmouth*](#), 87 Mass. App. Ct. 127 (2015), the Court noted that, unlike the situation in [*Sinn v. Selectmen of Acton*](#), 357 Mass. 606, 608 (1970), Falmouth's zoning bylaw did not contain any

general exemption for the Town from its zoning provisions. (In *Sinn*, the Acton zoning bylaw provided as follows: *"Nothing in the bylaw shall prohibit the development of any land in any district for municipal, educational, religious, historical or conservation use. Such use shall not be exempt from the general or specific regulations of this bylaw other than the Use Regulations."*)

Falmouth's bylaw made specific reference to a finite list of exempt municipal purposes, but provided no express exemption for wind turbines. The Court held that the town's plan to construct a wind turbine was subject to its own zoning bylaw, because that use was not specifically exempted.

Any municipal use bylaw exemption must be carefully crafted to express the intent of the town, whether broad or narrow. The list of uses was illustrative only, and the Appeals Court noted the weight of consideration to the comprehensiveness of the zoning bylaw was insufficiently considered by the trial judge. Even if there were a categorical town exemption in the bylaw, the fact that turbine uses were mentioned throughout the bylaw would have trumped the categorical exemption.

Section 4-04

Title/Citation of Chapter [G.L. c. 40A, § 1] and Definitions [G.L. c. 40A, § 1A]

1.0 – Title/Citation

1.1 – INTRODUCTION – [G.L. c. 40A, § 1](#), states that Chapter 40A shall be known as and may be cited as “The Zoning Act”.

2.0 – Definitions

2.1 – OVERVIEW – [G.L. c. 40A, § 1A](#), provides that, as used in Chapter 40A, the following words shall have the following meanings:

“Accessory Dwelling Unit” – a self-contained housing unit, inclusive of sleeping, cooking, and sanitary facilities on the same lot as a principal dwelling, subject to otherwise applicable dimensional and parking requirements, that: (i) maintains a separate entrance, either directly from the outside or through an entry hall or corridor shared with the principal dwelling sufficient to meet the requirements of the state building code for safe egress; (ii) is not larger in floor area than 1/2 the floor area of the principal dwelling or 900 square feet, whichever is smaller; and (iii) is subject to such additional restrictions as may be imposed by a municipality, including but not limited to additional size restrictions, owner-occupancy requirements and restrictions, or prohibitions on short-term rental of accessory dwelling units.

“As of Right” – development that may proceed under a zoning ordinance or by-law without the need for a special permit, variance, zoning amendment, waiver or other discretionary zoning approval.

“Eligible locations” – areas that by virtue of their infrastructure, transportation access, existing underutilized facilities or location make highly suitable locations for residential or mixed use smart growth zoning districts or starter home zoning districts, including without limitation: (i) areas near transit stations, including rapid transit, commuter rail and bus and ferry terminals; or (ii) areas of concentrated development, including town and city centers, other existing commercial districts in cities and towns and existing rural village centers.

“Gross density” – a units-per-acre density measurement that includes land occupied by public rights-of-way and any recreational, civic, commercial and other nonresidential uses.

“Lot” – an area of land with definite boundaries that is used or available for use as the site of a building or buildings.

"MBTA community" – a city or town that is: (i) one of the 51 cities and towns as defined in section 1 of chapter 161A; (ii) one of the 14 cities and towns as defined in said section 1 of said chapter 161A; (iii) other served communities as defined in said section 1 of said chapter 161A; or (iv) a municipality that has been added to the Massachusetts Bay Transportation Authority under section 6 of chapter 161A or in accordance with any special law relative to the area constituting the authority.

"Mixed use development" – development containing a mix of residential uses and residential uses, including, without limitation, commercial, institutional, industrial or other uses.

"Multi-family housing" – a building with 3 or more residential dwelling units or 2 or more buildings on the same lot with more than 1 residential dwelling unit in each building.

"Natural resource protection zoning" – zoning ordinances or by-laws enacted principally to protect natural resources by promoting compact patterns of development and concentrating development within a portion of a parcel of land so that a significant majority of the land remains permanently undeveloped and available for agriculture, forestry, recreation, watershed management, carbon sequestration, wildlife habitat or other natural resource values.

"Open space residential development" – a residential development in which the buildings and accessory uses are clustered together into 1 or more groups separated from adjacent property and other groups within the development by intervening open land. An open space residential development shall be permitted only on a plot of land of such minimum size as a zoning ordinance or by-law may specify which is divided into building lots with dimensional control, density and use restrictions for such building lots varying from those otherwise permitted by the ordinance or by-law and open land. The open land may be situated to promote and protect maximum solar access within the development. The open land shall either be conveyed to the city or town and accepted by said city or town for park or open space use, or be made subject to a recorded use restriction enforceable by said city or town or a non-profit organization the principal purpose of which is the conservation of open space, providing that such land shall be kept in an open or natural state and not be built for residential use or developed for accessory uses such as parking or roadway.

"Permit Granting Authority" – the board of appeals or zoning administrator.

"Solar Access" – the access of a solar energy system to direct sunlight.

"Solar Energy System" - a device or structural design feature, a substantial purpose of which is to provide daylight for interior lighting or provide for the collection, storage and distribution of solar energy for space heating or cooling, electricity generating, or water heating.

"Special Permit Granting Authority" – the board of selectmen, city council, board of appeals, planning board, or zoning administrators as designated by the zoning ordinance or bylaw for the issuance of special permits.

"Transfer of development rights" – the regulatory procedure whereby the owner of a parcel may convey development rights, extinguishing those rights on the first parcel, and where the owner of another parcel may obtain and exercise those rights in addition to the development rights already existing on that second parcel.

"Transfer of development rights zoning" or "TDR zoning" – zoning that authorizes transfer of development rights by permitting landowners in specific preservation areas identified as sending areas to sell their development rights to landowners in specific development districts identified as receiving areas.

"Zoning" – ordinances and bylaws, adopted by cities and towns to regulate the use of land, buildings and structures to the full extent of the independent constitutional powers of cities and towns to protect the health, safety and general welfare of their present and future inhabitants.

"Zoning Administrator" – a person designated by the board of appeals pursuant to [c. 40A, § 13](#), to assume certain duties of that board.

- The following terms and definitions included above were added by Chapter 358, § 16, of the Acts of 2020.

Accessory dwelling unit
As of right
Eligible locations
Gross density
Lot
MBTA community
Mixed-use development
Multifamily housing
Natural resource protection zoning
Open space residential development

- The following term and definition above was revised by Chapter 358, § 17, of the Acts of 2020.

Transfer of development rights

Section 4-05

Adoption & Amendment

[G.L. c. 40A, § 5; G.L. c. 40, §§ 32 & 32A]

1.0 – Introduction

1.1 – STATUTORY REFERENCES – While the authority to enact zoning regulations is vested within the Home Rule authority of cities and towns the procedures, requirements, and limitations applicable to the enactment process are governed by the General Laws. These are found mainly in [G.L. c. 40A, § 5](#), and (with respect to town bylaws) [G.L. c. 40, § 32](#) and [G.L. c. 40, § 32A](#).

1.2 – ZONING MAP – The official zoning map is also part of the zoning ordinance or bylaw, and thus changes to the map are subject to the same standards as changes to the text of the zoning ordinance or bylaw. [Hanna v. Town of Framingham](#), 60 Mass. App. Ct. 420 (2004).

1.3 – NOTICE OF DEFECT – Under [G.L. c. 40, § 32](#), a defect in the procedure for adoption or amendment may, in some circumstances, be waived by the Attorney Generals' office. (See Sections 3.4 and 6.2 below for more information.)

1.4 – ZONING LAW VS. GENERAL LAW – A threshold question is whether a proposed bylaw or ordinance that would directly or indirectly affect the use of land must only be adopted as a “zoning” measure (such as defining and establishing zoning districts and uses within those districts), or whether it is something that could be adopted as either a general or a zoning regulation (such as signs, earth removal, noise, storm water management, lighting, etc.).

A key case that helps in answering these questions is [Rayco Investment Corporation v. Board of Selectmen of Raynham](#), 368 Mass. 385 (1975). The warning given by *Rayco* is that a municipality should not be able to regulate the use of land in ways that frustrate the purposes of the Zoning Act, including bypassing the more stringent adoption procedures mandated by c. 40A § 5 for zoning measures but that are not required for the adoption of general ordinances and bylaws.

There are many factors to be considered in determining whether a proposed bylaw or ordinance is a general or a zoning law. These include:

- whether the subject of regulation is one that municipalities have historically or traditionally regulated under zoning;
- the extent to which the city or town itself may have regulated the subject in its own local general code; and
- most importantly, whether the objective to be served was primarily linked to the character of the neighborhood rather than to public health generally or other non-zoning objectives.

Another case illustrating the cautions of the *Rayco* case is [Spenlinhauer v. Town of Barnstable](#), 80 Mass. App. Ct. 134 (2011). There, the Appeals Court struck down Barnstable's overnight off-street parking ordinance that had been adopted as a general ordinance. The Court concluded that the

measure could only have been enacted as a zoning measure, and that the town failed to comply with requirements of G.L. c. 40A, § 5. The Court noted that the town had previously regulated overnight off-street parking under its zoning ordinance and that the town's objective was protection of the character and quality of its residential zones – which is a core objective of zoning.

1.5 – Chapter 358, §19 of the Acts of 2020 – VOTING REQUIREMENTS – Chapter 358 amended the 5th paragraph of Chapter 40A, § 5, regarding voting requirements for amendments. The changes are noted in Section 4.2 below. As of the date of the release of this Guidebook DHCD had been issuing updated Guidelines related to Chapter 358, voting requirements, and MBTA Communities guidance. For the most up-to-date information on these topics, go to: [Housing Choice and MBTA Communities Legislation | Mass.gov](#)

2.0 – Initiation of a Zoning Amendment

2.1 – SUBMISSION INITIATION – A proposal to adopt or amend the zoning ordinance or bylaw may be initiated by a submission to the city/town council or board of selectmen by any of the following:

- City/Town Council
- Planning Board
- Regional Planning Agency
- Property owner to be affected by the amendment
- Other methods provided by municipal charter
- Selectboard
- Board of Appeals
- Petition of registered voters in a town
- Request by registered voters in a city

2.2 – SUBMISSION BY PETITION – A petition submitted by registered voters differs for cities and towns.

Number of Registered Voters Required on a Petition Article	
In a City	In a Town (G.L. c. 39, § 10)
10 registered voters	a) For Annual Town Meeting – 10 registered voters b) For Special Town Meeting – 100 or 10% of the total registered voters, whichever is less. (The selectboard is required to hold a special town meeting at the request of 200 registered voters, or 20% of the registered voters, whichever is less.)
Residential street addresses must be included and all signatures must be certified by the registrars of voters and the city or town clerk in order to be valid.	

2.3 – WARRANT LANGUAGE FOR TOWN MEETING – The requirements for the warrant in [G.L. c. 39, § 10](#), are minimal; it must state the time and place of the meeting and “*the subjects to be acted upon thereat*” and must be specific enough to provide substantial and meaningful notice to the voters. Town meeting is then equipped to take action on anything within the scope of the warrant article.

Also, it is only “*requests of registered voters for the insertion of subjects in town meeting warrants*” that must be filed with the selectboard. There is some flexibility on precisely what language the selectboard must insert in the warrant. Ordinarily, selectboard fashion a warrant article faithful to the language of the request, often after an effort to understand what the petitioners seek to achieve.

For a variety of reasons, the selectboard might well consider including on the warrant a companion article that addresses the same “subject” but with attention to aspects of the subject in which the

petition article is seen to be deficient or as an alternative proposal on the same subject, thus equipping town meeting with a wider range of options to debate and to act upon.

2.4 – PROPERTY OWNER SUBMISSION – A property owner may submit a proposed zoning amendment to the city council or board of selectmen. The property owner may request a zoning amendment that affects only the petitioner’s property (such as a map change affecting the petitioner’s property).

2.5 – SUBMISSION TO THE PLANNING BOARD – The city council or board of selectmen shall forward any zoning amendment request to the planning board within 14 days of receiving that request. This requirement is seen as directory, rather than mandatory, the important consideration being that the planning board shall schedule and hold the required public hearing within the prescribed 65 days of its submittal to the council or selectmen.

2.6 – SUBMISSION BY THE PLANNING BOARD – If the planning board is the proponent of a zoning amendment, submittal to the selectboard or city council might seem superfluous; however, submittal serves the essential purpose of assuring that the proposed measure is inserted in the town meeting warrant or council agenda, while referring it back to the planning board serves as notice to the planning board that it must hold a hearing within 65 days of the submission to the council or selectboard. However, if the planning board holds the public hearing required by [G.L. c. 40A, § 5](#), and the selectboard approve a warrant article or the council sets it as an agenda item, the order in which these separate essential steps occurs has not been deemed jurisdictional.

3.0 – Adoption Process – Notice Requirements

3.1 – PUBLIC HEARING – The planning board and additionally the city council (or city council committee so designated) either jointly with the planning board or on their own shall hold a public hearing within 65 days after the proposed zoning ordinance or bylaw is submitted to the board.

3.2 – PUBLICATION OF NOTICE – CONTENTS – The public hearing notice must include the following:

- the time and place of the public hearing;
- the subject matter sufficient for identification; and
- the place(s) where any text or maps of the proposal may be viewed

3.3 – PUBLICATION OF NOTICE – LOCATION & TIMELINE – Publication of the notice shall be done in accordance with the following:

- The notice shall be published in a newspaper of general circulation in the city or town, in each of 2 successive weeks.
- The first publication of the notice shall not be less than 14 days before the public hearing.
- The notice shall also be posted in a conspicuous place in the city or town hall for not less than 14 days before the date of the public hearing.

Do not count the date of the hearing when calculating the 14-day notice requirement.

The notice requirements of [G.L. c. 40A, § 5](#), have been strictly construed by the courts. See [Hallenborg v. Town Clerk of Billerica](#), 360 Mass. 513 (1971), where the Court struck down a zoning amendment because the first notice of the public hearing fell one day short of the required 14 days. (However, see Sections 3.4 and 6.2 below)

3.4 – NOTICE DEFECT OPTION – [Chapter 299](#) of the Acts of 2000 amended [G.L. c. 40, § 32](#), provide a relief valve for “*any defect in the procedure of adoption or amendment of any zoning by-law relating to form or content of the notice of the planning board hearing prescribed in G.L. c. 40A, § 5, or to the manner or dates on which said notice is mailed, posted or published as required by said section 5.*” These amendments allow the Attorney General to waive qualifying defects where, after publication of notice of the defect by the town clerk, no claim of prejudice has been filed. (See Section 6.2 below)

3.5 – NOTICE REQUIREMENT & OPEN MEETING LAW – Also be aware that the 48-hour Open Meeting Law (OML) notice of the hearing is an additional notice requirement, and that posting/publishing of the notice required by [G.L. c. 40A, § 5](#), does not alone serve to satisfy OML requirements.

3.6 – REQUIRED NOTIFICATION – Notice of the hearing shall also be sent to the following:

- the Massachusetts Department of Housing & Community Development
- the regional planning agency
- the planning board of each abutting community
- nonresident property owners who annually request such notice from the city or town clerk by January 1st of each year and who pay any fee established by ordinance or bylaw

3.7 – WAIVER OF NOTICE – Those who are entitled to notice in Section 3.6 above may grant a waiver of notice if they did not receive it as required by G.L. c. 40A, § 5, or may submit an affidavit of actual notice to the city or town clerk prior to town meeting or city council action on the proposed zoning amendment.

3.8 – NONRESIDENT PROPERTY OWNERS – Zoning ordinances and bylaws may provide that a separate statement be included in property tax bills sent to nonresident property owners stating that notices of public hearings on zoning adoption and amendments shall be sent to any such owner who files an annual request with the city or town clerk to receive the notices by mail.

The annual request must be made by January 1 of each year. The zoning ordinance or bylaw may also establish a fee to be paid by the nonresident property owner. The nonresident property owner shall then be notified of any zoning amendments involving boundary, density, or use changes within the district where the owner’s property is located.

4.0 – Adoption Process – City Council/Town Meeting Actions

4.1 – PLANNING BOARD REPORT TO TOWN MEETING/CITY COUNCIL – No vote to adopt a zoning ordinance or bylaw or amendment shall be taken until a report with recommendations by the planning board has been submitted to the city council or town meeting, or 21 days shall have elapsed after the planning board’s public hearing without submission of the report. The planning board’s report to town meeting or city council may be either in oral or written form.

Note that when the planning board makes a report to the city council or town meeting it shall include some type of recommendation or recommendations. It cannot simply report that it has no recommendation. In the absence of a planning board “report with recommendations,” the city council or town meeting cannot take action within the 21-day time period.

There is no prescribed form for the planning board’s report or recommendations, or even whether

the report and recommendations represent a consensus of the board. They are purely advisory, leaving the city council or town meeting free to enact any measure within the scope of the article or agenda item regardless of whether it elects to follow or reject the recommendations of the planning board.

See [Crall v. City of Leominster](#), 362 Mass. 95 (1972). In *Crall*, the Court stated that regardless of any action by the board, on a petition for a zoning ordinance amendment, interested parties had a further opportunity to be heard at a city council meeting or a town meeting. Still, a report that the planning board has “no recommendations” fails to satisfy the statutory requirement. See [Whittemore v. Falmouth](#), 299 Mass. 64 (1937), and [Canton v. Bruno](#), 361 Mass. 598, 604 (1972).

4.2 – AGRICULTURAL/AQUACULTURAL ZONING NOTICE REQUIREMENT – Prior to the adoption of any zoning ordinance or bylaw and any amendment thereto which seeks to regulate matters established by [G.L. c. 131, § 40](#), or regulations authorized by that chapter and section relative to agricultural and aquacultural practices, the city or town clerk shall give notice of the proposed zoning adoption or amendment to the state farmland advisory board established under G.L. c. 131, § 40. This notice must be provided not later than 7 days prior to the city council’s public hearing or town meeting’s vote relative to the adoption of the zoning.

Failure to comply with that notice has historically not been seen as fatal to ordinances or bylaws adopted without the notice required under § 40.

4.3 – ACTION TIMELINE – The city council and town meeting have 2 different timelines for acting on a zoning amendment, shown in the table below.

Zoning Adoption or Amendment Action Timeline	
City Council	Within 90 days after the city council public hearing
Town Meeting	Within 6 months after the planning board public hearing

Failure to act within these time periods requires another public hearing with notice and planning board report. [Carstensen v. Zoning Board of Appeals of Cambridge](#), 11 Mass. App. Ct. 348 (1981).

4.4 – AMENDMENTS TO THE PROPOSED ZONING – City councils and town meetings have latitude in how the final ordinance or bylaw is written, so as long as it is within the scope of the warrant article for town meeting or the public hearing notice for a city council. [Town of Burlington v. Dunn](#), 318 Mass. 216 (1945). In *Burlington*, the Court noted that:

the subjects to be acted upon must be sufficiently stated in the warrant to apprise the voters of the nature of the matters with which the meeting is authorized to deal, and do not require that the warrant contain an accurate forecast of the precise action which the meeting will take upon those subjects.

4.5 – VOTING REQUIREMENTS – TWO-THIRDS VERSUS MAJORITY VOTE – A two-thirds vote of the city or town council or of town meeting shall be required to adopt most zoning bylaws, ordinances, or amendments. However, Chapter 358, §19, of the Acts of 2020, amended c. 40A, § 5, to add new language providing for a new simple majority vote requirement in the following instances:

- An amendment to allow any of the following as-of-right:
 - multifamily housing or mixed-use development in an eligible location;

- accessory dwelling units, whether within the principal dwelling or a detached structure on the same lot; or
- open-space residential development.
- An amendment to a zoning ordinance or bylaw to allow by special permit:
 - multifamily housing or mixed-use development in an eligible location;
 - an increase in the permissible density of population or intensity of a particular use in a proposed multifamily or mixed-use development pursuant to c. 40A, § 9;
 - accessory dwelling units in a detached structure on the same lot; or
 - a diminution in the amount of parking required for residential or mixed-use development pursuant to c. 40A, § 9.
- Zoning ordinances or bylaws or amendments thereto that:
 - provide for TDR zoning or natural resource protection zoning in instances where the adoption of such zoning promotes concentration of development in areas that the municipality deems most appropriate for such development, but will not result in a diminution in the maximum number of housing units that could be developed within the municipality; or
 - modify regulations concerning the bulk and height of structures, yard sizes, lot area, setbacks, open space, parking and building coverage to allow for additional housing units beyond what would otherwise be permitted under the existing zoning ordinance or bylaw.
- The adoption of a smart growth zoning district or starter home zoning district in accordance with Section 3 of chapter 40R.

4.6 – VOTING REQUIREMENTS – TWO-THIRDS VERSUS MAJORITY VOTE – ADDITIONAL CONSIDERATIONS – Two additional considerations regarding the changes made to the voting requirements by Chapter 358 are:

- Any amendment that requires a simple majority vote shall not be combined with an amendment that requires a 2/3 majority vote.
- If, in a city or town with a council of fewer than 25 members, there is filed with the clerk prior to final action by the council a written protest against a zoning change under this section, stating the reasons duly signed by owners of 50 per cent or more of the area of the land proposed to be included in such change or of the area of the land immediately adjacent extending 300 feet therefrom, no change of any such ordinance shall be adopted except by a 2/3 vote of all members.

4.7 – REPETITIVE PETITION – No zoning ordinance, bylaw or amendment which has been unfavorably acted upon shall be reconsidered by a city/town council or town meeting within 2 years of the date of the unfavorable action unless adoption of the ordinance, bylaw, or amendment is recommended in the planning board report at the time of reconsideration. “Unfavorable action” by the legislative body means that it has rendered a final and adverse judgment on the proposal, and is ordinarily determined by the rules of parliamentary procedures – e.g., Town Meeting Time, Robert’s Rules.

4.8 – EFFECTIVE DATE – The effective date of amendments differs for cities and towns:

- In a city, absent any charter provision or special act requiring otherwise, the effective date of

zoning and general ordinances or amendments is the date on which the measure has been both passed by the council and signed by the mayor. (Subject to referendum – see Section 5.3 below)

- In a town, the effective date of adoption or amendment of a zoning bylaw, absent any charter provision or special act requiring otherwise, is the date on which the legislative body (town meeting) voted to adopt it, subject, however, to its later approval by the Attorney General and its having been posted and published by the town clerk. (Subject to a referendum – see Section 5.4 below)
- It should be noted that an ordinance or bylaw that has “taken effect” in the manner described above may provide transitional provisions that specify a delayed commencement of its operation to some later date.
- In a town, the effective date of general bylaws is much later. The effective date occurs only after the general bylaw has been submitted to and approved by the Attorney General who has to review and approve the measure and once approved by the Attorney General, be posted/published by the town clerk. The Attorney General has 90 days after it is received from the town clerk

4.9 – TOWN SUBMISSION TO ATTORNEY GENERAL – [General Laws c. 40, § 32](#), requires that within 30 days after the adjournment of town meeting the town clerk shall submit adopted zoning bylaws and bylaw amendments to the Attorney General. The Attorney General then has 90 days from the clerk’s submittal in which to determine whether the bylaw or amendment is not inconsistent with the constitution and laws of the Commonwealth. Failure by the Attorney General to act within that period is deemed constructive approval. If the attorney general disapproves a by-law notice shall be given to the town clerk of the town in which the by-law was adopted of his disapproval, with reasons stated for the disapproval.

The submission to the Attorney General must be accompanied by a formal request for approval of the bylaw or amendment, a statement explaining the measure, and proof of compliance with all procedural requirements. Forms for this purpose are available on the Attorney General’s website – [Forms for Submittals](#).

While cities are also required to submit zoning ordinances and amendments to the Attorney General, review and approval of the ordinances by the Attorney General is not mandated by statute. This requirement is directory, not mandatory.

4.10 – POSTING/PUBLISHING – For towns, posting/publishing of the adopted bylaw or amendment, as approved by the Attorney General, shall be made in a town bulletin or pamphlet copies of which shall be posted in at least five public places in the town; and if the town is divided into precincts, copies shall be posted in one or more public places in each precinct of the town; or instead of such publishing in a town bulletin or pamphlet and such posting, copies thereof may be published at least twice at least one week apart in a newspaper of general circulation in the town. For this purpose, it is sufficient for the notice to briefly summarize the measure and indicate where the text and maps (if any) may be examined.

The publication of a zoning by-law shall include a statement that claims of invalidity by reason of any defect in the procedure of adoption or amendment may only be made within ninety days of such posting or of the second publication and a statement indicating where copies of such by-law may be examined and obtained.

5.0 – Referendum

5.1 – REFERENDUM – General or zoning ordinances and bylaws adopted by cities/towns may be subject to referendum before they become operative. Measures that are the subject of a referendum petition do not become operative until after the expiration of the period specified by statute or charter.

5.2 – AUTHORITY TO HOLD A REFERENDUM –The following table reviews the authority of cities and towns to conduct a referendum, and when a referendum is not allowed in certain towns.

Referendum Authority	
Where charter or special act provides for referendum.	For either cities or towns, the charter or special act governs.
Where charter or special act make no provision for referendum.	For towns with an Open Town Meeting form of government, <u>no referendum is allowed.</u> For towns with a Representative Town Meeting, G.L. c. 43A, § 10 provides for a referendum. (See Section 5.4 below for procedures) For cities, and for “towns” with a town council form of government, G.L. c. 43, § 42 provides for a referendum. (See Section 5.3 below for procedures)

5.3 – REFERENDUM IN CITIES – The table below outlines the procedures that must be followed to conduct a referendum in cities, including “towns” with a town council form of government.

Note: “A” = “Action”, as in a specific action that is taken.

Referendum in Cities			
A1	Council passes the measure		
A2	After 20 days elapse after A1 without a petition being filed: Measure takes effect; or see A3.	A3	Within 20 days of A1, a petition is signed by at least 12% of the registered voters protesting against the measure or parts thereof, addressed to the council, and filed with the municipal clerk: Measure or part thereof is thereupon suspended.
A4	Immediately following A3, registrars of voters certify signatures on petition in the manner prescribed in G.L. c. 43, § 38.		
A5	Immediately following A3, the council must reconsider the measure or part thereof.		
A6	Within 20 days of A4 council <u>entirely rescinds</u> the measure or part thereof: Measure or part thereof is rescinded; or	A7	By the 20 th day after A4, if the council has not entirely rescinded the measure or part thereof: Measure or part thereof goes to referendum.
A8	Municipal clerk then submits the question to the voters following the procedures prescribed in G.L. c. 43, § 38.		

A9	The referendum question is acted on by the registered voters at the next regular municipal election not less than 30 days after A7 or at a special election called for purposes of the referendum. If a majority of the voters vote in favor: Measure takes effect as of A2; if a majority vote opposed: Measure becomes null and void .

5.4 – REFERENDUM IN TOWNS WITH REPRESENTATIVE TOWN MEETING – The table below outlines the procedures that must be followed in order for towns that have a representative town meeting form of government to conduct a referendum subsequent to a town meeting action.

Note: “A” = “Action”, as in a specific action taken.

Referendum in Towns with Representative Town Meeting			
A1	Date of Town Meeting vote		Town Meeting action not operative or effective until after expiration of 7 days from A2.
A2	Dissolution of Town Meeting		If no referendum petition is filed within 7 days of A2. Measure takes effect
A3	Petition filed with Board of Selectmen (BoS)	Within 7 days of A2, exclusive of Sundays and holidays	Measure or part thereof is thereupon suspended Signatures of at least 3% of registered voters are required, including their names and addresses.
A4	BoS votes to set a referendum date	After 5 days following A3	<i>“Shall the town vote to approve the action of the representative town meeting whereby it was voted (brief description of the substance of the vote and by what vote thereon if such vote was tabulated.)”</i>
A5	Referendum vote		If a majority of <u>the voters voting thereon</u> vote to approve, Town Meeting Measure takes effect of A2. If a majority of the voters voting thereon (1) vote not to approve <u>and</u> (2) constitute at least 20% of <u>all registered voters</u> of the town, Measure becomes null and void . Otherwise, Town Meeting action becomes operative and effective as of A2.

6.0 – Other Considerations

6.1 – TRUE COPY OF ZONING ORDINANCE OR BYLAW AND MAP ON FILE – A true copy of the zoning ordinance or bylaw and map shall be kept on file for inspection in the office of the city or town clerk.

6.2 – PROCEDURAL DEFECTS – [General Laws c. 40, § 32](#), provides that if the Attorney General finds any defect in the procedure of adoption or amendment of any bylaw relating to form or content of the notice of the planning board hearing prescribed in [G.L. c. 40A, § 5](#), or to the manner or dates on which the notice is mailed, posted or published as required by c. 40A, § 5, then instead of disapproving the bylaw or amendment because of the defect, the Attorney General may act in the following manner.

6.2.1 – Attorney General Notice to Town – If the Attorney General so elects, written notice

shall be sent to the town clerk within a reasonable time setting forth the specific procedural defect or defects found. The Attorney General will also provide the town clerk with a form of notice that must then be posted and published by the Town as provided in Section 32. The running of the 90-day period provided for the Attorney General's review pursuant to this section shall thereupon be suspended.

6.2.2 – POSTING/PUBLISHING OF NOTICE OF DEFECT – The town clerk shall post the notice in a conspicuous place in the town hall for a period of not less than 14 days, and shall publish it once in a newspaper of general circulation in the town. The notice shall state that any resident, the owner of any real property in the town, or any other party entitled to notice of the planning board hearing who claims that any such defect was misleading or prejudicial may, within 21 days of the publication, file with the town clerk a written notice so stating and setting forth the reasons supporting that claim.

6.2.3 – Town Clerk Certificate – After the expiration of the 21 days, the town clerk shall submit to the Attorney General either (a) a certificate stating that no claim was filed within the 21 day period, or (b) a certificate stating that one or more claims were filed together with copies thereof. Upon receipt of the town clerk's certificate, the 90-day review period of the Attorney General shall resume; but if the expiration of the 90-day period is less than 10 days from the date on which the town clerk's certificate was received, then the review period shall be extended to the tenth day following such receipt.

6.2.4 – Waiver of Defect – If no claim was made, the Attorney General may waive any such defect; but, if any claim is made, then the Attorney General may not waive any such defect. However, by not filing a claim under this paragraph, a person shall not be deprived of the right to assert a claim of invalidity arising out of any defect in the procedure of adoption or amendment as provided in G.L. c. 40, § 32 and in G.L. c. 40A, § 5.

6.2.5 – Extension of Review Period – Despite the terms of the first paragraph of c. 40, § 32, the Attorney General and the town attorney may, by a written agreement with reasons stated and filed with the town clerk before the end of the 90-day period, extend the 90-day period for the Attorney General's review for not more than an additional 90 days.

6.3 – STATUTE OF LIMITATIONS ON PROCEDURAL DEFECTS Claims – A statutory remedy is accorded under [G.L. c. 40, § 32](#), to challenge the procedural validity of a zoning enactment. The publication of a zoning bylaw shall include a statement that:

- states that claims of invalidity by reason of any defect in the procedure of adoption or amendment may only be made within 90 days of the posting or of the second publication of the amendment; and
- indicates where copies of the bylaw may be examined and obtained.

Notice of a court challenge to the procedural validity of the ordinance or bylaw must be filed with the city or town clerk within 7 days of filing the claim.

6.4 – SPOT ZONING & CONTRACT ZONING – On a rare occasion the issue of spot zoning or, even more rare, contract zoning may arise when a city or town is presented with a rezoning request, particularly a rezoning request of the zoning map. For more information on these topics, refer to Zoning Chapter Section 4-06, subsections 3.0 and 4.0.

Section 4-06

Zoning Districts & Maps

[G.L. c. 40A, § 4]

1.0 – Uniformity

1.1 – UNIFORMITY OF DISTRICTS – Under [G.L. c. 40A, § 4](#), for any zoning ordinance or bylaw that divides cities and towns into districts, the zoning shall be uniform within the district for each class or kind of structures or uses permitted.

In [SCIT, Inc. v. Planning Board of Braintree](#), 19 Mass. App. Ct. 101 (1984), the Appeals Court expressed the thrust of G.L. c. 40A, § 4 by cautioning that land in similar circumstances should be treated alike.

The basic assumption underlying the division of a municipality into zoning districts is that, in general, each land use will have a predictable character and that the uses of land can be sorted out into compatible groupings . . . Based upon this assumption, certain uses are permitted as of right within each district, without the need for a landowner or developer first to seek permission which depends upon the discretion of local zoning authorities. The uniformity requirement is based upon principles of equal treatment: all land in similar circumstances should be treated alike, so that if anyone can go ahead with a certain development [in a district], then so can everybody else.

In general, every zoning district must have at least some significant as-of-right uses that will survive scrutiny, which does not include uses fairly described as *de minimis*, accessory, or incidental, or that are required to obtain a discretionary special permit.

Selective zoning violates the uniformity requirements, and constitutes a denial of equal protection under the law guaranteed by the Massachusetts and United States constitutions. The test, however, is not whether the zoning change is beneficial to a landowner. It would be a violation of the uniformity requirement where a rezoned area is not sufficiently differentiated from surrounding land to support a change in the zoning. (See [Van Renselaar v. City of Springfield](#), 58 Mass. App. Ct. 104 (2003)).

2.0 – Zoning Map

2.1 – ZONING MAP – [G.L. c. 40A, § 4](#), states: “Districts shall be shown on a zoning map in a manner sufficient for identification. Such maps shall be part of the zoning ordinances or by-laws.” The statute does not define characteristics for the map, other than it be “sufficient for identification.”

Zoning maps are an integral part of the zoning ordinance or bylaw, and may be changed or revised only by local legislative action. Assessors’ or property plans may be used as a basis for the zoning maps. If more than 4 sheets are used for a zoning map, then an index map showing the districts in outline shall be part of the zoning map and zoning ordinance or bylaw.

If there are discrepancies between the written and graphic versions of districts in the bylaw or

ordinance than an ambiguity may be created. Best practice would suggest that there be language within the bylaw or ordinance rules for the interpretation of boundaries to resolve any uncertainty.

In [*Jenkins v. Town of Pepperell*](#), 18 Mass. App. Ct. 265 (1984), the Appeals Court found the scale of the map to have insufficient detail for determining the location of the district boundary. When the location of a boundary falls short of the standard laid down in G.L. c. 40A, § 4, courts can be called upon to determine the exact location of the district boundary, and may rely upon “*extrinsic evidence*.” It will then fix the boundary most favorable to the landowner. With modern mapping options readily available, reliance on anything other than a dedicated zoning map may be problematic.

2.2 – FLOATING ZONES – [G.L. c. 40A, § 3](#), states that “[n]o provision of a zoning ordinance or bylaw shall be valid which sets apart districts by any boundary line which may be changed without adoption of an amendment to the zoning ordinance or by-law.” This is often referred to as prohibiting “floating zones.” The clear purpose of § 3 is to prevent the local legislative body from circumventing the mandatory statutory procedures for the adoption of zoning ordinances and bylaws.

3.0 – Spot Zoning

3.1 – SPOT ZONING – Although the expression “spot zoning” is not found in Chapter 40A, it is however grounded in § 4 and is one example of a violation of the uniformity principle. Spot zoning violates equal protection guaranteed by state and federal constitutions. This occurs when there is a singling out of one lot (or small area) for different treatment from that accorded to similar surrounding land indistinguishable from it in character, all for economic benefit of or detriment to the owner of that lot. (See [*Rando v. Town of North Attleborough*](#), 44 Mass. App. Ct. 603 (1998))

There is no spot zoning unless it is shown that a parcel or small area has been singled out from similar surrounding parcels or small areas for the economic benefit or the detriment to owner of parcel. See [*W.R. Grace & Co.-Conn. v. Cambridge City Council*](#), 56 Mass. App. Ct. 559 (2002) The singling out of a parcel for detrimental treatment not meted out to similar surrounding parcels is often referred to as “reverse spot zoning,” and will be reviewed by the courts in the same manner as “spot zoning”.

3.2 – PUBLIC PURPOSE & SPOT ZONING – Size alone is not determinative of spot zoning. Neither is the simple fact that a parcel is zoned in a different manner than the parcels around it. The existence of a valid planning purpose for the change can be cited to offset the claim of spot zoning.

In [*Bellis Circle, Inc. v. City of Cambridge*](#), 86 Mass. App. Ct. 1105 (2014), it was alleged that the municipality had engaged in selective or spot zoning in violation of the uniformity requirement of [G.L. c. 40A, § 4](#), and constitutional equal protection standards. There the plaintiff argued that the city had an affirmative duty to justify the zoning ordinance rather than merely relying on the presumption of validity. The Court held, however, that the party challenging the zoning change must demonstrate that “*the zoning regulation is arbitrary and unreasonable, or substantially unrelated to the public health, safety, morals, or general welfare*,” quoting from [*Johnson v. Edgartown*](#), 425 Mass. 117 (1997).

In *Bellis*, the Court held that “[w]hether a property is singled out for economic benefit or disadvantage is secondary to whether a zoning amendment carries with it a relation to a public purpose,” citing [*Sturges v. Chilmark*](#), 380 Mass. 246 (1980). *Sturges* merely requires “*the record to reflect a reasonable or permissible basis for the legislative enactment*.”

In the *W.R. Grace & Co.* decision noted above, the Court (at page 569) stated that “*the legality of a*

given zoning amendment turns not on what parcel has been singled out, or even on the effect on the parcel, but rather on whether the change can fairly be said to be in furtherance of the purposes of the Zoning Act.” Zoning amendments that have “a substantive relationship to the promotion of public welfare” are not, by definition, spot zoning.

“Public welfare” has a particular meaning in the zoning context. It must be based on permissible land use planning objectives. See [National Amusements Inc. v. Boston](#), 29 Mass. App. Ct. 305, 309-313 (1990). In this decision, the Court stated that “*there must be a showing of some substantial relation between the zoning code amendment and the general objectives of the enabling act,*” and that “*among the considerations to be taken into account are the physical characteristics of the land, its location, size, and the nature of adjoining uses*”. The Court declared that there is a presumption in favor of validity of local zoning and the judgment of the local legislative body. A zoning regulation will not be held invalid so long as its reasonableness is fairly debatable. However, it may be held invalid if it is found to be arbitrary or unrelated to public health, safety, convenience, or welfare.

4.0 – Contract Zoning

4.1 – OVERVIEW – As with the prohibition of spot zoning (which may be inferred from the uniformity principle of G.L. c. 40A, § 4), “contract zoning” is a topic that is also not addressed expressly by Chapter 40A. Rather, it is a term used in relation to a limitation on local zoning grounded elsewhere in the constitution and laws of the Commonwealth.

In general, contract zoning is a process whereby a local government enters into an agreement with a property owner and where the government receives a voluntarily offered guarantee that a certain action or actions will be taken by the owner in exchange for the rezoning of the owner’s property.

4.2 – LEGAL VERSUS ILLEGAL CONTRACT ZONING – Determination of what constitutes “contract zoning” and its legality has evolved over the past 50 years in Massachusetts as well as many other states. (For more information on this, read the *Durand* case cited at the end of Section 4.3.)

Illegal contract zoning is said to involve the process by which a local government enters into an agreement with a developer whereby the government extracts a performance or promise from the developer in exchange for its agreement to rezone the property . . . [and] . . . is disapproved of largely on the basis of the principle that a municipality may not contract away its police power to regulate on behalf of the general welfare

It is critical to understand what “illegal contract zoning” is not. Any promise, agreement, or “contract” of the city or town purporting to bind its legislative body to enact a local law if the other party to the contract first fulfills its contractual obligation (e.g., paying money) would be illegal contract zoning. By contrast, an agreement or contract equipping the city or town to compel the other party to fulfill its contractual obligation (once the legislative body of the city or town has first taken a legislative action which it is otherwise lawfully justified to take, e.g., rezoning a parcel, or revising the zoning bylaw in some specified respect) would not, under the cases discussed below, be illegal contract zoning. This key distinction is reflected in the court decisions referred to in Section 4.3 below.

4.3 – COURT HISTORY – The following cases provide a history of the most important decisions related to the topic of contract zoning.

- The first major appellate decision of note is [Sylvania Electric Products, Inc. v. City of Newton](#),

344 Mass. 428 (1962). Note that the former Zoning Enabling Act was in effect in 1962, and the court's decision was based in part on that Act. Sylvania voluntarily agreed to certain actions (limits on scale of development; grant of option to City to purchase some of the property) if the property were to be rezoned to limited manufacturing. The Court noted that it was the voluntary actions of Sylvania, not the city council vote, which resulted in the restrictions. Using an analogy to spot zoning, the Court declared that there was no singling out of a parcel for special treatment. The Court also stated: *"The fact that certain restrictions, voluntarily imposed on a tract of land by its owner as an inducement of an amendment of a local zoning ordinance reclassifying the tract were agreed to and imposed after the statutory public hearings on the proposed amendment did not invalidate the enactment of the amendment without further hearing."*

- In [*Rando vs. Town of North Attleborough*](#), 44 Mass. App. Ct. 603 (1998), a developer offered the town a number of benefits (open space, traffic improvements, mitigation fund, donation to Mass. Highway for road improvements, and an agreement not to seek tax reductions on the development) in exchange for rezoning property to a commercial zone to allow a shopping mall and movie theaters. Relying in part on the *Sylvania* case, the Court determined that the Rando rezoning was neither spot zoning nor illegal contract zoning. Note that in *Rando* legislative body's discretion to take the specified legislative action was not compromised, and if not taken the plaintiff's contractual obligations would end.
- In [*McLean Hospital Corp. v. Town of Belmont*](#), 56 Mass. App. Ct. 540 (2002), the Appeals Court determined that *"[a] zoning amendment enacted by the defendant town and affecting property owned by the plaintiff hospital was a valid exercise of the town's zoning authority and did not constitute illegal contract zoning, where the amendment served the interests of the town and did not involve extraneous consideration."*

The Court in *McLean* focused on whether the "benefits" of the bargain have "some reasonable relationship to the site governed by the zoning" and are not "extraneous." In this case, the Court was satisfied that there were many public benefits to the town having the requisite "relationship to the locus" to support the validity of town meeting's action in rezoning the parcel. The Court stated:

Despite the analytic simplicity implied by the contract zoning label, whether there has been an illegal contract zoning depends not on the mere presence of a contract, but on the relationship of the contract to the subject matter of the rezoning and the legislative process by which the municipality approved the rezoning.

The Court also cautioned that the term "contract zoning" is also sometimes referred to as "conditional zoning" or other terms but *"a court examining a zoning arrangement should not affix a formalistic label to it, but rather should engage in the substantive inquiry that we undertake here, namely ascertaining whether the zoning action is consistent with State law and constitutional requirements, and otherwise meets the criteria for a valid exercise of the police power."*

The Court in *McLean* offered 2 questions that should be answered on this issue:

- First, do the undertakings incorporated in the contract exert improper influence on

the town meeting to adopt the rezoning for the benefit of the proponent rather than in the best interests of the town?

- Second, does the contract give “*extraneous consideration*” for the approval of the rezoning unrelated to the subject matter of the rezoning?

With *Sylvania* in mind, the Appeals Court concluded that Belmont’s rezoning of the McLean Hospital land was not “extraneous” and was therefore lawful.

- Finally, in [*Durand v. IDC Bellingham*](#), 440 Mass. 45 (2003), the Supreme Judicial Court laid to rest the whole issue of “*reasonable relationship to the property*” and “*extraneous considerations*” by declaring irrelevant the motivations of the local legislative body. If the challenger cannot show that the rezoning violated the constitution or laws of the Commonwealth or that it lacked a substantial relationship to the public health, safety, or general welfare – however “extraneous” to the subject property – the challenge will fail.

The issue in the case was the town’s inducement to rezone the subject property. The inducement was that the landowner and the town had agreed that if the land were to be rezoned to allow a power plant, a payment of eight million dollars would be made to the town. The town intended to use the funds for the construction of a new school some distance away from the property. Lacking the “reasonable relationship” to the property, and thus arguably for “extraneous” reasons, the rezoning was challenged on grounds laid down in prior case law. Key excerpts from this decision are:

The motivations and dominant intent underlying a city or town’s rezoning of property are irrelevant in ascertaining whether the zoning bylaw provision is lawful or not, so long as it can be determined that the ordinance or bylaw does not violate the constitution or laws of the commonwealth and has a substantial relationship to the public health, safety, or general welfare.

A voluntary pledge by a corporation that if a town were to rezone a particular parcel for industrial use (and if other events occurred), the corporation would pay the town a certain sum, was not an adequate ground on which to set aside the town’s otherwise valid legislative act of enacting at town meeting a bylaw rezoning the parcel for industrial use . . .

The practice of conditioning otherwise valid zoning enactments on agreements reached between municipalities and landowners that include limitations on the use of their land or other forms of mitigation for the adverse impacts of its development is a commonly accepted tool of modern land use planning.

Because we conclude that the voluntary offer of public benefits beyond what might be necessary to mitigate the development of a parcel of land does not, standing alone, invalidate a legislative act of the town meeting we reverse the Land Court.

4.4 – SUMMARY – The legality of a local zoning enactment must stand or fall based upon whether it was enacted for a valid planning purpose independent of any contract that might conditionally bind a private party upon enactment. Any contract conditionally purporting to bind the legislative body to act, on the other hand, would be illegal contract zoning.

Section 4-07

Board of Appeals

[G.L. c. 40A, §§ 1A, 12, & 14]

1.0 – Introduction

1.1 – OVERVIEW – The Zoning Act, c. 40A, makes references to the Board of Appeals (also referred to as the Zoning Board of Appeals or ZBA) in many different sections of that Chapter. The information below is based predominately on those sections of c. 40A that are fundamental to understanding the role, organization, and powers of the Board of Appeals. These include c. 40A, §§ 1A, 12, and 14. Additional sections of c. 40A are also referenced on specific topics related to the board of appeals.

2.0 – Permit Granting Authority & Special Permit Granting Authority (G.L. c. 40A, § 1A)

2.1 – PERMIT GRANTING AUTHORITY (PGA) – This is defined by § 1A as “*the board of appeals or zoning administrator.*” All or some of the duties and responsibilities of the board may be delegated to a zoning administrator.

2.2 – SPECIAL PERMIT GRANTING AUTHORITY (SPGA) – This is defined by § 1A more broadly. Any of the following may be designated by the zoning ordinance or bylaw as the SPGA: the board of selectmen, city council, board of appeals, planning board, or zoning administrator. The SPGA issues special permits. A city or town may designate more than one of the listed bodies as the SPGA.

3.0 – Organization (G.L. c. 40A, § 12)

3.1 – APPOINTMENT – Zoning ordinances or bylaws shall provide for a zoning board of appeals. The mayor, with the confirmation of the city council, or the board of selectmen shall appoint members of the board of appeals. Vacancies shall be filled for unexpired terms in the same manner as above.

3.2 – BOARD ORGANIZATION – A board of appeals shall have either 3 or 5 members. The terms of office for members shall be such that the term of at least one member expires each year. Each board shall annually elect a chair and a clerk and may, subject to appropriation, employ experts, clerical, and other assistants.

3.3 – BOARD MEMBER REMOVAL – A board member may be removed for cause by the appointing authority upon written charges and after a public hearing.

3.4 – ASSOCIATE MEMBERS – Zoning ordinances or bylaws may provide for the appointment of associate members, appointed in the same manner as regular members. The chair of the board may designate an associate member to sit in the case of the absence, inability to act, or conflict of interest of a regular member, or where there is a vacancy on the board. See Guidebook Chapter Eight, Section 8-02 for further information.

3.5 – RULES & REGULATIONS – Zoning boards shall adopt rules for the conduct of its business and shall file a copy of the rules with the city or town clerk. In addition, under [G.L. c. 40A, § 9](#), if the board of appeals is a special permit granting authority, then it shall adopt rules and regulations relative to the granting of special permits. The rules shall proscribe the size, form, contents, style, and number of copies of plans and the procedure for a submission and approval of special permits.

If the board of appeals has appointed a zoning administrator in accordance with [G.L. c. 40A, § 13](#) then the rules of the board shall state that the board has made this appointment, identify the person so appointed and list the powers and duties, and any limitations thereof, delegated to this person.

4.0 – Powers ([G.L. c. 40A, § 14](#))

4.1 – POWERS OF THE BOARD – A board of appeals has the following powers:

- to hear and decide appeals
- to hear and decide applications for special permits as authorized by the local zoning ordinance or bylaw
- to hear and decide variances
- to hear and decide appeals from decisions of a zoning administrator

4.2 – LIMITATIONS OF POWERS – The powers conferred by c. 40A are broad and without detailed guidance to the board on how these powers are to be exercised. It is not surprising, therefore, that in addition to the language in the local zoning ordinance or bylaw, court decisions also provide guidance on the boundaries of this authority. It should be noted that the board of appeals does not act on its own authority. Rather, petitions, applications, and appeals are submitted to the board to act upon consistent with its statutory powers.

4.2.1 – Standards Required – In discerning the breadth of its discretion in exercising its authority, the board should look for ascertainable standards and criteria expressed in the zoning bylaw or ordinance. A bylaw, for example, may not authorize the board, without standards, the power to determine that a new or greatly extended use should be permitted, since that, in effect, would amount to, an unlimited delegation of zoning power. [Chilson v. Zoning Bd. of Appeal of Attleboro](#), 344 Mass. 406 (1962).

Adequate standards for guidance of a zoning board in exercise of the special permit power must have been set forth in the zoning ordinance. [Murphy v. Zoning Bd. of Appeals of Lawrence](#), 2 Mass. App. Ct. 876 (1974).

4.2.2 – Validity of Zoning Ordinance or Bylaw – The board’s authority does not extend to making decisions or orders relating to the validity of the zoning bylaw because the powers of the board do not include the power to nullify acts of a local legislative body. [Gamache v. Town of Acushnet](#), 14 Mass. App. Ct. 215 (1982).

4.2.3 – Powers of Other Officials – The board’s authority also does not extend to areas that are within the exclusive jurisdiction of other local or state officials, such as the state building code, notwithstanding that the building commissioner may concurrently be both the town zoning enforcement officer and as well as the code enforcement official under the state building code.

For example, the board is without authority to review the actions of the selectmen in granting a liquor license, though violations of zoning requirements were alleged. [*Bradshaw v. Board of Appeals of Sudbury*](#), 346 Mass. 558 (1963)

4.3 – LINKAGE BETWEEN POWERS AND DECISIONS – The propriety of board actions should be evident from its written decisions. Even where the power to deny an application is broad, some statement of reasons by the board is expected. The board’s power to deny a permit may be great; but it should make clear in its written decision that its decision neither is based on legally untenable grounds, nor is unreasonable, whimsical, capricious, or arbitrary. [*Stivaletta v. Zoning Bd. of Appeals of Medfield*](#), 12 Mass. App. Ct. 994 (1981).

In this regard, the making of sufficient findings of fact is important. The Court in *Stivaletta*, in upholding the board’s denial, noted that “[t]he board made detailed and specific findings upon which it grounded its denial, including its points of disagreement with the testimony of the plaintiff’s expert witness, an engineer.”

Section 4-08

Zoning Administrator

[G.L. c. 40A, § 13]

1.0 – Introduction

1.1 – BACKGROUND – A “Zoning Administrator” is a person designated by the board of appeals pursuant to [G.L. c. 40A, § 13](#), for the purpose of assuming certain duties of the board. The zoning administrator may be the “permit granting authority” as defined by [G.L. c. 40, § 1A](#).

2.0 – Zoning Administrator

2.1 – APPOINTMENT – A zoning ordinance or bylaw may authorize the appointment of a zoning administrator. Unless otherwise provided for by charter, the zoning administrator shall be appointed by the board of appeals, subject to confirmation by the city council or board of selectmen. The zoning administrator serves at the pleasure of the board of appeals in accordance with the qualifications as may be established by the city council or board of selectmen.

2.2 – POWERS – The board of appeals may delegate to the zoning administrator some of its powers and duties by a concurring vote of all members of a 3-member board, and all but one member of a 5-member board.

2.3 – APPEALS – Any person aggrieved by a decision of the zoning administrator may appeal to the board of appeals as provided for in § 13. The appeal shall be filed within 30 days after the decision of the zoning administrator has been filed in the office of the city or town clerk. A copy of the appeal, including certification by the clerk as to date and time filed, shall be filed with the office of the zoning administrator. The zoning administrator shall forward all records of the case to the zoning board of appeals.

2.4 – FAILURE TO ACT – Failure by the zoning administrator to act on any appeal, application, or petition within 35 days from the date of the filing shall be deemed denial of the petition. This denial may be appealed to the board of appeals pursuant to [G.L. c. 40A, § 8](#).

Section 4-09

Zoning Exemptions

[G.L. c. 40A, § 3]

MBTA Communities

[G.L. c. 40A, § 3A]

Zoning Exemptions – c. 40A, § 3

1.0 – Introduction

1.1 – OVERVIEW – [G.L. c. 40A, § 3](#), includes language regarding certain land uses and their regulation. It includes:

- uses that shall not be regulated
- uses that may only be reasonably regulated
- exempt uses
- prohibited uses
- residential buildings
- several other related topics

The Table in § 2.0 below provides a summary of G.L. c. 40A, § 3. This section is sometimes referred to as the “Dover Amendment,” derived from a 1950 amendment of an earlier version of Chapter 40A, creating what was to be the core of current § 3. That revision was followed by a Supreme Judicial Court decision in [Attorney General v. Dover](#), 327 Mass. 601 (1951), in which the Town of Dover’s zoning bylaw was found to be in violation of the revised statute because it prohibited sectarian educational uses in a residential zoning district.

2.0 – Table of G.L. c. 40A, § 3 Uses and Topics

2.1 – EXPLANATION OF TABLE – The table in Section 2.2 below lists the uses that are found in c. 40A, § 3, and the zoning powers that a city or town may, or may not have. The 4 powers found in § 3, and in the table, are:

- the Power to Prohibit;
- the Power to Regulate;
- the Power to Require a Special Permit; and
- the Power to Restrict.

Be aware that the language of § 3 is very inconsistent, using different phrases to address the powers for each of the uses. Thus, while the 4 categories of powers in the Table reflect that diversity of language in the entire § 3, not each phrasing of power is used in every land use category.

- A “Yes” entry means that § 3 expressly includes the power.
- A “No” entry means that the power is expressly denied.
- An “n/a” entry means that § 3 does not expressly address the power in that column.
- “SP” means “Special Permit”.

2.2 – TABLE HYPERLINKS – For use titles that are linked, the link will bring you to the end of the Table where you will find additional information, including court decisions, related to that specific land use topic. The links located with that information will, in turn, bring you back to the Table.

Zoning Exemptions – Use or Topic	Power to Prohibit	Power to Regulate	Power to Require SP	Power to Restrict
State Building Code ¹ – Materials and Methods of Construction	No	No	No	No
Local zoning bylaws or ordinances shall not either restrict or regulate: a) materials used in construction, or b) methods of construction, where the materials and/or methods are regulated by the State Building Code.				
Commercial agriculture ² , aquaculture, silviculture, horticulture, floriculture, or viticulture – use of land for the primary purpose of commercial agriculture	No	Limited reasonable regulations	No	n/a
However: a) Exemption may be limited by the city or town to 5+ acres; b) Exemption may be limited by city or town to 2+ acres of revenue producing land (\$1000/acre). For these purposes land divided by a public or private way or by a waterway shall be construed as one parcel.				
This limited right to regulate based upon area depends on the city or town having elected to do so in their zoning ordinance or bylaw, the absence of which the zoning protections accorded to agriculture and farming under § 3 apply without regard to area.				
<u>Farm Stands</u> – The exemption is applicable to farm stands provided that during the months of June, July, August, & September or during the harvest season of the primary crop raised on the land of the owner or lessee:				
• 25 per cent of the products for sale, based on either gross annual sales or volume have been produced by the owner or lessee of the land on which the facility is located, or • at least 25 per cent of the products for sale, based on gross annual sales or annual volume, have been produced by the owner or lessee of the land where the facility is located, and • at least an additional 50 per cent of the products for sale have been produced in Massachusetts on land other than which the farm stand is located, used for the primary purpose of commercial agriculture.				
Chapter 40A incorporates the definition of “agriculture” and “farming” found in G.L. c. 128, § 1A .				
The term “ <u>horticulture</u> ” shall include the growing and keeping of nursery stock and the sale thereof. Nursery stock shall be considered to be produced by the owner or lessee of the land if it is nourished, maintained, and managed while on the premises.				
(The interpretations set forth in this section are consistent with the interpretations advanced by the Massachusetts Department of Agriculture at the time this Guidebook was released – October 2021.)				

Zoning Exemptions – Use or Topic	Power to Prohibit	Power to Regulate	Power to Require SP	Power to Restrict
<u>Commercial agriculture</u>² , aquaculture etc. – use, expansion, reconstruction, or construction of buildings	No	Limited reasonable regulations	No	n/a
Note: The same conditions apply as noted in the “Commercial Agriculture - use of land” category above.				
Facilities for the sale of produce, wine and dairy products – use, expansion or construction of these facilities	No	Limited reasonable regulations	No	n/a
NOTE: The same conditions apply as noted in the 2 “Commercial Agriculture” categories above.				
Interior area of single-family residential buildings ³	n/a	No	n/a	No
Zoning bylaws and ordinances shall not regulate/restrict the interior area of a single-family residential building.				
Religious institutions - use of land or structures ⁴	No	Limited reasonable regulations	No	No
Land or structures for these uses may be subject to reasonable zoning regulations concerning the bulk and height of structures, yard sizes, lot area, yard setbacks, open space, parking, and building coverage requirements.				
Educational institution, public and/or non-profit ⁴	No	Limited reasonable regulations	No	No
Land or structures for this use may be subject to reasonable regulations concerning the bulk and height of structures, yard sizes, lot area, setbacks, open space, parking, and building coverage requirements.				
<u>Public Service Corporations</u> ⁵ – Use of land or structures	n/a	n/a	n/a	n/a
These uses are not exempt generally. They may be exempted in particular respects from a zoning bylaw or ordinance if, upon a corporation petition, the Department of Telecommunications & Cable or the Department of Public Utilities shall, after notice is given pursuant G.L. c. 40A, § 11 , and holding a public hearing in the city or town; a) determine the specific exemptions that are required; and b) find that the present or proposed use of land or structures is reasonably necessary for the convenience or welfare of the public.				
<u>Child Care Facility</u> ⁶ – use of land or structures or expansion of existing structures for primary, accessory or incidental purpose of operating a child care facility as defined in G.L. c. 15D, § 1A	No	Reasonable regulations	No	n/a
Reasonable regulations may include bulk & height of structures, yard size, lot area, open space, parking, and building coverage requirements.				

Zoning Exemptions – Use or Topic	Power to Prohibit	Power to Regulate	Power to Require SP	Power to Restrict
Housing Discrimination Against the Disabled	n/a	n/a	n/a	n/a
Land use, health and safety laws, regulations, practices, ordinances, bylaws, and decisions shall not discriminate against the disabled. Imposition of land use laws and regulations on congregate living arrangements among non-related persons with disabilities that are not imposed on families or groups of similar size or other non-related persons shall constitute discrimination.				
Family Day Care⁷ Homes and Large Family Child Care Homes as defined in G.L. c. 15D, § 1A	Yes	Yes	Yes	Yes
These uses are allowed unless local zoning ordinances or bylaws prohibit them. Regulations may also be adopted that restrict such uses.				
Floating Zone⁸	n/a	n/a	n/a	n/a
Provisions of bylaws or ordinances that set apart districts by any boundary line which may be changed without adoption of an amendment to the bylaw or ordinance (Floating Zones) shall not be valid.				
Temporary Manufactured Home⁹ on the site of a permanent residence, where the permanent residence has been destroyed by fire or other natural disaster.	No	n/a	No	Yes
There is a twelve-month limit on the occupancy of the manufactured home while the residence is being built. Such manufactured home shall be subject to the state sanitary code.				
Handicapped Access Ramp	No	n/a	n/a	n/a
No dimensional lot requirements including setback; front, rear and side requirements or open space requirements shall apply to such ramps on private property used solely to facilitate ingress and egress of a physically handicapped person as defined in G.L. c. 22, § 13A .				
Solar Access – installation of solar energy systems or buildings for such purpose	Partial	Reasonable regulations	n/a	n/a
Cities and towns may regulate where necessary to protect the public health, safety, and welfare.				
Federally Licensed amateur radio operator – construction or use of an antenna	No	Reasonable regulations	n/a	n/a
Cities and towns may reasonably regulate the location & height of antenna structures for the purposes of health, safety & aesthetics; provided, however, that these regulations must allow for sufficient height to accommodate amateur radio communications by federally licensed amateur radio operators and constitute the minimum practical regulations necessary.				

¹[State Building Code](#) – The state building code preempts the field on all “building code” regulated matters. “Field preemption” means that local zoning may not regulate any matter governed by the state building code even in a manner consistent with the code. The main purpose of zoning is to stabilize the use of property and to protect an area from harmful uses, while a building code relates to the safety and structure of buildings. [Enos v. City of Brockton](#), 354 Mass. 278 (1968). Statewide uniformity is essential on matters that fall within the scope of the state building code. Uniformity

would not be achieved if cities and towns were free to adopt different building codes within their boundaries. However non-zoning historic, architectural, and design control ordinances and bylaws may regulate building materials related to the very narrow control of those ordinances and bylaws.

²[Agriculture and Farming](#) – Agriculture and farming have enjoyed preferential treatment in Massachusetts from colonial days. Article 97 of the state constitution provides that:

"[t]he people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose."

Conditional exemption is also accorded under the state wetlands laws to "work performed for normal maintenance or improvement of land in agricultural use . . ." See [310 CMR 10.00](#) et seq., and the special classification of taxes on agricultural and forest land under [G.L. c. 61](#) and [G.L. c. 61A](#).

The terms "agriculture" and "farming" are very broadly defined. G.L. c. 40A, § 3, incorporates the definition laid out in [G.L. c. 128, § 1A](#), which states:

"Farming" or "agriculture" shall include farming in all of its branches and the cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural, aquacultural, floricultural or horticultural commodities, the growing and harvesting of forest products upon forest land, the raising of livestock including horses, the keeping of horses as a commercial enterprise, the keeping and raising of poultry, swine, cattle, and other domesticated animals used for food purposes, bees, fur-bearing animals, and any forestry or lumbering operations, performed by a farmer, who is hereby defined as one engaged in agriculture or farming as herein defined, or on a farm as an incident to or in conjunction with such farming operations, including preparations for market, delivery to storage or to market or to carriers for transportation to market."

The Table below is an aid for understanding the production formula applicable to "farm stands".

Farm Stand Production Formulas			
[Test 1] - Seasonal Production			
<i>... seasonally, at least 25 per cent of such products for sale, based on either gross sales dollars or volume, have been produced by the owner or lessee of the land on which the facility is located, or ...</i>			
	Owner	Lessee	Other Producer
MA land – facility location	Y	Y	n/a
Other MA land	Y	Y	N
Out of state land	Y	Y	N
[Test 2] - Annual Production			
[Part A] <i>... annually, at least 25 per cent of such products for sale, based on either gross sales dollars or volume, have been produced by the owner or lessee of the land on which the facility is located ...</i>			
	Owner	Lessee	Other Producer
MA land – facility location	Y	Y	n/a
Other MA land	Y	Y	N
Out of state land	Y	Y	N

and **[Part B]** ... *annually, at least an additional 50 per cent of such products have been produced in Massachusetts on land, other than that on which the facility is located, used for the primary purpose of commercial agriculture, whether by the owner or lessee of the land on which the facility is located or by another*

	Owner	Lessee	Other Producer
MA land – facility location	Y	Y	n/a
Other MA land	Y	Y	Y
Out of state land	N	N	N

³[Interior Area of Single-Family Residences](#) – This section derives from historical concern that zoning powers would be exercised to bar the construction of dwellings below minimum levels, affordable to low income persons; but the absence of “minimum” in the text leaves the prohibition equally applicable to regulations limiting the maximum interior area size of dwellings. The clear language of

§ 3 still permits the regulation of floor area ratio (FAR), as well as regulations relating to bulk, height, yards, lot area, setbacks, open space, and building coverage. See [81 Spooner Road LLC v. Town of Brookline](#), 452 Mass. 109, 112 (2008).

⁴[Religious and Educational Uses](#) – Preferential treatment has long been accorded to religion and education, but the precise boundaries of these uses are not always clear, and the terms have been given a very broad and comprehensive interpretation by the courts. Very often multiple “uses” are made of property, forcing the municipality to assess the property’s “primary use” before recognizing the exemption. Discernment is required to identify when a regulation goes too far so as to effectively preclude a use enjoying the benefits of § 3.

In [Trustees of Tufts Colleges v. City of Medford](#), 415 Mass. 753 (1993), the SJC held that the educational entity had the burden of proving that a local enactment is “unreasonable as applied”, and must demonstrate that compliance would, on balance, more diminish or detract from the usefulness of a proposed structure or impair the character of its campus, than it would appreciably advance any municipal concerns or achieve municipal objectives.

In [Martin v. Corporation of the Presiding Bishop of the Church of Jesus Christ of the Latter-Day Saints](#), 434 Mass. 141 (2001), the SJC ruled the height limitations of the Town of Belmont zoning bylaw unreasonable as applied to a proposed steeple. The Court concluded that the lower court erred in finding the steeple was not essential to the religious use. The SJC reasoned that “religious use” applied to the temple “as a whole,” and should not be applied to its constituent parts separately.

Federal law is also a factor to be considered in assessing the legality of a local zoning measure regarding religious institutions. The “Religious Land Use and Institutionalized Persons Act of 2000” (RLUIPA) extends the Free Exercise Clause of the First Amendment to religious uses, leaving open the question of how RLUIPA is to be reconciled with reasonable state and local regulations. (See Chapter 7-03 for more information on RLUIPA)

In [Regis College vs. Town of Weston](#), 462 Mass. 280 (2012), the SJC emphasized that “education” is given a very broad meaning under the Dover Amendment, and includes “*nontraditional communities of learners in a manner tailored to their individual needs and capabilities*,” and is not to be limited to traditional educational institutions. That said, the Court cautioned that to enjoy the benefits of § 3, the educational use “*must predominate over residential and recreational components*.”

More recently, the SJC, in [McLean Hosp. Corp. v. Town of Lincoln](#), 483 Mass. 215 (2019), concluded

“education” and “rehabilitation” do not denote functions so distinct that local zoning authority or a court could be required to quantify them relative to each other. McLean Hospital had established a specialized therapeutic program for boys with Borderline Personality Disorder in a rehabilitation program structured much like an academic one. The Land Court felt that the program was therapeutic not educational; but in its reversal the SJC concluded otherwise.

⁵[Public Service Corporations](#) – To qualify as such, the corporation (or entity) must first have been organized pursuant to an appropriate franchise from the state to provide for a necessity or convenience to the general public not available from the private sector generally, and must be subject to regulation by the state. In the zoning context, the use of land or structure must be reasonably necessary for public convenience or welfare, must yield benefits to the industry and consumers, must enhance the ability of the entity to serve the public, and must be a comparatively suitable use of the land or structure in light of welfare and convenience considerations. Even if the foregoing criteria are satisfied, the use or structure is not automatically exempt; the entity must secure the exemption from certain procedural requirements of local zoning from the Department of Public Utilities.

⁶[Child Care Facilities](#) – This 1990 amendment of § 3 offers a level of protection to “child care facilities” as that term is now defined in [G.L. c. 15D, § 1A](#), but permits local regulation not amounting to a *de facto* prohibition. See [Rogers v. Town of Norfolk](#), 432 Mass. 374 (2000). Protections are subject, however, to “*reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking, and building coverage requirements.*”

⁷[Family Day Care Homes](#) – One is left to wonder why this 1987 amendment to § 3 was enacted, given that it purports to permit what cities and towns had the right to do under Home Rule, and then goes on to say that cities and town may prohibit or regulate such uses under zoning in the absence of any state limitation on local zoning power. Zoning options for family day care facilities are the same with or without the 1987 amendment.

⁸[Floating Zones](#) – Only the municipal legislative body (typically, town meeting or town or city council) can adopt, revise, or repeal the zoning bylaw or ordinance. Any provision of local law having the effect of delegating the designation of zoning districts and district boundaries would be an unlawful delegation of legislative power.

⁹[Temporary Manufactured Home](#) – In [Rayco Inv. Corp. v. Board of Selectmen of Raynham](#), 368 Mass. 385 (1975) the SJC discusses when a city or town may regulate uses, such as those applicable to mobile homes, under a general rather than a zoning bylaw or ordinance. The line of demarcation between what must be regulated under zoning, and what may be regulated under zoning is an imprecise boundary.

3.0 – Other Considerations

3.1 – ZONING EXEMPTION RIGHTS & OTHER REGULATIONS – Exemption from zoning under G.L. c. 40A, § 3, does not necessarily confer a right to any use or structure, but merely eliminates or modifies the application of zoning that would otherwise pose a barrier. Other state and local regulations may also be applicable to the use or structure. For example, a structure that would be prohibited in a zoning district but that may be constructed on a farm because it is dedicated to commercial agriculture must still satisfy the requirements of the state building code and be authorized by a building permit from the city or town.

MBTA Communities – c. 40A, § 3A

4.0 – Multifamily Housing District

4.1 – INTRODUCTION – Chapter 358, § 18, of the Acts of 2020, added a new Section 3A to Chapter 40A. This section requires MBTA communities adopt as-of-right zoning for multifamily housing with several statutory requirements that must be met. In addition, Section 3A was amended by Chapter 29, § 10, of the acts of 2021.

4.2 – MULTIFAMILY HOUSING DISTRICT OVERVIEW – An MBTA community shall have a zoning ordinance or by-law that provides for at least 1 district of reasonable size in which multi-family housing is permitted as of right; provided, however, that the multi-family housing shall be without age restrictions and shall be suitable for families with children.

4.3 – DISTRICT REQUIREMENTS – For the purposes of this new section, a district of reasonable size shall:

- have a minimum gross density of 15 units per acre, subject to any further limitations imposed by Section 40 of Chapter 131 and Title 5 of the state environmental code established pursuant to Section 13 of Chapter 21A; and
- be located not more than 0.5 miles from a commuter rail station, subway station, ferry terminal, or bus station, if applicable.

5.0 – Eligibility for Funds

5.1 – FAILURE TO COMPLY – An MBTA community that fails to comply with this section shall not be eligible for funds from:

- the Housing Choice Initiative as described by the Governor in a message to the General Court dated December 11, 2017;
- the Local Capital Projects Fund established in Section 2EEEE of Chapter 29; or
- the MassWorks infrastructure program established in Section 63 of Chapter 23A.

6.0 – DHCD Guidelines

6.1 – GUIDELINES PROMULGATION – The Department of Housing and Community Development, in consultation with the Massachusetts Bay Transportation Authority and the Massachusetts Department of Transportation, shall promulgate guidelines to determine if an MBTA community is in compliance with this section.

Note that as of the date of the release of this Guidebook (October 2021), DHCD had begun to issue Guidelines. It is expected that further Guidelines will be promulgated. The reader should reference the resource noted in Section 6.2 below to obtain the most up-to-date information regarding MBTA Communities.

6.2 – DHCD RESOURCES – For information on this topic go to: [Housing Choice Initiative | Mass.gov](#).

Section 4-10

Adult Uses

[G.L. c. 40A, §§ 6 & 9A]

1.0 – Introduction

1.1 – CONSTITUTIONAL PROTECTIONS – Adult entertainment is protected under the First Amendment to the U.S. Constitution and Article 16 of the [Massachusetts Declaration of Rights](#), as amended by Article 77 of the Amendments to the Massachusetts Constitution, which simply states: “*The right of free speech shall not be abridged.*”

Obscenity, as defined for constitutional purposes, does not receive the benefits of First Amendment protection; but adult entertainment that is not obscene constitutes “speech” entitled to protection under the state and federal constitutions. While Chapter 40A expressly addresses adult uses as an aspect of regulation authorized by constitutional zoning powers, court cases far more often are considered and decided based on the “free speech” provisions of state and federal constitutional law rather than on the Zoning Act.

1.2 – CONSTITUTIONAL CHALLENGES – Challenges to the Massachusetts regulation of adult uses under [G.L. c. 40A, § 6](#), and [G.L. c.40A, § 9A](#) are likely be judged in light of the Supreme Court’s decision in [Renton v. Playtime Theatres, Inc.](#), 475 U.S. 41, 50, 106 S. Ct. 925, 930, 89 L.Ed.2d 29 (1986).

In *Renton*, the Supreme Court stated the basic tests for the constitutionality of zoning laws that regulate uses in which the First Amendment (and Massachusetts Article 16) are implicated, often referred to as “the Renton Rule.”

Under the Renton Rule, zoning laws:

- may not ban such establishments entirely;
- must be “*content neutral*”;
- may impose “*time, place, and manner*” regulations;
- must be designed to serve a substantial governmental interest;
- must not unreasonably limit alternative avenues of communication; and
- may provide for “*distance*” regulations requiring such uses to be a certain distance from identified other uses, such as churches, schools, or residential uses.

While it has clearly been established that adult entertainment enjoys the protections accorded under the First Amendment and under the state constitution, it lies at the outer fringe of that protected zone, thus providing cities and towns with somewhat greater latitude than accorded to main-line modes of expression. To understand this distinction, first consider the broad boundaries within which this analysis is to be made.

In [National Amusements, Inc. v. Dedham](#), 846 F. Supp. 1023 (D. Mass. 1994), the United States District Court for Massachusetts upheld Dedham’s regulation of entertainment in a challenge to the town’s

effort to restrict the times during which movies could be shown. Its conclusion was that the “[b]y-law at issue here is content neutral, serves a legitimate governmental interest, and offers reasonable alternative avenues for the same communication. It is, therefore, a reasonable time, place, and manner restriction on First Amendment rights which does not violate the Equal Protection clause, as its incidental effect upon a protected class is no different from society generally. Moreover, the Court rules that National has received such process as is its due from the Town and from this Court.”

The Court stated that the outcome of the case turned on the level of judicial scrutiny applied to the bylaw, citing an article written by Professor Lawrence H. Tribe:

The Supreme Court has evolved two distinct approaches to the resolution of first amendment claims; the two correspond to the two ways in which government may "abridge" speech. If a government regulation is aimed at the communicative impact of an act, analysis should proceed along what we will call track one. On that track, a regulation is unconstitutional unless government shows that the message being suppressed poses a "clear and present danger," constitutes a defamatory falsehood, or otherwise falls on the unprotected side of one of the lines the Court has drawn to distinguish those expressive acts privileged by the first amendment from those open to government regulation with only minimal due process scrutiny.

If a government regulation is aimed at the noncommunicative impact of an act, its analysis proceeds on what we will call track two. On that track, a regulation is constitutional, even as applied to expressive conduct, so long as it does not unduly constrict the flow of information and ideas . . .

Government may be deemed to have "abridged" speech in the first sense, thus triggering track-one analysis, if on its face a governmental action is targeted at ideas or information that government seeks to suppress, or if a governmental action neutral on its face was motivated by (i.e., would not have occurred but for) an intent to single out constitutionally protected speech for control or penalty. Of course, the target of government action will be instantly recognizable if the government openly admits that its purpose is limiting information or suppressing an idea, but government will ordinarily defend a restriction on free expression by reference to some danger beyond the speech itself often, by invoking the permissive talisman of "time, place, or manner" regulation.

Laurence H. Tribe, American Constitutional Law, 2d ed. (1988) at 791-92, 794 (footnotes omitted).

See [Reed v. Town of Gilbert](#), 576 U. S. ____ (2015), where the United States Supreme Court explains:

- the differences between content-based regulations vs. content-neutral regulations;
- the differences between viewpoint-based and viewpoint-neutral regulations; and
- the differences between “strict scrutiny” and “intermediate scrutiny”.

While *Reed* is a case relating to the Town of Gilbert’s “sign code,” the principles applicable to signs overlap the principles applicable to the regulation of expressive speech in entertainment contexts.

1.3 – STATUTORY REFERENCE – The regulation of adult uses through zoning is covered by 2 sections of Chapter 40A:

- [G.L. c. 40A, § 6](#), includes the exemptions for existing uses, structures, and permits, but expressly limits the protections of § 6 available to adult uses. Section 6 states, in pertinent part: *“This section shall not apply to establishments which display live nudity for their patrons, as defined in section nine A, adult bookstores, adult motion picture theaters, adult paraphernalia shops, or adult video stores subject to the provisions of section nine A.”*
- [G.L. c.40A, § 9A](#), provides that zoning ordinances or bylaws may require special permits for the establishment of adult uses and outlines the procedure for doing so.

2.0 – Definitions

2.1 – ADULT USE DEFINITIONS – Section 9A includes definitions for a variety of uses that are collectively referred to as “adult uses.” These include the following:

- Adult Bookstore
- Adult Paraphernalia Store
- Adult Video Store
- Adult Motion Picture Theatre
- Establishments With Live Nudity

3.0 – Special Permits

3.1 – SPECIAL PERMIT REGULATIONS – Section 9A allows for zoning ordinances and bylaws to require specific improvements, amenities, and/or locations related to the issuance of a special permit. The ordinances and bylaws may also require that adult uses be a specific distance from any residential district or any other adult bookstore, adult theatre or any establishment holding an “on-premises” liquor license under [G.L. c. 138, § 12](#).

Special permits granted under c. 40A, § 9, may be subject to the requirement that they be permitted in specified districts, or they may also extend to distances from zoning districts. From this it may be concluded that adult uses can either be identified by reference to an existing or new zoning district, or “overlay” district, or by reference to specific distances *“from any district designated by zoning ordinance or by-law for any residential use”* or from other specified adult uses or licenses premises. The locations in which a special permit may be granted for an adult bookstore or movie theater need not necessarily be defined as a “zoning district.”

3.2 – PROHIBITION ON ISSUANCE OF SPECIAL PERMITS – The zoning ordinance or bylaw shall prohibit the issuance of special permits to any person convicted of violating the provisions of [G.L. c. 272, § 28](#) (dissemination of matter harmful to minors), or [G.L. c. 119, § 63](#) (contributing to the delinquency of a minor).

3.3 – EXISTING ADULT USES WHEN ZONING IS ADOPTED – Existing adult uses are subject to a statutory twilight provision that requires that any such use must apply for a special permit within 90 days following the adoption of a zoning ordinance or bylaw for adult uses by a municipality.

4.0 – Court Cases

4.1 – COURT DECISIONS – Listed below are court cases that communities should be aware of related to specific aspects of “adult use” regulation.

4.1.1 – Reasonable Alternative Locations – [T & D Video, Inc. v. City of Revere](#), 423 Mass. 577

(1996) – This court decision construing the adult use provisions of Section 9A was decided shortly after that section of the Zoning Act was enacted. The Supreme Judicial Court (SJC) ruled that the city’s adult entertainment ordinance failed to identify any “*substantial governmental interest*” as underlying it (such as prevention of harmful secondary effects); and moreover, restricted the regulated uses to a tiny area within an industrial zone that effectively denied the plaintiff a “*reasonable alternative avenue of communication*.”

In [*A.F.M. Ltd. V. City of Medford*](#), 428 Mass. 1020 (1999) – A similar conclusion was reached by the SJC in this case which limited adult uses to 0.11% of developable land on one city block occupied by business establishments. This case points out that the burden of establishing “*reasonable alternative avenues*” lies with the city.

In [*T & D Video., Inc. v. City of Revere*](#), 66 Mass. App. Ct. 461 (2006) – In further appellate review regarding this case (See 4.1.1 above), the court noted that failure to assure reasonable alternatives could lead to serious penalties. The Appeals Court awarded attorney fees to the plaintiff in the 1996 case, stating that the city’s ordinance effectively prohibited adult establishments from operating in Revere, concluding that the city’s efforts violated civil rights laws. As for narrow tailoring, the Court also found Revere’s ordinance to be “*an illegal prior restraint on protected speech*,” granting the city council broad discretion to grant or deny the permit. Here the Court said:

[H]eighted scrutiny was applicable to the city's adult entertainment zoning ordinances, upon constitutional challenge thereto on free speech grounds by owners of an adult video store, where the ordinance in question applied to all adult entertainment, including sale of videos which were plainly not obscene.

4.1.2 – Secondary Effects – [*D.H.L. Associates, Inc. v. O’Gorman*](#), 199 F.3rd 50 (U. S. First Circuit Court of Appeals, 1999) – Laws regulating adult uses pass muster if they are “*content neutral*” and aimed at the “*secondary effects*” of the uses. Establishing secondary effects does not require case specific studies; rather, reliance may be made based on the experiences of other cities and towns.

Thus, a “*time, place, and manner*” restriction will be upheld if “*narrowly tailored to serve a substantial governmental interest*” while leaving open “*reasonable alternative avenues*” for expression. Note the Tyngsborough regulation implicated in *D.H.L. Associates, Inc.* withstood scrutiny, although only 0.0986% of the town’s land area was available for the use; but that translated to 10.4 acres on 5 lots. Area is thus but one of many factors, and is not always determinative. Moreover, the price of available land is irrelevant.

4.1.3 – Alcoholic Beverages – This case began with a filing of an appeal by *Showtime Entertainment LLC* to the United States Court of Appeals for the First Circuit. The 1st Circuit in turn referred 2 questions of law to the state Supreme Judicial Court. The questions posed to the SJC by the 1st Circuit were:

Question 1. “*Do the pre-enactment studies and other evidence considered by [the town] demonstrate a 'countervailing State interest,' [*Cabaret Enterprises, Inc. v. Alcoholic Beverages Control Comm'n*](#), 393 Mass. 13 (1984), sufficient to justify [the town's] ban on alcohol service at adult-entertainment businesses?*”

Question 2. *“If the ban is so justified, is it adequately tailored?”*

In [*Showtime Entertainment, LLC vs. Town of Mendon*](#), 472 Mass 102 (2015), the SJC answered “yes” to Question 1, and “no” to Question 2. The SJC made the following conclusions:

Town Studies – The Court found that studies and other evidence used by the town prior to adopting a bylaw prohibiting the sale or presence of alcoholic beverages at any establishment with live nudity can be sufficient to justify regulations.

Ban on Alcoholic Beverages – The Court found that Mendon’s bylaw restricting alcoholic beverages at strip clubs unconstitutionally bans free expression and was an overbroad restriction on speech in violation of Article 16 of the Massachusetts Constitution. The bylaw banning alcoholic beverages was not *“adequately tailored.”*

The SJC ruled the bylaw was so broadly framed that *“its sweep encompassed works of unquestionable artistic and socially redeeming significance that might be displayed at an establishment serving alcohol in the town’s adult entertainment overlay district but had not been shown to cause the disorderly conduct the town sought to prevent.”*

The Court further stated: *“Banning all manner of expression at establishments licensed to serve alcohol on the basis that the expression features nude dancing is not the logical response to the determination that alcohol service in physical proximity to adult businesses increases the incidence of crime.”*

This decision also emphasized that the Massachusetts Declaration of Rights grants protections to adult uses that are broader than protections under the First Amendment.

Lastly, the 1st Circuit entered a final judgment in the case consistent with the SJC opinion.

4.2 – LEGAL CONSIDERATIONS FOR MUNICIPALITIES – So long as local regulations of constitutionally protected speech are content-neutral rather than content-based and complies with G.L. c. 40A, § 9A, it should withstand scrutiny. Communities should consider the following when adopting adult use ordinances or bylaws and when reviewing adult use special permits:

- Zoning restrictions may regulate the time, place, and manner in which adult uses may be available.
- Zoning regulations should focus on the negative effects of the uses rather than on the uses themselves.
- Zoning regulations should leave open adequate alternative avenues of communication and space to operate.
- Reasonably anticipated secondary effects of adult uses might include increased traffic, reduced property values, or impact on the character of a neighborhood.
- Zoning districts in which adult uses are permitted by special permit should not be designed so as to foreclose the possibility of the practical operation of any adult uses.
- Zoning ordinances and bylaws should always include clear criteria and standards that avoid conferring upon the special permit granting authority unbridled discretion whether to grant or deny the special permit for an adult use.

Section 4-11

Solar Access

[G.L. c. 40A, § 9B]

1.0 – Introduction

1.1 – OVERVIEW – [G.L. c. 40A, § 9B](#), covers the topic of solar access. It includes zoning regulations for solar access, buffer zones, and exemptions from regulations, special permit issues, and solar maps.

The thrust of § 9B is to establish as a valid planning purpose the encouragement and the protection of solar access, and not to establish a comprehensive statutory scheme barring a city or town from enacting their own solar access provisions. Section 9B does not enable, but illustrates, how local legislative bodies might best achieve § 9B's statutory purposes.

1.2 – ADDITIONAL ZONING ACT REFERENCES – Note that [c. 40A, § 1A](#), and [c. 40A, § 3](#), also have language regarding solar access. These sections, as well as § 9B, were added to the Zoning Act in 1985.

Section 1A defines both “solar access” and “solar energy system.”

- “Solar access” is defined as “the access of a solar energy system to direct sunlight.”
- “Solar energy system” is “a device or structural design feature, a substantial purpose of which is to provide daylight for interior lighting or provide for the collection, storage and distribution of solar energy for space heating or cooling, electricity generating, or water heating.”

Section 3 states the following:

- That “no zoning ordinance or bylaw shall prohibit or unreasonably regulate the installation of solar energy systems or the building of structures that facilitate the collection of solar energy, except where necessary to protect the public health, safety and welfare.”

2.0 – Zoning Regulations

2.1 – SOLAR ACCESS REGULATIONS – Zoning ordinances or bylaws may encourage the use of solar energy systems and also protect solar access by regulating:

- the orientation of streets, lots and buildings;
- the maximum building height limits;
- the minimum building setback requirements;
- limitations on the type and placement of vegetation; and
- other provisions.

2.2 – BUFFER ZONES – Zoning ordinances and bylaws may establish buffer zones and additional districts which overlap existing zoning districts to protect solar access.

2.3 – VEGETATION – Zoning ordinances and bylaws may regulate the planting and trimming of vegetation on public property to protect the solar access of private and public solar energy systems and buildings.

2.4 – ZONING EXEMPTIONS – Solar energy systems may be exempted from setback, building height, and roof and lot coverage restrictions.

3.0 – Special Permits

3.1 – SPECIAL PERMITS – While § 9B declares that zoning ordinances and bylaws may provide for special permits to protect solar access to direct sunlight for solar energy systems, the special permit could “benefit” the property of the applicant, while potentially “burdening” other nearby properties in the form of an “easement” benefiting the applicant’s property.

3.2 – ACCESS TO SUNLIGHT – Zoning ordinances and bylaws may provide that special permits for solar access may create an easement to sunlight over neighboring property. They may also specify what constitutes an impermissible interference with the right to direct sunlight granted by the solar access special permit and how to regulate growing vegetation that may interfere with such right.

3.3 – SOLAR ACCESS EASEMENT – CAUTION – It has been observed that when § 9B was enacted by Section 6 of Chapter 637, Acts of 1985, the phrase “*an easement to sunlight*” appears in that original legislation. It must have been meant to “*create an easement [for] sunlight over neighboring property*” or more accurately “*an easement [for direct access to sunlight] over neighboring property*” since G.L. c. 40A, § 1A, defines “solar access” as “*the access of a solar energy system to direct sunlight.*” (28 Mass. Practice Series [Real Estate] § 8.41).

Whether to include reference to the “easement” in granting a special permit under § 9B should be discussed with the municipal attorney, as the authors in 28 Mass. Practice Series (West Publishing Company) have expressed grave doubts that this power to create an easement on adjacent properties is constitutional in that its exercise could be a “due process” violation. Imposition of an easement on neighboring property without payment of compensation could be argued to be a regulatory taking, requiring the payment of just compensation. The authors of the Guidebook are aware of no cases directly addressing this issue as of the date of the Guidebook.

3.4 – ZONING STANDARDS FOR ACCESS TO SUNLIGHT – Zoning ordinances and bylaws may further provide standards for the issuance of special permits for solar access that balance the need of solar energy systems for direct sunlight with the right of neighboring property owners to the reasonable use of their property within other zoning restrictions.

3.5 – PROCESS – Zoning ordinances and bylaws shall include a process for special permits for solar access including notification of neighboring property owners, opportunity for hearing, appeals process, and recordation of such permits on burdened and benefitted property deeds.

4.0 – Solar Map

4.1 – Solar Map – Zoning ordinances and bylaws may provide for the establishment of a solar map that identifies all local properties burdened or benefitted by special permits for solar access. The ordinances or bylaws may also require the examination of the solar map by the appropriate official

prior to the issuance of a building permit.

5.0 – Other Considerations

5.1 – RELATED GENERAL LAWS – It should be noted that there are other sections of the General Laws intended to reinforce the public purposes underlying § 9B.

5.1.1 - [G.L. c. 187, § 1A](#) – In this chapter and section direct sunlight easements are expressly recognized, and “*may be acquired over the land of another by express grant or covenant*” as provided in G.L. c. 40A, § 9B. The statute requires that the easement be recorded in the Registry of Deeds, and suggests that the easement contain the following provisions:

- A description of the dimensions of the easement expressed in measurable terms, such as vertical or horizontal angles measured in degrees, or the hours of the day on specified dates during which direct sunlight to a specified surface of a solar collector, device, or structural design feature may not be obstructed, or a combination of these descriptions.
- The restrictions placed upon vegetation, structures, and other objects which would impair or obstruct the passage of sunlight through the easement.
- The amount, if any, of permissible obstruction of the passage of sunlight through the easement, expressed in measurable terms, such as a specific percentage of sunlight that may be obstructed.
- The provisions for trimming vegetation that would impermissibly obstruct the passage of sunlight through the easement including any compensation for trimming expenses.
- Any provisions for compensation of the owner of property benefiting from the easement in the event of impermissible obstruction of the easement.
- The terms or conditions, if any, under which the easement may be revised or terminated.

5.1.2 - [G.L. c. 184, § 23C](#) – This chapter and section prohibits, and declares to be void, any land use restriction relative to the ownership or use of real property which purports to forbid or unreasonably restrict the installation or use of a solar energy system as defined in G.L. c. 40A, § 1A, or the building of structures that facilitate the collection of solar energy.

5.1.3 – Subdivision Regulations – The public purposes that underlie the foregoing statutes are additionally recognized as also serving as a valid basis for planning board subdivision regulations. See [G.L. c. 41, § 81M](#).

5.2 – COURT DECISION – In a recent decision, the Land Court expressed its views on the outer limits of ordinances and bylaws that impose restrictions on solar energy systems. The takeaway caution was summarized in the docket for *PLH LLC v. Town of East Longmeadow*, 18 MISC 000640 (GHP) (Land Ct. 2019) summarizing Chief Judge Piper’s ruling from the bench. The following is an excerpt:

Before there is any prohibition or even regulation of any given proposed solar development on any site in the town, there must be an analysis and a balancing of the need to prohibit or regulate, measured against the legislatively determined public interest in rolling out facilities for the collection of solar energy. The need for regulation

or even the denial of permission must in all districts be weighed in accordance with the need to protect the public health, safety, or welfare. . . .

. . . [T]he court now concludes that the correct municipal analysis of a solar facility project must be made on a micro (site specific) level rather than on a macro (town-wide) level. The legislative intent is best served by having that analysis conducted, as it is on all the other Dover Amendment and other § 3 cases, on a very site-specific basis, use by use, parcel by parcel, neighborhood by neighborhood.

Section 4-12

Child Care Facilities

[G.L. c. 40A, § 9C]

1.0 – Introduction

1.1 – OVERVIEW – [G.L. c. 40A, § 9C](#), covers the topic of “child care facilities,” and provides for a conditional exemption from otherwise applicable floor area limitations.

1.2 – DEFINITION – As used in this section the term “*child care facilities*” means a “*child care center*” or a “*school age child care program*” as those terms are defined in [G.L. c. 15D, § 1A](#). G.L. Chapter 15D relates to the state’s Department of Early Education and Care, and § 1A includes definitions for family day care, family foster care, group care facilities, and several other categories that are outside those protections directly accorded by Chapter 40A, § 9C exclusively to child care facilities and centers.

1.3 – [G.L. c. 40A, § 3](#) – G.L. c. 40A, § 3, was amended in 2008 to add references to “*family child-care home*,” “*large family child-care home*,” and “*child-care facility*,” all as defined by [G.L. c. 15D, § 1A](#), as having the conditional exemption (may not be prohibited or required to obtain a special permit) accorded by § 3. The land use category of the facilities in question should be properly identified.

2.0 – Allowable Floor Area

2.1 – FLOOR AREA REGULATIONS – When any municipal zoning ordinance or bylaw limits the floor area of any structure, then that floor area shall be measured exclusive of any portion of a structure where a child care facility is operated as an accessory or incidental use. In addition, the otherwise allowable floor area of the structure shall be increased by an amount equal to the floor area of the child care facility to a maximum increase of ten percent.

2.2 – OTHER USES ALLOWED BY VARIANCE – Where the otherwise allowable floor area of the structure has been increased as described in Section 2.1 above, the portion of the structure where the child care facility is to be operated as an accessory or incidental use shall not be used for any other purpose.

However, the board authorized to grant a variance (Permit Granting Authority), following the completion of the structure, may authorize another use if it determines, with the written concurrence of the office of children (Department of Early Education and Care), that the public interest and convenience do not require the operation of the child care facility. The procedures for granting a variance, including rights of appeal, shall apply to this determination.

3.0 – Allowable Charges and Income Diversity

3.1 – BUILDING OWNER CHARGES – A building owner where the allowable floor area has been increased based on Section 2.0 above, shall be allowed to charge a for-profit child care facility for the following:

- the cost of the utilities used by the child care facility;

- a reasonable building operation fee for the costs of maintenance, cleaning & security; and
- real estate taxes for the portion of the building used for the child care facility.

3.2 – NON-ALLOWABLE CHARGES – The owner of the building shall not impose a charge for the cost of alterations necessary to meet the requirements of the office for children (Department of Early Education and Care) regarding the physical facility of a day care center.

3.3 – FAMILY INCOME DIVERSITY – Any person operating a child care facility in a portion of a structure which is used only for the purposes of § 9C shall use their best efforts to assure that at least 50 percent of the children attending this facility are from families whose income is not more than 110 percent of the median family income of the Commonwealth.

4.0 – Other Considerations

4.1 – ADDITIONAL PROTECTIONS FROM ZONING REGULATIONS – OVERVIEW – While § 9C focuses on floor area limits and provides a conditional exemption therefrom, case law extends child care protection to other zoning regulations that act as a de facto prohibition on such uses, and are thus “unreasonable.”

4.1.1 – Setback & Height Requirements – In [*Petrucci v. Board of Appeals of Westwood*](#), 45 Mass. App. Ct. 818 (1998), the applicability of setback and height requirements to child care facilities in an existing nonconforming structure was found to be unreasonable, given that associated costs of rendering the property compliant amounted to the effective denial of the use of the structure as a child care facility. Moreover, G.L. c. 40A, § 3, affords a broader slate of protections to child care facilities than those under G.L. c. 40A, § 9C.

4.1.2 – Footprint Limitation – In [*Rogers v. Town of Norfolk*](#), 432 Mass. 374 (2000), the Town's zoning bylaw imposed a “footprint” limitation of 2,500 square feet on a child care facility. The Court examined 2 aspects of this limitation: a) Whether it was “facially valid” under the statute exempting child care facilities from local zoning ordinances except for reasonable regulations concerning bulk and height of structures, and b) Whether it was “valid as applied” in this particular case.

The Court held that the bylaw's “footprint” restriction was “facially validly” as it was adopted to protect and preserve the town's residential nature. However, the Court decided that it was invalid “as applied” to the subject property. The Court examined if the bylaw was reasonable in limiting the facility to a 2,500 square feet footprint. In other words, the applicability of (or exemption from) a facially valid bylaw turns on the particular facts of each case.

The Court cited the basic principle that a party challenging the application of local zoning requirements to a proposed exempt use has the burden of proving that those requirements are unreasonable as applied to its proposed project.

In *Rogers*, the zoning bylaw's imposition of a footprint limitation of 2,500 square feet on a child care facility was invalid as applied to the owner's proposed child care facility use of an existing single-family residence with a footprint of approximately 3,200 square feet. The application of the bylaw would significantly impede the owner's ability to use the premises as a child care facility while not substantially advancing the bylaw's purpose of preserving the residential appearance of the town's neighborhoods.

Section 4-13

Vested Rights & Nonconformities

[G.L. c. 40A, § 6]

1.0 – Introduction

1.1 – BACKGROUND – The topics of Vested Rights and Nonconformities are largely governed together by [G.L. c. 40A, § 6](#). Section 6 is notoriously difficult to read and understand because of its impenetrably dense text and indecipherable grammar and syntax. To provide clearer guidance on these 2 topics, they have been split into separate sub-headings of Section 4-13. The topic of Vested Rights is covered in Section 2.0 below and the topic of Nonconformities is covered in Section 3.0 below.

1.2 – MINIMUM PROTECTIONS – The protections accorded under § 6 are minimum protections; Section 6 does not foreclose adoption of more extensive protections in local ordinances and bylaws.

2.0 – Vested Rights

2.1 – OVERVIEW – The term “vested right” has been described as the right to initiate or continue the establishment of a use or construction of a structure that would not conform to amendments of the zoning ordinance or bylaw. In effect, this “freezes” the provisions of the pre-amended ordinance or bylaw to permit the use to continue or construction to proceed to completion as a “lawful prior non-conforming” use or structure.

The question of vested rights is whether – and how – the adoption of local zoning ordinances or bylaws and amendments are applicable to uses and structures that either already exist or have earned the right to exist. Until recently these have commonly been referred to as being “grandfathered”. In light of the Appeals Court’s decision in [Henry W. Comstock, Jr., Trustee v. Zoning Board of Gloucester](#), 98 Mass. App. Ct. 168 (2020), in this Guidebook the authors have used substitute terms, such as “frozen” or “vested” in referring to such protected uses and structures.¹ Where the term “grandfathered” is used in a direct citation of a court decision, the term has not been changed by the authors.

2.2 – LIMITATIONS – Vested rights do not include the right to change or substantially extend a legally non-conforming use or structure. The right to change or substantially extend a use or structure must first be provided for in the zoning ordinance or bylaw and must then follow the process laid out in [G.L. c. 40A, § 6](#).

¹ In footnote 11 of *Comstock*, Justice Milkey offer this explanation: “Providing such protection commonly is known — in the case law and otherwise — as “grandfathering.” We decline to use that term, however, because we acknowledge that it has racist origins. Specifically, the phrase “grandfather clause” originally referred to provisions adopted by some States after the Civil War in an effort to disenfranchise African-American voters by requiring voters to pass literacy tests or meet other significant qualifications, while exempting from such requirements those who were descendants of men who were eligible to vote prior to 1867. See Webster’s Third New International Dictionary 987 (2002) (definition of “grandfather clause”); Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era*, 82 Colum. L. Rev. 835 (1982).”

Nor does the vesting of rights under the Zoning Act insulate the land from the applicability of general, non-zoning ordinances and bylaws, notwithstanding that they may in practical effect regulate or restrict what may be done on land within the city or town.

2.3 – WHEN A RIGHT IS VESTED – The analysis begins by ascertaining the status of land and its uses immediately prior to the zoning change. This is covered in sections 2.4, 2.5, and 2.6 below.

2.4 – USES OR STRUCTURES AUTHORIZED UNDER A BUILDING PERMIT OR SPECIAL PERMIT - The permit must have been issued prior to the first notice of the planning board's public hearing called to consider the proposed zoning amendment ("Date of First Notice"). See [G.L. c. 40A, § 5](#). Any building permit or special permit issued after the Date of First Notice will be subject to the provisions of the zoning ordinance or bylaw as subsequently amended by the local legislative body that would render the use or structure "nonconforming."

Construction or a use under a building permit will enjoy the benefit of these protections only if commenced within a period of 12 months² from the date the permit was issued unless the period is tolled (or extended) during an appeal or moratorium. In cases involving construction, such construction must be continued through to completion as continuously and expeditiously as is reasonable.

2.4.1 – Court Decisions – Listed below are a few relevant court cases on this topic.

- In [Albahari v. Zoning Board of Appeals of Brewster](#), 76 Mass. App. Ct. 245 (2010), the Appeals Court construed § 6 generously for the property owner holding that *"the right to a building permit vests at the time the applicant is unconditionally entitled to its issuance."* If an applicant can demonstrate that the issuance of the building permit is not discretionary on the part of the building inspector – i.e., the building inspector has a duty to issue the permit because the applicant has done all that is necessary for it to be issued – the right to the permit is "vested" and the protections of [G.L. c. 40A, § 6](#), are applicable to the permit.
- In [Framingham Clinic, Inc. v. Zoning Board of Appeals of Framingham](#), 382 Mass. 283, 297 [1981], the SJC held that once an applicant demonstrates their entitlement to a building permit, *"the issuance of [the] permit is a matter of duty, not discretion . . ."* Thus, upon judicial review the court may order the issuance of the building permit.
- In [Alexander v. Building Inspector of Provincetown](#), 350 Mass. 370, 375 (1966), the SJC determined that site preparation in and of itself was not enough to satisfy the statutory requirement for commencing construction within the 6-month period.

2.4.2 – Extension of Protection Period – Special circumstances – such as court appeals or building moratoria – may toll (or "extend") the period of protection.

2.4.3 – Date of Permit Submission v. Date of Issuance – The date of submission of a building or special permit application does not secure a freeze or vested right. Only the issuance of the permit may provide these protections.

² Increased from "six" months to "12" months by § 29 of Chapter 219 of the Acts of 2016

2.4.4 – Risks – Uses begun or structures constructed under a permit issued after the Date of First Notice are potentially exposed to the risk of revocation if the zoning change passes. Acting without the benefit of a vested permit could lead to enforcement actions such as a cease and desist order to stop the operation of the use or to remove the structure.

2.5 – VACANT LAND PROTECTION – Lots consisting of vacant land for single-family and 2-family residential use enjoy 2 distinct zoning protections, often referred to as the “separate lot” protection and the “common lot” protection, both relating to area, frontage, width, yard, and depth requirements. The key to this protection is determining the status of the lot immediately prior to the zoning change. The underlying purpose of the residential zoning freeze is to protect a once valid lot from being rendered unbuildable for residential purposes.

2.5.1 – “Separate Lot” Protection – This protection requires that the separate lot:

- be for single-family or two-family residential use;
- not be held in common ownership with any adjoining land;
- has at least 5,000 sq. ft. of area and at least 50 feet of frontage;
- be shown or described on a recorded or endorsed document or plan; and
- conform to the then-existing requirements of the zoning ordinance or bylaw.

2.5.1.1 – Court Decisions – Separate Lot Protection – Listed below are instructive cases related to “separate lot protection.”

- In [*Seltzer v. Board of Appeals of Orleans*, 24 Mass. App. Ct. 521, 522 \(1987\)](#), the Appeals Court set out a general rule for “separate lot protection” noting that *“adjacent lots in common ownership will normally be treated as a single lot for zoning purposes so as to minimize nonconformities with the dimensional requirements of the zoning by-law or ordinance.”*
- The words “then existing requirements” was discussed in [*Rourke v. Rothman*, 448 Mass. 190 \(2007\)](#). The SJC held that a local zoning board of appeals correctly determined that a lot that was once buildable due to a local by-law exemption from minimum lot size requirements remained buildable after the repeal of that local exemption by virtue of G. L. c. 40A, s. 6. Section 6 protects once-valid lots from being rendered unbuildable due to changes in local zoning restrictions, regardless of whether the change rendering the property unbuildable is characterized as a “repeal” of an “exemption” or a “vested rights clause” in the town’s zoning bylaws.
- Most Recent Plan of Record – With respect to the document showing or describing the lots, in [*Adamowicz v. Ipswich*, 395 Mass. 757 \(1985\)](#), the Court noted that this exemption looks to “*the most recent plan of record*” prior to the effective date of the zoning change.
- In [*Clark v. Zoning Board of Appeals of Nahant*, 338 Mass. 473 \(1959\)](#), the court found that 2 lots adjoining for 13 feet did constitute “*adjoining lots*.” However, in a later case, [*Sturges v. Chilmark*, 380 Mass. 246 \(1980\)](#), the court found that 2 lots that come together only at a point were not “*adjoining lots*” for the purpose of the separate lot protection.
- In [*Dowling v. Board of Health of Chilmark*, 28 Mass. App. Ct. 547 \(1990\)](#), the Appeals Court addresses the status of lots on opposite sides of public and private ways.

2.5.2 – “Common Lot” Protection – This protection shall not apply to more than 3 adjoining lots held in common ownership and it requires that that the lots:

- are for single-family or two-family residential use;
- are held in common ownership with adjoining land;
- are shown or described on a document that has been recorded or endorsed before the effective date of the zoning amendment;
- conformed to the then-existing requirements of the zoning ordinance or bylaw; and
- have less than the then minimum dimensional requirements, but at least 7,500 square feet in area and 75 feet of frontage.

If the above criteria are met then the lots are protected for a period of 5 years from the effective date of the zoning amendment that renders them non-conforming or for 5 years after January 1, 1976, whichever is later.

2.5.2.1 – Trigger Date & Length of Protection – The “common lot protection” (the “freeze” protection) runs from the effective date of the zoning amendment and not from the date of planning board endorsement of the plan. It is the status of the lot immediately prior to the zoning change that is the controlling factor.

The effective date of the zoning amendment is the date on which the legislative body (town meeting, city/town council) votes on the amendment. The common lots are protected from an increase in the area, frontage, width, yard, and depth requirements for a period of 5 years from the effective date of the zoning adoption or amendment.

2.5.2.2 – Court Decisions – Common Lot Protection – Courts have examined several issues on this topic. A few of the more important cases are noted below.

- Date Recorded – In [*Baldiga v. Board of Appeals of Uxbridge*](#), 395 Mass. 829 (1985), the Court made it clear that 3 qualifying lots in common ownership, regardless of when they were created, conformed to applicable zoning as of January 1, 1976. The date on which the plan or document most recently recorded need not have been after January 1, 1975, and plans or document recorded prior to that date satisfy the requirements of the statute.
- Number of Lots; Frontage – In [*Marinelli v. Board of Appeals of Stoughton*](#), 440 Mass. 255 (2003), the Court stated that “*if a party owns four or more adjacent lots, the grandfather protection applies to the first three lots for which the protection is sought.*” The Court also noted that for “frontage” requirements, it is the “frontage” definition in the ordinance or bylaw that controls.

2.6 – DEFINITIVE SUBDIVISION PLAN & APPROVAL NOT REQUIRED (ANR) PLAN PROTECTION – Paragraphs 5 and 6 of [G.L. c. 40A, § 6](#), establish separate standards for the protection of land shown on subdivision plans and Approval Not Required (“ANR”) plans. The time period protections are:

- Subdivision Plan – Land shown on a plan protected for 8 years from date of endorsement. [See (a) and (b) below.]
- ANR Plan – Use of land shown on a plan protected for 3 years from date of endorsement. [See (b) below.]

(a) This time period may be extended equal to the time a city or town imposes, or has imposed upon it, a moratorium on construction, issuance of permits, or utility connections.

(b) This time period may be extended “... for a period equal to that from the date of filing of an appeal or commencement of litigation, whichever is earlier, to the date of final disposition, provided final adjudication is in favor of the owner of the lot.”

(See Sections 2.6.1 and 2.6.2 below for detailed information on these protections.)

2.6.1 – Definitive Subdivision Plans - Paragraph 5 of Chapter 40A, § 6 states:

If a definitive plan, or a preliminary plan followed within seven months by a definitive plan, is submitted to a planning board for approval under the subdivision control law, and written notice of such submission has been given to the city or town clerk before the effective date of ordinance or by-law, the land shown on such plan shall be governed by the applicable provisions of the zoning ordinance or by-law, if any, in effect at the time of the first such submission while such plan or plans are being processed under the subdivision control law, and, if such definitive plan or an amendment thereof is finally approved, for eight years from the date of the endorsement of such approval, ...

2.6.1.1 – Protection of the Land – It is important to remember that the 8-year zoning freeze protects the land shown on a subdivision plan, and not the plan itself.

For residential subdivisions, the filing of a preliminary plan is optional, but if filed secures vested right status of the land shown on the plan for a period of 8 years from the date on which the definite plan – if filed within the 7 months of the preliminary – is endorsed by the planning board.

2.6.1.2 – Plan Consistency – There is no required consistency between the preliminary plan and the definitive plan and the later-filed definitive plan can wildly differ from the plan depicted in the preliminary. See [*Massachusetts Broken Stone Co. v. Town of Weston*](#), 430 Mass. 637 (2000).

2.6.1.3 – Final Plan Approval and Freeze Protections – Final approval of a subdivision plan occurs with its endorsement, or with the municipal clerk issuing a certificate that the plan has been approved because the planning board failed to act. Unless and until either of those actions is completed, the zoning freeze does not take effect.

2.6.1.4 – Freeze Protection and Plan Rescission – In [*Heritage Park Development Corporation v. Southbridge*](#), 424 Mass. 71 (1997), the SJC determined that a subdivision plan rescinded under G.L. 41, §81W, does not terminate the zoning freeze protection. The SJC stated that “Once a definitive subdivision plan is “finally approved,” as was the case here, the eight-year zoning freeze is secure. Nothing in the statute suggests that the continued vitality of a freeze is coextensive with subdivision approval.”

2.6.2 – ANR Plans – Paragraph 6 of Chapter 40A, § 6 states:

When a plan referred to in section eighty-one P of chapter forty-one has been

submitted to a planning board and written notice of such submission has been given to the city or town clerk, the use of 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 the submission of such plan while such plan is being processed under the subdivision control law including the time required to pursue or await the determination of an appeal referred to in said section, and for a period of three years from the date of endorsement by the planning board that approval under the subdivision control law is not required, or words of similar import.

2.6.2.1 – Use of Land Protected – It is only the use of the land shown on the ANR plan that is protected, a subtle but huge distinction from the protections accorded subdivision plans under Paragraph 5 of c. 40A, § 6.

What this means is that all other zoning amendments are applicable, including those amending dimensional requirements. For example, an ANR endorsed plan depicting 10 1-acre house lots secures “the use” of the land for the lawful purposes proposed (i.e., residential), notwithstanding a later zoning amendment changing permissible uses (to commercial, for example) that would render the proposed use nonconforming. If, however, the amendment increased the minimum area requirement from 1 acre to 2 acres, a revised plan showing only 5 lots would be necessitated.

See [*Bellows Farms Inc. v. Building Inspector of Acton*](#), 364 Mass. 253, 257-260 (1973), for a discussion of this protection and how it is distinguished from the definitive plan freeze protection.

2.6.2.2 – ANR Recordation & Zoning Freeze – In [*Long v. Board of Appeals of Falmouth*](#), 32 Mass. App. Ct. 232 (1992), the Appeals Court held that an ANR plan does not have to be recorded in order for the freeze protection to take effect.

2.6.3 – Waiver – The record owner of land has the right to waive the provisions of these freeze Protections by recording the waiver in the Registry of Deeds. If done, the new bylaw or ordinance shall then apply. (See Guidebook Chapter 5, §27, subsection 6-0.). The waiver is an “all-or-nothing” choice, and not a right to cherry-pick the protections accorded.

2.7 – LOT MERGER – The general proposition underlying “merger” is that – unless the zoning ordinance or bylaw provides otherwise – adjoining lots in common ownership merge for zoning purposes; that is, they are considered to be a single lot rather than 2 separate lots so that new zoning requirement can be given effect. In determining “common ownership,” it is not relevant how the constituent parts of the total parcel came to be joined. What is relevant is “*whether the sum of the components meets the requirements of the bylaw.*” See [*Becket v. Building Inspector of Marblehead*](#), 6 Mass. App. Ct. 96, 104 (1978), and [*Heald v. Zoning Board of Appeals of Greenfield*](#), 7 Mass. App. Ct. 286, 290 (1979).

In 2001, the Appeals Court in [*Preston v. Appeal Board of Hull*](#), 51 Mass. App. Ct. 236 (2001) concluded the Legislature did not intend to reject the common law merger doctrine in enacting G.L. c. 40A, § 6. Accordingly, 2 vacant contiguous lots, separately owned at the time of a zoning bylaw change that made them nonconforming for purposes of constructing a dwelling, merged into one conforming lot under the common law merger doctrine when they were subsequently purchased by one owner, and the new owner was not entitled under § 6 to a building permit for one lot without the other.

The Court in [*Sorenti v. Board of Appeals of Wellesley*](#), 345 Mass. 348, 353 (1963), put it this way: “[A]n owner of a lot who has or has had adjacent land has within his power, by adding such land to the substandard lot, to comply with the frontage requirement, or, at least, to make the frontage less substandard.” Maintaining “separate identities” does not serve to escape the net of merger.

In the [*Hoffman v. Board of Zoning Appeal of Cambridge*](#), 74 Mass. App. Ct. 804 (2009) case, the court stated that “it is within the legislative power of the city to override the effects of the common law merger doctrine and allow adjacent nonconforming lots that come into common ownership to be treated as separate lots for zoning purposes.” Thus, in determining whether merger has occurred, a careful read of the zoning ordinance or bylaw may trump the application of the common law doctrine.

Where a city or town has a more generous exemption from merger, the zoning ordinance or bylaw must do so with clear language. In [*Mauri v. Zoning Board of Appeals of Newton*](#), 83 Mass. App. Ct. 336 (2013), the Appeals Court ruled that 2 adjacent undersized lots – one with a dwelling and the other a garage – had merged, even though that the board of appeals interpreted the ordinance otherwise. The board relied on ambiguous language in the ordinance; but the Court determined that only unambiguous language in the ordinance can overcome the common law policy favoring merger.

2.8 – CHECKERBOARDING – To bar maneuvers intended to preserve non-standard lots for building purposes, landowners have sometimes tried configuring straw ownerships of lots shown on a subdivision or ANR plan. Courts have not been receptive to such efforts.

In [*Planning Board of Norwell v. Serena*](#), 27 Mass. App. Ct. 689 (1989), the ineffective strategy employed by the landowners (husband and wife) was to distribute ownership of the lots in question, some to themselves and others to a nominee trust in which they were both the trustees and beneficiaries. The Court in this case determined that it was not a matter of “title” but rather of “control,” concluding that the landowners had with their legal control the right to use adjoining land to avoid or reduce the nonconformity.

This was best stated by the Appeals Court in [*DiStefano v. Town of Stoughton*](#), 36 Mass. Appeals. Ct. 642 (1994): “We may disregard the shell of purportedly discrete legal persons engaged in business where there is active and pervasive control of those legal persons by the same controlling person and there is a confusing intermingling of activity among the purportedly separate legal persons while engaging in a common enterprise.”

3.0 – Nonconformities

3.1 – [G.L. c. 40A § 6](#) – When zoning laws are amended, local boards and officials often confront the question of whether and how the amended zoning laws apply to existing uses and structures. Section 6 addresses the obvious unfairness of applying the amended zoning law to uses and structures that were lawful at the time of the zoning change but are rendered noncompliant by the change. These are commonly referred to as lawful pre-existing nonconforming uses and structures.

The following table contains the verbatim text of the first paragraph of G.L. c. 40A, § 6. However, the language is shown in a 3-column format that better indicates the scope of the exemptions accorded to certain uses and structures.

- Column 1 contains the Section’s text conferring categorical exemption from the amended law.
- Column 2 contains the Section’s text expressing categorical or conditional applicability of the

amended law.

- Column 3 offers an explanatory comment.

R = single- or 2-family residential structure; NR = non-single- or 2-family residential structure.

Nonconformities			
	Section 6 Exemptions	Section 6 Applicability	Comments
1	<i>"Except as hereinafter provided, a zoning ordinance or by-law</i>		
2	shall not apply		
	<i>to <u>structures or uses lawfully in existence or lawfully begun</u> before the first publication of notice of the public hearing on such ordinance or by-law required by section five, or</i>		Categorical exemption for R and NR structures and uses.
3	<i>to a <u>building or special permit issued before</u> the first publication of notice of the public hearing on such ordinance or by-law required by section five,</i>		Categorical exemption for R and NR structures and uses.
4	but shall apply		
5		<i>to any change or substantial extension of such use</i>	Conditional applicability to R and NR uses in the absence of a PGA or SPGA finding (see Line 10).
6		<i>to a building or special permit issued after the first notice of said public hearing,</i>	Categorical applicability to R and NR building and special permits.
7		<i>to any reconstruction, extension or structural change of such structure and to any alteration of a structure begun after the first notice of said public hearing to provide for its use for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent</i>	Note: Conditional applicability to R and NR structures in the absence of a PGA or SPGA finding (see Line 10).
8	except where		Note: This is the infamous "second except" clause.
9	<i>alteration, reconstruction, extension or structural change to a single or 2-family residential structure does not increase the nonconforming nature of said structure [or use].</i>		Note: An R [structure or] use is categorically exempt. No PGA or SPGA finding required.

Nonconformities			
	Section 6 Exemptions	Section 6 Applicability	Comments
10	<i>Pre-existing nonconforming structures or uses may be extended or altered, provided, that no such extension or alteration shall be permitted unless <u>there is a finding by the permit granting authority or by the special permit granting authority designated by ordinance or by-law that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming [structure or]³ use to the neighborhood.</u></i>		Note: Relates back to uses (Line 5) and structures (Line 7), but not to R uses or structures (Line 9).
11	<i>This section shall not apply to establishments which display live nudity for their patrons, as defined in section nine A, adult bookstores, adult motion picture theaters, adult paraphernalia shops, or adult video stores subject to the provisions of section nine A”.</i>		

3.2 – OVERVIEW – When a use or structure does not “conform” to the provisions of a zoning ordinance or bylaw, it is said to be “nonconforming.” Nonconforming uses or structures can either be:

- lawful, and thus entitled to continue or to be pursued; or
- unlawful, or simply noncompliant, and thus subject to enforcement and abatement action by the city or town.

In other words, to be lawful, the nonconforming use or structure must first have been lawfully begun or lawfully existing before the change in the zoning that renders the use or structure nonconforming. It may be useful to apply the term “nonconforming” to uses and structures that are lawful but noncompliant, and the term “noncompliant” to uses and structures that are neither lawful nor compliant. For example, a variance can make a use lawfully noncompliant with a zoning bylaw or ordinance but does not make it a lawfully nonconforming use. (See § 3.6 below.)

3.3 – SELF-CREATED “NONCONFORMITIES” – Voluntary actions of the owner that render the property noncompliant will deprive the property of the benefits of being nonconforming. In [81 Spooner Road v. Zoning Board of Appeals of Brookline](#), 78 Mass. App. Ct. 233 (2010), the Court employed the expression “*infectious invalidity*” when describing the consequences of the owner’s sale of a portion of an existing large conforming lot, which portion contained a dwelling that, as a consequence of the sale, rendered that portion noncompliant with the applicable floor area ratio (FAR) provisions of the bylaw. Although the remainder of the original lot retained by the owner for development was in and of itself conforming, its conforming status was “infected” by the FAR nonconformity created when sale occurred. This left both lots nonconforming.

3.4 – TYPES OF NONCONFORMITIES – The generic term “nonconformity” can apply to a variety of circumstances. These can include:

- nonconforming building
- nonconforming use in a conforming building
- conforming building on a nonconforming lot
- nonconforming use
- nonconforming use in a nonconforming building
- nonconforming use of land

³ The words “structure or” are inserted in light of [Bransford v. Zoning Board of Appeals of Edgartown](#), 444 Mass. 852 (2006): “The words “structure or” . . . were supplied by [Willard v. Board of Appeals of Orleans](#), 25 Mass. App. Ct. 15, 21 (1987), and later noted and applied in [Rockwood v. Snow Inn Corp.](#), 409 Mass. 361 , 363 n.4, 364 (1991).

3.5 – **LAWFUL PRIOR NONCONFORMING USES AND STRUCTURES** – These derive their legitimacy by possessing a vested right to continue or be pursued if and as that right is conferred by Chapter 40A or by more generous provisions of the local zoning ordinance or bylaw. For it to be lawful the use or structure must first have been lawful when created, and the date for this determination is the Date of First Notice of the planning board hearing on a zoning amendment.

3.6 – **VARIANCE USE AS A NONCONFORMING USE** – A use established by variance is not deemed to be a lawful nonconforming use that enjoys the freeze protections under § 6, in that its right to be continued does not depend on having ever been vested or previously lawfully conforming. [*Mendes v. Board of Appeals of Barnstable*](#), 28 Mass. App. Ct. 527, 531 (1990).

3.7 – **ZONING REGULATIONS & NONCONFORMITIES** – Nonconformities may, however, only be changed, extended, or altered as the zoning ordinance or bylaw so provides. See [*Blasco v. Board of Appeals of Winchendon*](#), 31 Mass. App. Ct. 32 (1991). Thus, the first sentence of § 6 is not applicable if the ordinance or bylaw is silent regarding nonconformities. The municipality is free to liberally provide for such changes or to prohibit modification altogether, such that only a variance will suffice.

Expressed another way, for the municipality to address nonconformities it must first have authorized in its zoning ordinance or bylaw:

- a change or substantial extension of a use; or
- reconstruction, extension, or structural change of a structure; or
- alteration of a structure to provide for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent.

In addition many communities have adopted language in the nonconforming section of their zoning bylaw or ordinance that specifies circumstances where the building commissioner may allow certain modifications to a nonconforming single or two-family structure without the need for a finding being made by the board of appeals. Communities have considerable flexibility in the specific language they adopt regarding the building commissioner’s authority to grant building permits without the need of a finding.

3.7 – **EXTENSION, CHANGE OR ALTERATION OF A NONCONFORMING USE OR STRUCTURE** – The conditional right to change, extend, or alter is stated in § 6 this way: “*Pre-existing nonconforming structures or uses may be extended or altered, provided, that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority or by the special permit granting authority designated by ordinance or by-law that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood.” (Emphasis added). Ordinarily, the mere repair of a nonconforming structure does not alone rise to the requirement of such a finding.*

3.7.1 – **Change of Use “Tests”** – In [*Powers v. Building Inspector of Barnstable*](#), 363 Mass. 648 (1973), the Court provided 3 tests for determining whether a pre-existing nonconforming use can be changed or expanded within the exemption for nonconforming uses in the first sentence of § 6. The 3 tests are:

- Test 1 – Does the nonconforming use reflect the “*nature and purpose*” of the use prevailing when the zoning bylaw took effect? [“yes” is required]
- Test 2 – Is there a difference in the quality or character, as well as the degree, of the use? [“no” is required]

- Test 3 – Is the use “*different in kind in its effect on the neighborhood.*” ? [“no” is required]

If the proposed change of use fails any one of these tests, a variance would be needed. But if the proposed change passes all 3 tests, the change may then be allowed under a § 6 finding that the change shall “*not be substantially more detrimental than the existing nonconforming use or structure to the neighborhood.*”

3.7.2 – Extension of Nonconforming Use – A nonconforming use can be extended so long as the increased use is attributable to the growth of the original nonconforming use. [*Cape Resort Hotels v. Alcoholic Licensing Board of Falmouth*](#), 385 Mass. 205 (1982). This case illustrates this point, as it involved a hotel with a place to buy a drink that had morphed into a bar with rooms attached thereby exceeded the scope of what may be authorized by a § 6 finding alone.

3.7.3 – Improvement of Nonconforming Use – A nonconforming use may be improved or made more efficient if the changes are “*ordinarily and reasonably adapted to the original use and do not constitute a change in the original nature and purpose.*” [*Derby Refining Co. v. City of Chelsea*](#), 407 Mass 703 (1990). The applicant has the burden of proof.

3.7.4 – Two-Step Process for Determination of Nonconforming Structure – In general, reconstruction, extension, or structural change of structures are governed under a 2-step approach laid down in [*Rockwood v. The Snow Inn Corp.*](#), 409 Mass. 361 (1991). The proposal is reviewed to determine whether (1) the change or extension does not conform to current zoning, in which case a variance is required, or (2) the change or extension does conform with current zoning, in which case it may be allowed under a § 6 finding that the change shall “*not be substantially more detrimental than the existing nonconforming use or structure to the neighborhood.*”

3.7.5 – Change of Structure – Changes to a nonconforming structure that would require a finding include:

- any reconstruction, extension, or structural change to the structure; and
- any alteration that substantially changes its purpose, or provides for the same purpose but in a substantially different manner or to a substantially greater extent.

See [*Nichols v. Board of Zoning Appeal of Cambridge*](#), 26 Mass. App. Ct. 631 (1988), which held that any alteration to a nonconforming structure that leads to a change of use, if authorized locally, requires the § 6 finding. This is true even if the use is a permitted use.

3.7.6 – Single- or Two-Family Residential Structures – Under what is often, and infamously, referred to as the ‘second except’ clause of G.L. c. 40A, § 6, ¶ 1, zoning changes do not apply to alterations, reconstruction, extensions, or structural changes to a nonconforming single- or two-family residential structure “*that do not increase the nonconforming nature of the structure.*” This statutory language makes such changes a matter of right.

To deconstruct the Legislature’s convolution of words, the first paragraph of § 6 serially expresses (a) what the zoning change does not apply to, then (b) what it does apply to. The first paragraph of § 6 then contains an exception (the “second except” clause) which applies

to single- and 2-family residential structures.

What this means is that alteration, reconstruction, extension, or structural change to a single- and 2-family structures that does not increase the nonconforming nature of the structure are excluded from the zoning changes to which the first paragraph applies and no “finding” would be required as determined by the court in the *Gale* decision. (See 3.7.7 below)

3.7.7 – Selected Court Decisions – Nonconformities – A few of the most relevant court cases on this topic are noted below.

- In [*Bransford v. Zoning Board of Appeals of Edgartown*](#), 444 Mass. 852 (2005), the Court dealt with a situation where a dimensionally conforming house was to be reconstructed on a nonconforming lot. The question before the Court was whether “reconstruction” of a single-family residence, which satisfies all dimensional requirements in the town’s zoning bylaw except required minimum lot area, “increase[s] the nonconforming nature of [the] structure” within the meaning of the language in that clause in G. L. c. 40A, § 6, first paragraph. The Land Court judge concluded that, under this clause, “doubling the size of the structure on an undersized (nonconforming) lot [would] increase the nonconforming nature of the structure,” thereby requiring the plaintiffs to seek a special permit, and the SJC agreed. Left unanswered in *Bransford* – and what is ambiguous in the § 6 language – is whether extension of one nonconforming aspect (among many nonconformities) of the structure wipes out all § 6 protections for the entire structure, or only the one that was unlawfully extended.
- In [*Bjorklund v. Zoning Board of Appeals of Norwood*](#), 450 Mass. 357 (2008), the Court clarified that an otherwise dimensionally conforming home cannot be built upon a nonconforming, undersized lot without a § 6 finding that the newer, bigger house would not be more detrimental to the neighborhood. In holding this, the Court echoed the concurring opinion in *Bransford*, that increasing the size of a home on an undersized lot increases the density of the neighborhood, and such a change amounts to “an increase to the nonconforming nature of the structure.”
- In [*Gale v. Zoning Board of Appeals of Gloucester*](#), 80 Mass. App. Ct. 331 (2011), the Court best summed up how best to resolve the “difficult and infelicitous” first 2 sentences in G.L. c. 40A, § 6, as they related to single- or 2-family residential structures.
- “The Supreme Judicial Court, in the concurring opinion in [*Bransford v. Zoning Bd. of Appeals of Edgartown*](#), 444 Mass. 852, 857-859 (2005) (Greaney, J., concurring) (hereinafter *Bransford*), discussed the interpretive framework set out by this court in [*Fitzsimonds v. Board of Appeals of Chatham*](#), 21 Mass. App. Ct. 53, 56 (1985), and [*Willard v. Board of Appeals of Orleans*](#), 25 Mass. App. Ct. 15, 21 (1987), and later applied in [*Goldhirsh v. McNear*](#), 32 Mass. App. Ct. 455, 460 (1992), and [*Dial Away Co. v. Zoning Bd. of Appeals of Auburn*](#), 41 Mass. App. Ct. 165, 170-171 (1996).

The Appeals Court stated:

That framework provides that under the second “except” clause of the first

paragraph of the statute, as concerns single- or two-family residential structures, the permit granting authority must first "identify the particular respect or respects in which the existing structure does not conform to the present by-law and then determine whether the proposed alteration or addition would intensify the existing nonconformities or result in additional ones. If the answer to that question is in the negative, the applicant will be entitled to the issuance of a special permit." *Bransford, supra* at 858, quotes from *Willard v. Board of Appeals of Orleans, supra* at 21- 22. If the answer is in the affirmative, a finding of no substantial detriment under the second sentence is required. *Ibid.*, quoting from *Willard v. Board of Appeals of Orleans, supra*.⁴

This 2-part framework does not include application of a local by-law or ordinance as an additional step when proceeding to the no substantial detriment finding under the second sentence. That finding stands alone as sufficient to proceed with the proposed project, if the permit granting authority deems that no substantial detriment will result from the extension or alteration. This conclusion is in keeping with special treatment explicitly afforded to single or 2-family residential structures under the statute. Thus, we hold that the board's finding in this case was all that was required."

- The Appeals Court in [*Deadrick v. Zoning Board of Appeals of Chatham*](#), 85 Mass. App. Ct. 539 (2014), again dealt with the "second except" clause of § 6. The issue addressed was whether the creation of a new nonconformity should be given the same treatment as the alteration, reconstruction, or extension of an existing nonconformity or whether a variance required. It concluded that a variance was required. Whereas the zoning board "finding" that the change will not be substantially more detrimental is sufficient with respect to existing nonconformities, a variance is required where a new nonconformity results. (See [*Henry W. Comstock, Jr., Trustee v. Zoning Board of Gloucester*](#), 98 Mass. App. Ct. 168 (2020) for the Appeals Court's clarification of *Deadrick*.)⁵
- In [*Welch-Philippino v. ZBA of Newburyport*](#), 86 Mass. App. Ct. 258 (2014), the Appeals Court held that a lawfully nonconforming use in a dimensionally conforming structure is not subject to the "reconstruction, extension or structural change" provisions of § 6, and that the replacement of the conforming structure that does not result in a change or substantial extension of the use will be permitted "as of right." No Section 6 finding is required.

⁴ In [*Goldhirsh*](#), the Appeals Court said: "[W]e see nothing in *Willard* which supports the proposition that there will never be an increase in a structure's nonconforming nature where the proposed alterations are confined to the existing footprint. . . . Whether the addition of a second level to the carriage house will intensify the nonconformity is a matter which must be determined by the board in the first instance. The fact that there will be no enlargement of the foundational footprint is but one factor to be considered in making the necessary determination or findings."

⁵ There is probably no more abstruse area of Massachusetts zoning law than nonconforming uses, structures, and lots. The infamous density of the language of G.L. c. 40A, Section 6, that deals with this topic is often discussed in terms of "grandfathering". In this Appeals Court decision Justice Milkey, in addition to announcing that the Court will no longer use the term "grandfathering", lays out a long-overdue clarification of *Deadrick v. Zoning Bd. of Appeals of Chatham*, 85 Mass. App. Ct. 539 (2014). Justice Milkey disposes the case at hand with: "We reverse and take this opportunity to clarify the meaning of *Deadrick*."

- In an unpublished decision, the Appeals Court in *Harrison v. St. Pierre*, 84 Mass. App. Ct. 1128 (2014), found that the replacement of a pre-existing, nonconforming structure and use with a new nonconforming structure or use requires a variance. The Court held that *“a pre-existing nonconforming commercial structure may not be reconstructed, extended, or changed unless the new structure first is found to be in compliance with a zoning by-law's setback and other dimensional requirements.”*

The proposed new structure in this case was not compliant, and had shortfalls under the dimensional and use requirements of the Chatham zoning bylaw. Thus, the new structure could not properly be the subject of a special permit under G.L. c. 40A, § 6, and the holding in *Rockwood* (supra). The Court dismissed the argument that the new structure and use would yield fewer nonconformities against the Chatham zoning bylaw than the older "worn-out" gasoline station and repair shop which crowd the locus.

- In *Palitz v. Zoning Board of Appeals of Tisbury*, 470 Mass. 795 (2015), the SJC restated a long standing precedent that an ANR endorsement under [G.L. c. 41, § 81L](#) does not render a lot compliant with zoning, and that any new noncompliance that results from the conveyance of a noncompliant lot can be cured only by a variance. Section 81L states that *“... 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.”*

A § 81L endorsement carries with it no determination of zoning compliance and provides no vested right protections. (Discussed also in Chapter 5, Section 5-06, subsection 6.0)

- Finally, in 2019 the SJC issued a decision that retraces the troubled path through the *“Serbonian bog”* of caselaw addressing nonconforming structures and uses. See *Maria Bellalta v. ZBA of Brookline*, 481 Mass. 372 (2019). The decision punctuates the importance of zoning bylaw provisions as the controlling body of law governing nonconformities, while G.L. c. 40A, § 6, has meaning only with respect to what the bylaw itself prescribes.

Section 6 *“... creates a statutory requirement that ‘sets the floor’ throughout the Commonwealth for the appropriate protections from local zoning bylaws to be afforded to properties and structures protected under that statute. ... As such, the statute prescribes ‘the minimum tolerance that must be accorded to nonconforming uses.’ ... A municipality’s bylaws may not afford fewer protections to preexisting nonconforming structures or uses than does the governing statute.”*

The corollary is that a municipality’s bylaws may afford more protections than the statute.

3.8 – THE SECTION 6 FINDING – The ensuing process mandated by § 6 entails the “finding” requirement that must be made by the permit granting authority or the special permit granting authority. The authority must find that the change, extension, or alteration shall not be substantially more detrimental than the existing nonconforming use or structure to the neighborhood.

3.8.1 – Who May Make the Finding? – The statute provides that either the permit granting authority (board of appeals or zoning administrator) or the special permit granting authority (the city council, board of selectmen, planning board, and board of appeals or zoning administrator) is authorized to make the § 6 finding. The zoning bylaw or ordinance must specify who among this group makes the finding

3.8.2 – Factual Determinations – The finding of the board must be expressed not by simply repeating language of the statute, but by making specific, physical, and factual determinations related to the use or structure itself.

3.8.3 – Conditions – The board may attach reasonable conditions for the statutory finding.

3.8.4 – The Process – The statute is silent as to the process to be used by the board to make such a finding. A majority vote or super majority vote may be required. (See 3.8.5 below.) A public hearing may or may not be required. There is no statutory timeline for a board to make the finding. The municipality has a degree of flexibility as to how it structures the “Finding” process.

3.8.5 – Vote Required – In [*Shrewsbury Edgemere Associates Limited Partnership v. Board of Appeals of Shrewsbury*](#), 409 Mass. 317 (1991), the Supreme Judicial Court clarified that the municipality could require either a super majority vote or a simple majority vote, and may either use the special permit process or another process established for the purpose.

3.9 – ZONING LANGUAGE FOR FINDINGS – It is important, therefore, for cities and towns to have specific language in their zoning ordinances or bylaws as to the process to be used for making the finding; that is which board, or the zoning administrator, is responsible for making the finding, if a public hearing is required, the timeline for the decision-making and the required vote for that finding.

3.10 – ABANDONMENT OR DISCONTINUANCE – One of the objectives of zoning is the eventual elimination of nonconformities. A lawful nonconformity can lose its lawful status by abandonment or discontinuance. Paragraph 3 of Chapter 40A, § 6 provides that: “A zoning ordinance or bylaw may define and regulate nonconforming uses and structures abandoned or not used for 2 years or more.” The 1975 Zoning Act revisions altered the prior law on abandonment which required both (1) an intent to abandon, and (2) voluntary conduct consistent with that intent. [*Cities Serv. Oil. Co. v. Bd. of Appeals of Bedford*](#), 338 Mass. 719 (1959). Thus, nonconforming uses and structures under the earlier law could possibly have extended nonconforming status for indeterminately long periods of time.

The “or” in current § 6, however, equips cities and towns with the authority to provide in their ordinances and bylaws that nonconforming status shall terminate after the expiration of a stated period of time, not less than 2 years; but it should be noted that the language of § 6, is permissive only. The local zoning ordinance or bylaw must expressly provide for termination of nonconforming status by abandonment or discontinuance or both; otherwise, nonconforming status continues indefinitely.

3.10.1 – Abandonment – This requires voluntary conduct with the intent to abandon, and there is no prerequisite minimum period of time. Sale of property protected as a nonconforming use does not establish by itself an abandonment of that use. Courts have provided some guidance as to what constitutes abandonment.

- The voluntary demolition of a structure on the premises has been found to constitute abandonment. [*Dial Away Co., Inc. v. Zoning Board of Appeals of Auburn*](#), 41 Mass. App. Ct. 165 (1996).
- Surrendering or giving up of a license to operate a non-conforming use constitutes abandonment. [*Dawson v. Board of Appeals of Bourne*](#), 18 Mass. App. Ct. 962 (1984)
- If the surrender is compelled and involuntary, then this would not constitute abandonment. [*Derby Refining Co. v. Chelsea*](#), 407 Mass. 703 (1990).

Thus, there must be additional facts for a finding of abandonment: an intent to abandon and voluntary conduct, affirmative or negative that carries an implication of abandonment.

3.10.2 – Abandonment as a Matter of Law – Note that the act of abandonment can exist as a matter of law, even if local zoning does not define abandonment. This usually is based on a significant period of time passing since the action that resulted in abandonment. See [*Dial Away Co. v. Zoning Board of Appeals of Auburn*](#), 41 Mass. App. Ct. 165, 172 (1996), where a structure was demolished 23 years earlier and the Appeals Court determined this was so significant a time period that abandonment exists as a matter of law.

3.10.3 – Discontinuance – Discontinuance, or non-use, in the absence of express provisions in the local zoning ordinance or bylaw, does not alone imply the abandonment of a nonconforming use or structure. However, where local zoning exercises the authority of § 6, simple cessation of an existing, nonconforming use or structure for 2 years or more would result in extinguishment of the nonconforming use. [*Bartlett v. Bd. of Appeals of Lakeville*](#), 23 Mass. App. Ct. 664 (1987). In such a case, a finding of non-use is alone sufficient, it being unnecessary to find a voluntary and intentional abandonment. [*Ka-Hur Enterprises, Inc. v. Bd. of Appeals of Provincetown*](#), 424 Mass. 404 (1997).

4.0 – Enforcement

4.1 - UNLAWFUL NONCONFORMING USE OR STRUCTURE – In certain circumstances the municipality's right to enforce or abate an unlawful, noncompliant use or structure may be foreclosed by statute after certain time limits have passed ([G.L. c. 40A, § 7](#)): These limits are:

- For uses that comply with the terms of the original building permit, but that violate local zoning, no enforcement or abatement action may be brought after 6 years from the date of the alleged violation.
- For uses that do not comply with the terms of (or in the absence of) an original building permit, but that violate local zoning, there is no time limit on enforcement or abatement action.
- For structures that comply with the original building permit, but that violate local zoning, no enforcement or abatement action may be brought after 6 years from the date of the alleged violation.
- For structures that do not comply with (or in the absence of) an original building permit, but that violate local zoning, no enforcement or abatement action may be brought after 10 years from the date of the alleged violation.

4.2 – LAWFUL PRIOR NONCONFORMING STATUS – Up until 2016, protection under this § 7, did not confer

lawful prior nonconforming status on a use or structure that violates local zoning. So, the conditional right available to lawful nonconforming uses and structures to be changed or extended had not until 2016 been available to unlawful noncompliant uses and structures, even though they may be insulated from enforcement actions by the city or town. In some respects, this was similar to the status enjoyed under a variance with respect to which the right to expand or extend are unavailable.

Under Chapter 184 of the Acts of 2016, the Legislature amended G.L. c. 40A, § 7, to confer prior nonconforming status on non-compliant structures if no notice of suit has been filed within 10 years.

[See Chapter Four, Section 4-21, subsection 3.0, for a further discussion of the changes effected by Chapter 184 of the Acts of 2016.]

Section 4-14

Special Permits – Part 1

Special Permit Granting Authority & Special Permit Process

[G.L. c. 40A, § 9]

1.0 – Introduction

1.1 – BACKGROUND – The “special permit” regulates uses that differ from uses so favored (**green light**) that they are allowed as of right within a district and differ from uses so disfavored (**red light**) that they are prohibited. Uses allowed by special permit are conditionally favored (**yellow light**) so that the Special Permit Granting Authority (SPGA) may review criteria listed in the ordinance or bylaw to assure that the proposed special permit use or structure is in harmony with the other uses in the town or neighborhood.

[G.L. c. 40A, § 9](#), includes language related to the SPGA as well as the process for acting on a special permit application. It also includes specific provisions for certain land uses that may be addressed by the local ordinance or bylaw regarding special permits. Because § 9 covers a great deal of information, the Guidebook has 2 separate Chapter Four sections covering the material:

- Special Permits - Part 1 – Section 4-14 covers the SPGA and the procedures that govern the board’s handling of special permit applications.
- Special Permits – Part 2 – Section 4-15 focuses on provisions of [G.L. c. 40A, § 9](#), that are applicable to specific uses.

For information relating to notice of hearings, board decisions, and the exercise of the rights conferred by the special permit, see Chapter Four, Sections 4-18 and 4-19, and [G.L. c. 40A, § 11](#).

For more information regarding meetings, hearings, voting, and decisions, see Chapter Eight, Administration & Meetings.

1.2 – DISCRETIONARY NATURE OF SPECIAL PERMITS – ADEQUATE STANDARDS – A benefit/detriment analysis underlies the SPGA’s discretionary powers. Although special permits are discretionary in nature, that discretion may not be unguided. For this reason, the zoning ordinance or bylaw by which special permit uses are established must provide satisfactory standards and criteria with sufficient specificity as to the terms used in the ordinance or bylaw so that anyone applying for the special permit is informed of what factors and considerations will govern the application. See [MacGibbon v. Board of Appeals of Duxbury](#), 356 Mass. 635, 638 (1970).

In [SCIT, Inc. v. Planning Board of Braintree](#), 19 Mass. App. Ct. 101 (1984), the Appeals Court punctuated the importance of clearly stated standards, contrasting them to a “*roving and virtually unlimited power to discriminate as to uses between landowners similarly situated.*”

1.3 – PROHIBITION ON ALL SPECIAL PERMIT ZONING DISTRICTS – Section 9 limits special permits to “*specific types of uses which shall only be permitted in specific districts.*” In [*SCIT, Inc. v. Planning Board of Braintree*](#), 19 Mass. App. Ct. 101 (1984), the Appeals Court invalidated zoning that required all uses in a business district to obtain a special permit. Special means “special” not the norm.

2.0 – Special Permit Granting Authority

2.1 – SPGA – The ordinance or bylaw may specify any of the following to be the SPGA:

- Board of Selectmen
- Planning Board
- Zoning Administrator
- City Council
- Board of Appeals

2.2 – MULTIPLE SPGAs – Zoning ordinances and bylaws may provide that certain special permit uses be issued by one SPGA while other special permit uses be issued by another SPGA.

2.3 – RULES & REGULATIONS – The statute requires that SPGAs adopt rules and regulations relative to the issuance of special permits. They shall, at a minimum, prescribe the size, form, contents, style, and number of copies of plans and specifications and the procedure for submission and approval of the application. A copy of the rules and regulations shall be filed with the city or town clerk.

2.4 – ASSOCIATE PLANNING BOARD MEMBERS – A city or town may adopt a zoning ordinance or bylaw provision for the appointment of associate members (sometimes referred to as “alternate members”) of a planning board when the board acts as a SPGA. A 5-member planning board is authorized to have one associate member, while a board of more than 5 members is authorized to have 2 associate members. The city or town shall establish the procedure for filing this position.

2.5 – ASSOCIATE ZBA MEMBERS – Zoning ordinances or bylaws may provide for the appointment of associate ZBA members, to be appointed in the same manner as regular members. There is no statutory specified number of associate members.

2.6 – DESIGNATION OF ASSOCIATE MEMBERS – The chair of either the planning board or zoning board of appeals, as the case may be, may designate an associate member to sit in case of absence, inability to act, or certain conflicts of interest on the part of a regular member, or in the event of a vacancy on the board.

The statute does not contemplate or authorize serial re-composition of the board from case to case, as if board members and associates constituted a panel and were re-assignable from case to case.

3.0 – Special Permit Process

3.1 – APPLICATION FILING – A special permit application shall be filed by the applicant with the city or town clerk. A copy of the application, including the date and time of filing as certified by the clerk, shall then be filed with the SPGA.

3.2 – PUBLIC HEARING & DECISION – The SPGA shall hold a public hearing with notice provided as required in G.L. c. 40A, § 11. In a city with more than 5 council members, where the council is a SPGA, the council may appoint a committee of the council to hold the public hearing. The timeline

requirements for the hearing and decision are as follows:

- The public hearing shall be held within 65 days of the filing of the application.*
- The SPGA shall take final action (making and filing of the decision) within 90 days of the close of the public hearing.* (See [Kenrick v. Board of Appeals of Wakefield](#), 27 Mass. App. Ct. 774, 776 (1989))

*These timelines may be extended with the written agreement between the applicant and the SPGA. A copy of the agreement shall be filed with the city or town clerk.

The language in G.L. c. 40A, § 9 states: *"The decision of the special permit granting authority shall be made within ninety days following the date of such public hearing."* In [Kenrick v. Board of Appeals of Wakefield](#), 27 Mass. App. Ct. 774, 776 (1989), the Appeals Court established that the 90-day time limit to make the decision "... runs from the final day rather than the first day of [the] hearing".

3.3 – VOTING REQUIREMENTS – A vote to approve a special permit shall require the following vote of the SPGA, except as noted below:

- 3-member board – unanimous vote
- 5-member board – 4 of 5 members
- more than a 5-member board - 2/3 vote

Section 24 of Chapter 358 of the Acts of 2020 added new voting requirements for some special permits. A simple majority vote on a special permit is required for the following uses:

- multifamily housing that is located within 1/2 mile of a commuter rail station, subway station, ferry terminal or bus station; provided, that not less than 10 per cent of the housing shall be affordable to and occupied by households whose annual income is less than 80 per cent of the area wide median income as determined by the United States Department of Housing and Urban Development and affordability is assured for a period of not less than 30 years through the use of an affordable housing restriction as defined in section 31 of chapter 184;
- mixed-use development in centers of commercial activity within a municipality, including town and city centers, other commercial districts in cities and towns and rural village districts; provided, that not less than 10 per cent of the housing shall be affordable to and occupied by households whose annual income is less than 80 per cent of the area wide median income as determined by the United States Department of Housing and Urban Development and affordability is assured for a period of not less than 30 years through the use of an affordable housing restriction as defined in section 31 of chapter 184; or
- a reduced parking space to residential unit ratio requirement, pursuant to this section; provided, that a reduction in the parking requirement will result in the production of additional housing units.

3.4 – WITHDRAWAL – [G.L. c. 40A, § 16](#), provides that any petition for a special permit (or variance) that has been transmitted to the SPGA may be withdrawn without prejudice by the petitioner prior to the publication of the notice of the public hearing for that application. Subsequent to the posting of the notice, the petition may only be withdrawn without prejudice with the approval of the SPGA.

4.0 – Decisions

4.1 – DETAILED RECORD – The SPGA shall make a detailed record of its proceedings, including the vote of each member on every application including the failure to vote, the absence of a member, and the reasons for its decisions and actions.

4.2 – FINDINGS – “Reasons” should be understood to entail the board’s relevant findings supporting the decision or action. A recitation of evidence and testimony alone does not suffice if unaccompanied by a record of the board’s concurrence or disagreement with that evidence or testimony. It is also insufficient if the board merely re-states the obligatory findings required under the ordinance or bylaw in the language of the ordinance or bylaw itself.

4.3 – FILING TIMELINE – The SPGA shall file its decision with the city or town clerk within 14 days of making the decision. For special permits, the SPGA shall file the decision within the 90-day time period after the close of the hearing. It is not the case that the SPGA has 90 days to make the decision and an additional 14 days to file it.

It’s worth restating here that, for both special permits and variances, the written decision must be filed with the municipal clerk within 14 days of the decision having been made. For variances, the 14 days are added to the 100 days within which the board must “act,” while for special permits the 14th day must fall no later than the 90 days within which the SPGA must “take final action.” (See the Action Date Tables in Section 4-33 of this Chapter)

4.3 – NOTICE OF DECISIONS – The decision shall be deemed a public record. Copies of the decision shall be mailed to the petitioner, to parties in interest, and to every person at the public hearing who requested that notice be sent to them and provided an address for that purpose.

The notice shall specify that any appeals of the decision shall be taken within 20 days of the filing of the decision with the city or town clerk.

4.4 – CONDITIONS – G.L. c. 40A, § 9, allows a SPGA to attach “*conditions, safeguards, and limitations on time and use*” to decisions to approve a special permit. Unlike a variance, a requirement that limits the special permit to the applicant or owner is an acceptable condition. In addition, when a special permit application is accompanied by plans or designs, those become conditions of the special permit. and the SPGA should so specify in its decision.

4.5 – DENIAL OF A SPECIAL PERMIT – Unlike a special permit approval, a denial of a special permit does not require detailed findings. See *MacGibbon v. Board of Appeals of Duxbury*, 369 Mass. 512, 515 (1976). There is no right to a special permit. The Board may deny the permit based on any reasonable grounds. See *MacGibbon v. Board of Appeals of Duxbury*, 356 Mass. 635, 638 (1970)

4.6 – EFFECTIVE DATE OF DECISION – A special permit, or any extension, modification, or renewal of the permit, shall not take effect until a copy of the decision bearing the certification of the city or town clerk that 20 days have elapsed after the decision has been filed in the office of the city or town clerk and either:

- that no appeal has been filed; or
- the appeal has been filed within such time; or
- if it is a special permit which has been approved by reason of the failure of the special permit

granting authority to act thereon within the time prescribed, a copy of the application for the special permit-accompanied by the certification of the city or town clerk stating the fact that the permit granting authority or special permit granting authority failed to act within the time prescribed, and whether or not an appeal has been filed within that time, and that the grant of the application resulting from the failure to act has become final,

The decision then must be recorded in the registry of deeds for the county and district in which the land is located and indexed in the grantor index under the name of the owner of record or is recorded and noted on the owner's certificate of title.

4.7 – RISK FOR APPLICANT PROCEEDING TO EXERCISE SPECIAL PERMIT RIGHTS – Under [G.L. c. 40A, § 11](#), the party receiving the special permit may proceed to exercise the rights conferred by the special permit after the filing of the decision, but at the risk of later having to cease the use or undo construction if an appeal filed within 20 days proves to be successful. (See Section 4-19, subsection 4.0 of this Chapter for further information on this topic.)

4.8 – EXTENSION/RENEWAL OF A SPECIAL PERMIT – There is no statutory authority for the granting of an “extension” or “renewal” of a special permit. If a special permit expires, a new application must be filed triggering the necessity of complying with all relevant notice and hearing requirements applicable to the original application itself. Since special permits *“shall lapse within a specified period of time, not to exceed 3 years,”* there is no available administrative mechanism the authors are aware of short of a full noticed hearing to accomplish this. (See subsection 7.0 below for a discussion of the power to amend a special permit.)

5.0 – Lapse of Special Permit

5.1 – TIME LIMIT FOR PROTECTION OF SPECIAL PERMIT RIGHTS – Zoning ordinances or bylaws shall provide that a special permit not used shall lapse within a specified period of time, not to exceed 3 years⁶, from the grant of the special permit. This time shall include time required to pursue, or await, the determination of a Chapter 40A, § 17, appeal to court.

- For special permits relating to use, the rights granted under a special permit must have been substantially used within 3 years from the grant of the special permit, except for good cause, or else the special permit will lapse.
- For special permits relating to construction, construction must commence within 3⁶ years from the grant of the special permit, except for good cause, or the special permit will lapse.

6.0 – Constructive Grant

6.1 – CONSTRUCTIVE GRANT TRIGGER – The language of § 9 solely references the failure by the SPGA to take final action within the 90-day decision time limit, or any agreed upon extended time period, as being deemed a constructive grant (approval) of the special permit.

Section 9 is silent as to the consequence of the SPGA not opening the public hearing within the required 65 days related to constructive grant. The authors have found no court cases decided under Chapter 40A, the Zoning Act, (as of the date of this Guidebook) that support a claim of constructive grant, or even if any constructive grant arises after the 65 days required for opening the hearing.

⁶ Increased from “two” years to “3” years by § 30 of Chapter 219 of the Acts of 2016.

In [*Oyster Creek Preservation, Inc. v. Conservation Commission of Harwich*](#), 449 Mass. 859 (2007), Footnote 11, the SJC explained that where the Legislature intends there to be a constructive grant it can be expected to provide expressly so. The Court wrote:

*Contrast, e.g., G.L. c. 40A, § 9 (failure of special permit granting authority to take final action on application for special permit within ninety days or agreed extended time "shall be deemed to be a grant of the special permit"); G.L. c. 40A, at § 15 (failure of zoning board of appeals to act within specified time deemed grant of appeal); G.L. c. 40B, § 21 (failure of zoning board of appeals to act on application for comprehensive permit within specified time deemed allowance of application). These other types of land use statutes demonstrate that if the Legislature had intended an applicant to receive a constructive grant of the permit or approval sought, the Legislature would have specifically so provided. See [*Anderson Street Assocs. v. City of Boston*](#), 442 Mass. 812, 817-818 (2004).*

In addition, under the previous Chapter 40A, the Zoning Enabling Act, there were court decisions where the court held that if a statute does not have an explicit provision for constructive grant, then the time limit is “discretionary” and not “mandatory”.

6.2 – PROCESS TO OBTAIN CONSTRUCTIVE GRANT – The following actions need to be taken for the petitioner to obtain constructive grant approval:

- The petitioner who seeks to claim a constructive grant shall file a notice with the city or town clerk in writing, within 14 days of the expiration of the 90 day, or extended, time period, and shall include in the filing that notice of the filing has been sent to parties in interest.
- The petitioner shall send notice by mail to parties of interest and that notice shall specify that appeals shall be filed within 20 days after the petitioner filed the notice with the city or town clerk.
- After the expiration of the 20 days without appeal, or if an appeal was filed, after receipt of certified records from of the court indicating that such approval has become final, the city or town clerk shall issue a certificate stating the date of approval, the fact that the SPGA failed to take final action and that approval resulting from such failure has become final. The certificate shall be provided to the petitioner.

7.0 – Power to Amend the Decision

7.1 – LIMITATIONS ON THE POWER TO AMEND A SPECIAL PERMIT – The SPGA’s power to amend its decision without further hearing is limited to the correction of inadvertent or clerical errors; and even then, the power does not permit any amendment that amounts to a reversal of its original decision, or that grants different relief, or that would affect persons who relied upon it. [*Board of Selectmen of Stockbridge v. Monument Inn, Inc.*](#), 8 Mass. App. Ct. 158 (1979).

The board has inherent administrative – as distinct from adjudicatory – power to correct inadvertent and clerical errors. The Court, in *Stockbridge*, makes clear that the correction of inadvertent or clerical errors may not constitute “a reversal of its conscious decision,” may not grant relieve different from that originally sought, may not change the result of its original decision, and may not prejudice anyone relying on the original decision.

In [*Tenneco Oil Co. v. City Council of Springfield*](#), 406 Mass. 658 (1990), the SJC pointed out that any

amendment purporting to rescind or revise the intended result of the original decision without a new public notice and hearing is invalid. In *Tenneco*, the SJC once again reaffirmed the rule that:

... when a board wishes to change or amend a previous decision, a zoning board has "inherent power ... to correct an inadvertent or clerical error in its decision so that the record reflects its true intention ... but may not make a substantive amendment which changes the result of an original deliberate decision, or which grants relief different from that originally granted, without compliance with the relevant notice and hearing requirements.

In [*Huntington v. Zoning Board of Hadley*](#), 12 Mass. App. Ct. 710 (1981), the Appeals Court reserved judgment on whether modification on the board's own motion is possible (in a manner somewhat analogous to modifications under the Subdivision Control Law, G.L. c. 41, § 81W). If this were to be allowed, all procedures originally applicable, including new notice and hearing, would clearly be required.

The question to ask is whether the proposed amendment changes the original decision in some substantive way. In the 2005 case of [*Barlow v. Planning Board of Wayland*](#), 64 Mass. App. Ct. 314 (2005) the Appeals Court held: "*Substantive amendments to special permit conditions are subject to the same procedural requirements for notice and public hearing, and the same substantive decision-making standards, as the original grant.*" (quoted text is from MCLE's Massachusetts Zoning Manual, Section 10.19). [G.L. c. 40A, § 11](#), would govern the process.

Section 4-15

Special Permits – Part 2

Zoning Regulations & Special Permit Uses

[G.L. c. 40A, § 9]

1.0 – Introduction

1.1 – OVERVIEW – [G.L. c. 40A, § 9](#), includes language with specific provisions for particular aspects of zoning and for particular land uses that may be addressed by the local ordinance or bylaw regarding special permits. This Part 2 of § 9, Special Permits, is devoted to these topics.

The general standard and criteria that apply to special permits is that the special permit use be “*in harmony with the general purpose and intent of the ordinance or by-law.*” Unlike permitted uses, a use requiring a special permit is a use that may satisfy the general zoning standards and criteria, but that warrants additional review by the special permit granting authority (SPGA). The SPGA can then determine the appropriateness of the requested permit based on the facts and circumstances of the individual situation, and can vote to grant, deny, or condition it accordingly.

Much of the language employed by the Legislature in § 9 purports to “authorize” certain land uses that are clearly within a city’s or town’s constitutional home rule powers to already allow. In those instances, the language should not be read as a city or town’s sole source of authority to enact such local laws.

That said, the language of § 9 should be carefully reviewed for any restrictions, limitations, or conditions which the Legislature has determined to impose on local zoning bylaws and ordinances.

2.0 – Density or Intensity Bonus Provisions

2.1 – BONUS PROVISIONS – The Zoning Act contemplates that zoning ordinances and bylaws will provide for special permits authorizing increases in the density of population (or level-of-use adjustment) or the intensity of a particular use (or dimensional adjustment). However, in return the applicant shall, as a condition of the special permit, provide certain “amenities.” These may include the following examples.

- open space
- installation of solar energy systems
- traffic and pedestrian improvements
- low and moderate income housing
- protection for solar energy
- other amenities

2.2 – ZONING ORDINANCE OR BYLAW REQUIRED LANGUAGE – The ordinance or bylaw shall state the specific improvements, amenities, or locations of proposed uses for which special permits are granted and the maximum increases in the density of population or intensity of use which may be authorized by special permit.

In [*Davenport v. Planning Board of Dennis*](#), 76 Mass. App. Ct. 221 (2010), the Appeals Court held that Dennis's bylaw failed expressly to equip the SPGA with the power to grant an affordable housing special permit reducing width, frontage, coverage, and parking requirements. In other words, where an ordinance or bylaw equips the SPGA to adjust density and intensity, it must expressly link to the "specific improvements or amenities or location" of the proposed use.

3.0 – Special Permit Uses

3.1 – OVERVIEW – Section 9 includes a list of uses that either may (or shall) be included in local zoning ordinances and bylaws. In addition, the section includes specific language that must be included for some of those uses. The following sections offer details on those specific uses.

3.2 – TRANSFER OF DEVELOPMENT RIGHTS (TDR) – As a means of securing stated planning objectives, such as open space or other environmental community benefits, ordinances or bylaws may authorize special permits for TDRs of land within a district or between districts. In effect, the development potential of one parcel is converted to a development credit that then can be "sent to" and utilized by a property in the "receiving" area where the increase in density or intensity can more appropriately be accommodated.

TDR provisions should include incentives such as increases in density of population, intensity of use, amount of floor space, or percentage of lot coverage, to encourage TDRs in a manner that protects open space, preserves farmland, promotes low and moderate income housing, or furthers other stated community interests.

Section 20 of Chapter 358 of the Acts of 2020 added the following language to the TDR section:

"... provided, however, that nothing herein shall prohibit a zoning ordinance or bylaw from allowing transfer of development rights to be permitted as-of-right, without the need for a special permit or other discretionary approval."

3.3 – MULTI-FAMILY USES IN NONRESIDENTIAL ZONE – Ordinances or bylaws may provide for special permits for multi-family residential uses in nonresidentially zoned areas upon a finding that the nonresidentially zoned area would not be adversely impacted by the residential use and that the permitted uses in the zone would not be noxious to the multi-family use. Thus, § 9 obligates the SPGA to undertake a factual inquiry as to the mutual compatibility of multi-family residential uses and nonresidential uses.

3.4 – OPEN SPACE RESIDENTIAL DEVELOPMENT OR PLANNED UNIT DEVELOPMENT (PUD) – SPECIAL PERMIT OR BY-RIGHT USE – Section 21 of Chapter 358 of the Acts of 2020 replaced the term "cluster" development with the term "open space residential" development in c. 40A, § 9.

Ordinances or bylaws may provide that such uses be allowed by special permits. Section 22 of Chapter 358 of the Acts of 2020 added the following language regarding Open Space Residential developments.

Provided, however, that nothing herein shall prohibit a zoning ordinance or bylaw from allowing open space residential development to be permitted as of right, without the need for a special permit or other discretionary zoning approval.

Open Space Residential Developments may also be permitted by-right upon review and approval by

the planning board under the Subdivision Control Law (G.L. c. 41, §§ 81K-GG). As a practical matter, it is important to provide a protocol designed to assure coordination of the powers exercised by the planning board under both the Zoning Act and the Subdivision Control Law.

Specific provisions of § 9 regarding Open Space Residential developments and PUD developments include:

3.4.1 – Open Space Residential Developments – Definition – Open Space Residential development is defined to mean a residential development in which the buildings and accessory uses are clustered into one or more groups separated from adjoining property and from each other by intervening open space.

3.4.2 – Criteria for Open Space Residential Developments – Open Space Residential developments shall be permitted only on a parcel of land of a minimum size as required by local zoning and that may be divided into building lots with dimensional control, density, and use restrictions varying from those otherwise permitted by the ordinance or bylaw.

3.4.3 – Open Space Area & Solar Access – The open space, when added to the area of buildings lots, shall be at least equal to the land area required by the ordinance or bylaw for the total number of units or buildings otherwise required. The open land may be situated to promote and protect solar access within the development.

3.4.4 – Open Space – Ownership – The open space shall be conveyed to one of the following:

- the city or town and accepted by it for open space or park use;
- a non-profit organization the principal purpose of which is the conservation of open space; or
- a corporation or trust owned or to be owned by the owners of the lots or units within the development. If a corporation or trust is utilized, ownership shall pass with conveyances of the lots or units.

In any case where the land is not conveyed to the city or town, a restriction enforceable by the city or town shall be recorded providing that the land shall be kept in an open and natural state and not be built upon for residential use or developed for accessory uses such as parking or roadways.

3.4.5 – Planned Unit Development (PUD) – This means a mixed-use development on a parcel containing a minimum of the lesser of 60,000 square feet or 5 times the minimum lot size of the zoning district, or such larger size as the local zoning may specify. The development may include a mixture of residential, open space, commercial, industrial, or other uses and a variety of building types such that it is determined to be advantageous for the community that it is appropriate to approve a special permit for the development.

Open space within the PUD may be situated to promote and protect solar access.

3.5 – SHARED ELDERLY HOUSING – Although an ordinance or bylaw could lawfully provide for such use as a matter of right, local zoning enacted expressly under this provision of § 9 must specify the maximum number of elderly occupants allowed, not to exceed 6, and any age requirements or other conditions deemed necessary for special permit approval. The section does not prescribe age

requirements, nor define “elderly”. These matters should be addressed in the local zoning bylaw or ordinance.

3.6 – RESEARCH & DEVELOPMENT USES – Research and development uses shall include investigation, development, laboratory, and similar uses and any related offices. Limited manufacturing uses and accessory uses may also be permitted subject to the requirements noted below.

3.6.1 – Accessory Use for Research & Development – Zoning ordinances and bylaws shall provide that uses accessory to activities permitted as of right for scientific research or development or related production may be allowed with a special permit. The SPGA must find that the accessory use does not substantially derogate from the public good.

3.6.2 – Research & Development Uses – Ordinances and bylaws may provide for special permits for research and development uses in non-residential zoning districts provided the SPGA finds that the uses do not substantially derogate from the public good.

3.6.3 – Limited Manufacturing – Limited manufacturing shall be a use permitted by special permit if the following requirements are met:

- the manufacturing activity is related to research uses;
- no manufacturing activity customarily occurs within 50 feet of a residential district;
- substantially all manufacturing activity customarily occurs inside of buildings; and
- any manufacturing activities customarily occurring outside of buildings are subject to conditions imposed in the special permit.

3.7 – HAZARDOUS WASTE FACILITY – A hazardous waste facility as defined in [G.L. c. 21D, § 2](#), shall be permitted to be constructed as of right on any land zoned for industrial use provided that permits and licenses required by law have been issued to the developer and a siting agreement has been established in accordance with [G.L. c. 21D, §§ 12 & 13](#).

Following the submission of a notice of intent in accordance with [G.L. c. 21D, § 7](#), a city or town may not adopt any zoning change that would prohibit the facility from the site identified in that notice. However, a city or town may adopt a zoning change relative to the specified site of the proposed facility following the final disapproval and exhaustion of appeals for permits and licenses required by law and by G.L. c. 21D. Requiring a special permit for such use is acceptable so long as the conditions attached to the permit do not rise to the level of a prohibition. See [Warren v. Hazardous Waste Facility Site Safety Council](#), 392 Mass. 107 (1984).

3.8 – REFUSE TREATMENT AND DISPOSAL FACILITIES – A refuse treatment and disposal facility, as defined in [G.L. c. 111, § 150A](#), which has received a site assignment letter shall be permitted to be constructed or expanded on any site zoned for industrial use unless the use is specifically prohibited by the zoning ordinance or bylaw in effect as of July 1, 1987.

A city or town may not adopt a zoning ordinance or bylaw prohibiting the siting or expansion of such a facility unless such prohibition was in effect on or before July 1, 1987. Nevertheless, a city or town may require a special permit for a facility but no special permit may be denied for any such facility. Reasonable conditions may be imposed as part of the special permit.

In addition, a city or town may adopt a zoning or a general ordinance or bylaw prohibiting the siting

or expansion of such facility, which is not statutory in nature, in the following areas:

- recharge areas of surface drinking water supplies as defined by the Department of Environmental Protection;
- areas subject to [G.L. c. 131, § 40](#) (wetlands); or
- areas within the zone of contribution of existing or potential public water supply wells.

However, in [Town of Freetown v. Board of Appeals of Dartmouth](#), 33 Mass. App. Ct. 415 (1992), the court let stand a prohibition of siting a sanitary landfill near a drinking water supply because the language of G.L. c. 111, § 150 does not apply to bodies politic and corporate performing this function. The court stated:

This language, however, applies to solid waste facilities in general and does not specifically apply to bodies public and corporate performing an essential governmental function. The Greater New Bedford Regional Refuse Management District, as a body politic and corporate devoted to an essential governmental function, was exempt from

the zoning requirements of one of its constituent municipalities. [417-419. That the District is thus a body politic devoted to an essential public purpose and, hence, absent a State statute expressly to the contrary, exempt from municipal zoning by-laws appears uncontradictable. This conclusion is further strengthened by a perusal of the Solid Waste Management Act, St. 1987, c. 584. As noted above, Section 3 of that Act added G. L. c. 21H to the General Laws. Section 16 amended G. L. c. 111, Section 150A, so as to delete the requirement that solid waste facilities operated by subdivisions of the Commonwealth are subject to municipal zoning by-laws.

We note, as Freetown suggests, that The Zoning Act, c. 40A, Section 9, as rewritten by Section 10 of the Solid Waste Management Act, does permit municipalities to subject solid waste facilities to certain zoning strictures. Prohibitions of, or license or permit requirements for, such a facility in effect as of July 1, 1987, are valid. Municipalities may prohibit siting facilities in areas critical to drinking water supplies. Moreover, special permits "imposing reasonable conditions on the construction or operation of the facility" are permissible. This language, however, applies to solid waste facilities in general and does not specifically apply to bodies public and corporate performing an essential governmental function.

This conclusion is further strengthened by a perusal of the Solid Waste Management Act, St. 1987, c. 584. As noted above, Section 3 of that Act added G. L. c. 21H to the General Laws. Section 16 amended G. L. c. 111, Section 150A, so as to delete the requirement that solid waste facilities operated by subdivisions of the Commonwealth are subject to municipal zoning by-laws.

3.8 – REDUCED PARKING REQUIREMENTS – Section 23 of Chapter 358 of the Acts of 2020 added this new section regarding parking space reduction. Zoning ordinances and bylaws may provide that special permits may be granted for reduced parking space to residential unit ratio requirements after a finding by the special permit granting authority that the public good would be served and that the area in which the development is located would not suffer a substantial adverse effect from such diminution of parking.

Section 4-16

Variances

[G.L. c. 40A, § 10 and §§ 11, 15 & 16]

1.0 – Introduction

1.1 – OVERVIEW – A variance is a zoning tool by which a property owner may seek relief from certain requirements of the zoning ordinance or bylaw. This topic is covered by [G.L. c. 40A, § 10](#). Additional information on variances is also found in Chapter 40A, §§ [11](#), [15](#), and [16](#).

1.2 – TYPES OF VARIANCES – There are 2 types of variances:

- Dimensional – A “dimensional variance” applies to zoning regulations such as lot area, frontage, building height, setbacks, lot coverage, and similar requirements.
- Use – A “use variance” applies to a land use that is not permitted in a zoning district.

1.3 – USE VARIANCES – Use variances are not allowed unless expressly permitted by the zoning ordinance or bylaw. To obtain a use variance, the applicant must meet all of the same requirements for a dimensional variance, including soil, shape, and topographical circumstances that would result in a substantial hardship without the variance. [Ora F. Kirkwood v. Board of Appeals of Rockport](#), 17 Mass. App. Ct. 423 (1984).

1.4 – NOMENCLATURE – The terms PGA, zoning board of appeals, and board of appeals are used interchangeably in Chapter 40A and this Section 4-16 reflects that use.

2.0 – Procedures

2.1 – FILING – A variance application shall be filed with the city or town clerk and a copy of the application, with the date and time of filing, certified by the city or town clerk, shall be transmitted forthwith by the petitioner to the permit granting authority (PGA) which could be either the zoning board of appeals or zoning administrator.

2.2 – PUBLIC HEARING – The board of appeals shall hold a public hearing within 65 days from day the board receives notice of the variance petition filing.

2.3 – NOTICE OF HEARING – The board shall have the notice of the public hearing published and sent to parties of interest in accordance with the requirements of [G.L. c. 40A, § 11](#).

3.0 – Decision Considerations

3.1 – REQUIREMENTS FOR GRANTING VARIANCES – Under [G.L. c. 40A, § 10](#), the permit granting authority may grant a variance only where it specifically finds all of the following:

- that owing to the circumstances relating to the soil conditions, shape, or topography of the

land or structures, but not affecting generally the zoning district in which it is located, a literal enforcement of the provisions of the bylaw would involve substantial hardship, financial or otherwise;

- that desirable relief may be granted without substantial detriment to the public good; and
- that desirable relief may be granted without nullifying or substantially derogating from the intent and purpose of the ordinance or bylaw.

3.2 – ALL REQUIREMENTS MUST BE MET – The statutory requirements for zoning variances are conjunctive, and thus variances may properly be granted only where all of the above requirements are met. [*Perez v. Board of Appeals of Norwood*](#), 54 Mass. App. Ct. 139 (2002). A failure to establish any one of the prerequisites to the granting of a variance is fatal. [*Blackman v. Board of Appeals of Barnstable*](#), 334 Mass. 446 (1956). Deficiency of frontage alone has been held not to satisfy the statutory prerequisites. [*Karet v. Zoning Bd. of Appeals of Worcester*](#), 27 Mass. App. Ct. 439 (1989).

3.3 – HARDSHIP – Financial hardship alone is not sufficient for the grant of a variance. There must be hardship related to the soils, slope, or topography particular to the subject property itself as distinct from properties generally in the zoning district in which it is located.

3.4 – FINDINGS – The PGA must make findings of actual facts to support the conclusion that the applicant has satisfied the statutory criteria and not merely make “findings” that simply restate the words of the statutory criteria. Additionally, the PGA must make findings as to each of the statutory prerequisites of a variance. [*Boyajian v. Board of Appeal of Wellesley*](#), 6 Mass. App. Ct. 283 (1978).

The courts are clear that the statutory requirements for the grant of a zoning variance cannot be satisfied by mere repetition of statutory words, and findings of actual facts are indispensable. [*Sullivan v. Board of Appeals of Belmont*](#), 346 Mass. 81 (1963).

3.5 – CONDITIONS/OWNERSHIP – The PGA may impose conditions, safeguards, and limitations regarding both time and use. However, variances – unlike special permits – cannot be conditioned on an applicant’s continued ownership of the land or structures to which the variance pertains.

3.6 – VOTE – A vote to approve a variance petition requires the following vote of the PGA:

- 3 member board – unanimous vote
- 5 member board – 4 of 5 members
- 7 member board – 5 of 7 members

3.7 – DECISION INFORMATION – A copy of the decision of the board of appeals shall be provided to the owner and to the applicant if other than the owner. The decision shall include the name and address of the owner, identification of the land subject to the variance, a statement setting forth compliance with the statutory requirements of the issuance of the variance, and certification that copies of the decision and all plans referred to in the decision have been filed with the planning board and city or town clerk.

3.8 – EXERCISE AND EXTENSION OF VARIANCE RIGHTS – Rights to a variance must be exercised within 1 year of the date of the grant of the variance or the rights shall lapse. The variance must be exercised within 1 year whether the variance has been recorded or not. However, the PGA, upon written application of the applicant, may extend the time for such rights for a period not to exceed 6 months. The application for an extension beyond the original 1- year period shall be filed prior to the 1- year

expiration. The PGA has 30 days in which to act on the request, and if it fails to do so, such rights may be reestablished only after notice and a new hearing pursuant to the provision of Chapter 40A.

What must be done in order to “exercise” this right? The statute is silent on this issue but in the case of [*Cornell v. Board of Appeals of Dracut*](#), 453 Mass. 888 (2009), the Supreme Judicial Court provided guidance on this issue with a few specific examples, noted below:

- If a building is under construction, then the variance has been “exercised”.
- For a dimensional variance, obtaining a building permit constitutes “exercise” of the variance.
- If the variance is for construction on an existing non-conforming lot, a conveyance of the lot in reliance on the variance is sufficient for the “exercise” of the variance.
- Where due to circumstances beyond the variance holder’s control, delays are encountered in obtaining a building permit within 1 year (for example, if the variance is appealed and variance holder is the unable to “exercise” the variance) then the variance time period may be tolled. However, in order for the variance to be tolled, the variance holder must request the statutory extension of 6 months available under G.L. c. 40A, § 10.
- Expenditures of time and money to obtain other permits and approvals (for example, septic system, wetlands, utilities, etc.) are not sufficient to exercise a dimensional variance.

3.9 – VARIANCE AS DISCRETIONARY – Even if the PGA finds that the petition has met the 3 requirements enumerated in § 3.1 above, it is not required to approve the variance request. There is no entitlement to a variance. The courts have consistently held that variances are not allowed as a matter of right and should be sparingly granted. [*Lussier v. Zoning Board of Appeals of Peabody*](#), 447 Mass. 531 (2006). Given that no one has a legal right to a variance, the language of the variance requirements is to be construed against the individual requesting a variance, rather than against the granting authority. [*DiGiovanni v. Board of Appeals of Rockport*](#), 19 Mass. App. Ct. 339 (1985).

The fact that a more economical and practical use of the land might be made if it were used for apartments rather than a single-family purpose does not support the (use) variance. [*Sullivan v. Board of Appeals of Belmont*](#), 346 Mass. 81, 84 (1963), and [*Garfield v. Board of Appeals of Rockport*](#), 356 Mass. 37, 41 (1969).

3.10 – VARIANCE DENIAL – A decision to deny a variance does not require the same level of detailed findings as an approval. However, it would be prudent for a PGA to explain its reason for denial.

4.0 – Decision Timeline and Factors – [G.L. c.40A § 15](#)

4.1 – TIMELINE FOR MAKING DECISION – The decision of the permit granting authority shall be made within 100 days of the date of the filing of the variance application. The required time limit for that action may be extended by written agreement between the applicant and the board with the agreement being filed with the city or town clerk.

4.2 – TIME LINE FOR FILING DECISION – It is important to note that the PGA must make its decision within 100 days of the filing of the application and then must file that decision within 14 days of making it in order to avoid a constructive approval. Thus, the permit granting authority could potentially make its decision on the 100th day and then file the decision on the 114th day of the filing of the application.

This is unlike the special permit process where the 14-day timeline for filing the decision must occur within the 90 day timeline for taking final action.

4.3 – CONSTRUCTIVE GRANT – Failure by the PGA to make its decision within the 100 days or agreed upon extended time shall be deemed to be a constructive grant of the application. The petitioner who seeks a constructive grant shall notify the city or town clerk in writing within 14 days from the expiration of the 100 days or extended time and that notice has been sent by the petitioner to the parties in interest. That notice shall specify that any appeals shall be filed within 20 days after the date the city or town clerk received the written notice of constructive grant.

4.4 – DECISION FILING – The PGA shall file its decision within 14 days after it has acted with the office of the city or town clerk. This includes a detailed record of its proceedings, indicating the vote of each member upon each question, or if absent or failing to vote, indicating such fact, and setting forth clearly the reasons for its decision and of its official actions. Notice of the decision shall also be mailed to the petitioner, parties in interest and to everyone at the hearing who had requested that the decision be mailed to them. Notices shall specify that appeals shall be filed within 20 days after the filing of the decision with the city or town clerk.

4.5 – EFFECTIVE DATE & RECORDING OF DECISION – [G.L. c. 40A, §11](#), provides that a variance or any extension, modification, or renewal thereof, shall not take effect until a copy of the decision is recorded at the Registry of Deeds and indexed in the grantor index under the name of the owner of record or is recorded and noted on the owner’s certificate of title. (See [Table at Chapter 4-19, § 3.6](#))

5.0 – Other Variance Considerations

5.1 – WITHDRAWAL – [G.L. c. 40A, §16](#), provides that a petition for a variance (or special permit) that has been transmitted to the PGA may be withdrawn without prejudice prior to the publication of the public hearing notice. Thereafter it may be withdrawn without prejudice only with the approval of the PGA.

5.2 – RE-ESTABLISHING A LAPSED VARIANCE – In [Hunters Brook Realty Corporation v. Zoning Board of Appeals of Bourne](#), 14 Mass. App. Ct. 76 (1982), the court clarified what was necessary to re-establish a variance that had lapsed after the 1 year period. In order to re-establish a variance the same procedures that are required for an original variance under §§ 10, 11, and 15 of Chapter 40A are again required. Thus, an application must be filed with the clerk, notice provided, public hearing held, decision made within 100 days and filed within 14 days of the decision and a 20-day appeals period observed. The petitioner must also show anew that the requirements for the granting of the variance have been met and the PGA must make findings of fact to that effect.

5.3 – VARIANCES AND NON-CONFORMITIES – The approval of a variance does not create a legal non-conformity that then can benefit from the protection of G.L. c. 40A, § 6, (Pre-existing Non-conforming Structures and Lots). Where a use or structure had been established as the result of a variance, that variance does not render the use or structure “lawfully nonconforming.” Thus, the structure or use may not be altered or expanded by the findings set forth under G.L. c. 40A, § 6, which is only available to “lawfully nonconforming” uses or structures. See [Mendes v. Board of Appeals of Barnstable](#), 28 Mass. App. Ct. 527 (1990).

Section 4-17

Site Plan Review

1.0 – Introduction

1.1 – BACKGROUND – Site plan review (SPR), sometimes referred to as site plan approval (SPA) or other similar names, is a land use tool long used by municipalities throughout Massachusetts and the country. It is an additional method of examining development proposals within the community. SPR is not found in Chapter 40A, the Zoning Act, or in any other state statute. The SPR procedure is a land use process that is a creature of local government and that communities may use based on their home rule power to protect the public health, welfare, and safety.

In the usual situation, a site plan review approval procedure is required prior to the issuance of a building permit or a special permit. However, there may be circumstances – such as SPR for parking lot construction or modification – where no building or special permit would be required.

1.2 – PURPOSE – The purpose behind SPR is for a community to have an administrative review process that serves as a site and design review mechanism; but, unlike special permits, it is not discretionary in nature. “*Site plan review has to do with regulation of permitted uses, not their prohibition, as would be the case with a special permit or a variance.*” [*Bowen v. Board of Appeals of Franklin*](#), 36 Mass. App. Ct. 954, 955 (1994).

In the case of [*Osberg v. Planning Bd. of Sturbridge*](#), 44 Mass. App. Ct. 56, 57 (1997), the Court determined that “*site plan review has been found to be a permissible regulatory tool for controlling the aesthetics and environmental impacts of land use.*”

1.3 – SPR AND BY-RIGHT USES – SPR has traditionally been used for evaluating by-right uses. Reasonable conditions can be imposed based on the SPR regulations of the city or town, prior to the issuance of a building permit. The Supreme Judicial Court defined SPR as a “*regulation of a use rather than its prohibition . . . contemplating primarily . . . the imposition of reasonable terms and conditions.*” [*Y.D. Dugout v. Board of Appeals of Canton*](#), 357 Mass. 25, 31 (1970).

The Court in [*SCIT, Inc. v. Planning Bd. of Braintree*](#), 19 Mass. App. Ct. 101, 105-106 n.12 (1984), explains the distinction between site plan review and special permits. As those cases and the decision in [*Prudential Ins. Co. of America v. Board of Appeals of Westwood*](#), 23 Mass. App. Ct. 278, 282 (1986), have determined, site plan review has to do with regulation of permitted uses, not their prohibition, as would be the case with a special permit or a variance.

1.4 – ADMINISTRATIVE BOARD OR AGENCY – A by-right SPR procedure is traditionally, although not always, administered by a planning board. In some communities, SPR is a staff, not a planning board, function.

1.5 – SITE PLAN REVIEW AND SPECIAL PERMITS – In Massachusetts, some communities combine special permits and site plan review to create a permit process referred to as special permit with site plan review or some similar name. This type of permit is covered in Section 7.0 below.

1.6 – SUMMARY – The following points are important to consider when adopting SPR:

- SPR is a creation of local government.
- There is no language in G.L. c. 40A about SPR.
- Massachusetts Courts have long upheld the validity of SPR.
- SPR is traditionally used for by-right uses to review site and design issues.
- Process, timeline, public hearing, decision maker, etc. are determined by the local bylaw/ordinance or rules & regulations.
- It is meant to be a means of remediating deficiencies of a proposed project, rather than regulating its use.
- It is sometimes used as part of a special permit process.

2.0 – Adoption, Regulations, and Standards

2.1 – ADOPTION – Whether and how a municipality adopts SPR is entirely a local choice, there being no governing state statutory provisions. That said, the courts have recognized this land use tool by providing legal guidance, explaining what SPR is and what it is not. In some communities, this is a procedure found in the zoning bylaw or ordinance. In other communities, the procedure has been adopted into the rules and regulations of the planning board.

If the municipality intends to use SPR in any significant manner, it should adopt SPR requirements as part of a zoning ordinance or bylaw.

2.2 – REGULATIONS & STANDARDS – A municipality should consider how it intends to use the SPR procedure. SPR can be an effective tool to improve the quality of the design and site characteristics of a proposed development. Therefore, any substantial use of this regulatory procedure warrants a set of well-written and comprehensive standards and criteria that reflect the goals of the city or town in adopting the procedure.

The following criteria are among those most generally found in SPR regulations and for which the SPR procedure is well adapted to address:

• siting of buildings	• parking & vehicle circulation
• protection of adjacent properties	• drainage
• driveways & access	• adequacy of wastewater disposal
• sidewalks, pedestrian paths	• landscaping & screening
• utilities & infrastructure	• lighting
• traffic impacts	• building design
• signs	• trash, recycling, & loading facilities
• on site open space	• convenience & safety of vehicular, bicycling, and pedestrian traffic
• relationships of building and parking	

3.0 – Procedures

3.1 – PROCEDURAL ISSUES – The procedures to be used by the city or town for the SPR process are for the city or town to determine. Procedures should specify the board, committee, or staff responsible for review and approval, the scope of the review, and the degree of public participation.

Questions a community should ask before adopting SPR include:

- What entity (board or staff) is to administer SPR?
- What are the voting requirements? (Generally, a majority vote unless it is tied to a special permit procedure.)
- What information is required to be filed with the application?
- What is the filing fee?
- Is a public hearing required?
- What is the timeline for a public hearing (if any) and a decision?
- Is notice provided? (abutters, legal ads etc.)
- Is the decision filed with the city/town clerk and in the Registry of Deeds?
- Should the zoning bylaw provide for a direct appeal from an SPR decision to the courts pursuant to G.L. c. 40A, § 17?

4.0 – Decision Issues

4.1 – WRITTEN DECISION – The Appeals Court has ruled that unless the bylaw or ordinance so requires, no written decision is mandatory by the SPR board. See [Bowen v. Board of Appeals of Franklin](#), 36 Mass. App. Ct. 954, 955 (1994). Good sense would suggest that a written decision is a prudent action to take for the benefit of the applicant, board, municipal officials, and parties in interest. Moreover, if the city or town has provided for a court appeal pursuant to G.L. c. 40A, § 17, good judgment – in addition to state law – would require that the decision appealed from be in writing.

4.2 – REGULATION, NOT PROHIBITION – As noted, the intent of the SPR procedure is the regulation of a use rather than a prohibition of that use. Thus, the SPR establishes narrow powers that are related to the imposition of reasonable conditions on a land use project for which the zoning ordinance or bylaw requires site plan approval.

4.3 – DENIAL – There are limited, but rare, circumstances wherein a board may deny a SPR application. See the decision of the Appeals Court in [Prudential Insurance Company of America v. Board of Appeals of Westwood](#), 23 Mass. App. Ct. 282 (1986). The best way to state the SPR take-home point of this case is the following excerpts from Footnote 9 of that decision:

A board may lawfully reject a site plan that fails to furnish adequate information on the various considerations imposed by the by-law as conditions of the approval of the plan. See [Auburn v. Planning Bd. of Dover](#), 12 Mass. App. Ct. 998 (1981). (Emphasis added)

In some cases, the site plan, although proper in form, may be so intrusive on the interests of the public in one regulated aspect or another that rejection by the board would be tenable. This would typically be a case in which, despite best efforts, no form of reasonable conditions could be devised to satisfy the problem with the plan and the judge conducting de novo review concurs in that conclusion. (Emphasis added)

4.4 – CONDITIONS – A site plan may be approved with reasonable conditions. Just as with any other land use permit, courts are deferential to a community's site plan approval requirements and conditions imposed pursuant to them. The ruling in the *Prudential* case noted that:

A board also possesses discretion to impose reasonable conditions under a by-law's requirements in connection with approval of a site plan, even if the conditions are

objected to by the owner or are the cause of added expense to the owner. See, e.g., the conditions suggested by the planning board of Canton on the site plan before it in the [Y.D. Dugout](#) decision, as set forth at 357 Mass. at 31 n.7.

In [Castle Hill Apartment Limited Partnership v. Planning Board of Holyoke](#), 65 Mass. App. Ct. 840 (2006), the Appeals Court noted that:

Where use and density have been established in the ordinance or bylaw, conditions attached to an SPR approval reducing by-right densities, but where the site plan reviewing board is unable to articulate health, safety, or convenience concerns to justify significant impacts the conditions would have on a proposed project, then those conditions will fail.

In [Susan Muldoon v. Planning Board of Marblehead](#), 72 Mass. App. Ct. 372 (2008), the Appeals Court held that the site plan review provisions of Marblehead's zoning bylaw empowered the planning board to impose, as reasonable conditions, dimensional requirements stricter than the minimum required by the zoning bylaw. In remanding the case for factual findings, the Court required that a determination be made regarding the reasonableness of a setback condition in light of the standards set forth in the zoning bylaw. In this case, the applicable bylaw section would, but for the condition, require only an 8-foot setback. The board's condition required a 30-foot setback. The Appeals Court held that it was an error for the Land Court judge to have ruled the condition a violation of the uniformity requirement of G.L. c.40A, § 4. To punctuate the importance that the zoning bylaw must set forth the factors that weigh on the reasonableness of conditions, the Court noted that:

... the by-law contains minimum dimensional requirements is not dispositive of whether, in accordance with site plan approval criteria set forth in the by-law, the board may impose reasonable conditions that result in stricter dimensional requirements than would otherwise be the case. In [[Castle Hill Apartments Ltd. Partnership v. Planning Bd. of Holyoke](#), 65 Mass. App. Ct. 840, 841 (2006)] we noted that density was not among the factors listed for the board to consider. Here, by contrast, the site plan provision of the by-law specifically directs the board to consider (1) whether the architectural and design features of the proposed structure are in harmony with the prevailing character and scale of buildings in the neighborhood and town and afford adequate light, air, circulation, and separation between buildings, and (2) whether adverse effects on abutting lots, the neighborhood, and the town, including obstruction of views, are minimized.

5.0 – Additional Considerations

5.1 – SPR & VESTED RIGHTS – Does a site plan review approval have any effect on vesting rights if zoning changes are subsequently adopted by the municipality? While there are no Supreme Judicial Court or Appeals Court decisions on this point, (as of 2020) in [Towermarc Canton Limited Partnership v. Town of Canton](#), Misc. Case No. 13947 (Land Court 1989), the Land Court determined that the freeze protections of G.L. c. 40A, § 6, do not apply to site plan review. Site plan approval alone is not the functional equivalent of a grant of a special permit, and in the absence of express provisions in G.L. c.40A, § 6, site plan review would not be accorded the same protections given to special permits.

5.2 – SPR & CONSTRUCTIVE GRANT – Does a constructive approval result from the failure of the site plan review board to act? There is no language in the General Laws or any reported court cases (as of

2020) that provide definitive guidance on this topic. In [*Board of Aldermen of Newton v. Maniace*](#), 429 Mass. 726 (1999), the Court left open the possibility of a constructive approval where the site plan approval is linked to a special permit, but was silent on whether such would be the case for a site plan review process not directly linked to a special permit. Constructive approval may best be handled by municipalities including express language in the zoning ordinance or bylaw making provision for that outcome. See [*Cumberland Farms v. Planning Board of Bourne*](#), 56 Mass. App. Ct. 605 (2002).

5.3 – UNCERTAINTIES – Until and unless the Legislature elevates site plan review to statutory status, the ambiguities and uncertainties accompanying this planning tool are destined to continue. Therefore, best practice would suggest that cities and towns adopt comprehensive, clear, and reasonable bylaws and regulations as to the procedure, review criteria, and decision-making standards for a SPR process.

6.0 – Appeals

6.1 – APPEALS – Since SPR is a solely a creature of local government, there have been questions of how an appeal is made to a decision of a by-right SPR. The subsections below discuss the various permutations of appeals and the courts’ evolution in their thinking regarding this topic; but it should be emphasized as of the date of this Guidebook, a city or town may legally prescribe in its zoning ordinance or bylaw a direct appeals to either the courts pursuant to [G.L. c. 40A, § 17](#) or to the zoning board of appeals under [G.L. c.40A, § 8](#). (See the most recent cases in subsection 6.1.3, below.)

6.1.1 – Appeal Procedure for a By-right, Non-discretionary SPR with no Zoning Bylaw or Ordinance Language – In 1981, the Appeals Court, in [*McDonald’s Corp. v. Town of Seekonk*](#), 12 Mass. App. Ct. 351, 353 (1981), ruled that the appropriate procedure to appeal a SPR decision was to appeal the denial of a building permit based on the SPR application to the zoning board of appeals. This left open the question of how the SPR applicant could appeal the grant – not the denial – of a building permit for a project to which the site plan review board had previously imposed conditions unsatisfactory to the applicant.

Appeal from a non-discretionary – or stand-alone – SPR decision would first have had to proceed under G.L. c. 40A, § 8, (Administrative Appeal) before an appeal under G.L. c. 40A, § 17, (Court Appeal) is available, or an appeal under the *certiorari* provisions of G.L. c. 249, § 4. It can be perplexing where an appeal under § 8, to the ZBA is from an SPR decision of the ZBA itself; and bypassing a § 8, appeal would deprive the appellate court of jurisdiction.

An SPR applicant, unhappy with a SPR decision, must first exhaust administrative remedies by requesting a building permit and appealing its denial to the Zoning Board of Appeals. Other “parties in interest” who wish to appeal must await the building permit decision by the building inspector.

This would have left the denial of the building permit as perhaps the only available appellate route to follow. See *Cumberland Farms, Inc. v. Planning Board of Bourne*, in 2 decisions addressing these issues, the first in 2002 at [56 Mass. App. Ct. 605](#), 609 n. 10, and the second in 2006 at [67 Mass. App. Ct. 67](#), 69.

In all of these cases, there was no language in the local zoning bylaw or ordinance that directly addressed the appeal procedure from an SPR decision. Where site plan approval was non-discretionary and the zoning was silent, then direct court appeal was unavailable.

6.1.2 – Appeal Procedure; SPR as Special Permit – In 2002, the Superior Court ruled in [*Rehabilitative Resources, Inc. v. Gibson*](#) (15 Mass. L. Rprt. 506)(Superior Court CIVIL ACTION Worcester, SS 021550A (2002) that “[w]here the municipal body charged with the site plan review is designated a special permit granting authority for that purpose, a site plan review decision is directly appealable to the Superior Court pursuant to G.L. c. 40A, § 17.”

In addition, it also reiterated that: “When, however, the site plan review does not result in the issuance of a special permit, but is required in connection with the issuance of a building permit, the review is not a final action, but only a prerequisite to the grant of the [building] permit.” [*St. Botolph Citizens Comm., Inc. v. Boston Redevelopment Authority.*](#), 429 Mass. 1, 9 (1999). Thus, exhaustion of the administrative remedy afforded under Section 8 is required.

6.1.3 – APPEAL Procedure for a By-right, non-discretionary SPR with Zoning Bylaw or Ordinance Language – Common sense prevailed when the courts declared that a city or town may legally prescribe in its zoning ordinance or bylaw a direct appeals to either the courts pursuant to [G.L. c. 40A, § 17](#), or to the zoning board of appeals.

- Direct Appeal to the Court - In [*Wildstar Star Farm, LLC, v. Planning Board of Westwood & the Town of Westwood*](#), No. 11-P-142, February 15, 2012, one issue concerned the town bylaw that regulated the environmental impact and design review process (Environmental Impact and Design Review by-law) stated that “any decision of the planning board pursuant to this Section shall be appealed in accordance with [G.L. c. 40A, § 17] to a court of competent jurisdiction.”

This case, the Appeals Court noted, involved a site plan review process for a by-right use, but was unusual in that the town had expressly directed in its bylaw that exhaustion of remedies (i.e., issuance of a building permit and then appeal to the ZBA) would not be required. The plaintiffs were entitled to rely on the bylaw to appeal directly under § 17, and should not have to bear the delay or incur the expense by being required to exhaust administrative remedies before a court appeal.

In [*M & K Partners LLC v. Scardino*](#), Land Court Decision, MISC 14-481559 (July 30, 2014), the Land Court addressed the question of whether a site plan decision was properly appealed under G.L. c. 40A, § 17, where the Stoughton bylaw provided that “the appeal of any decision of the Planning Board hereunder shall be made in accordance with the provisions of MGL c. 40A, § 17.” There was a challenge to the validity of that bylaw provision.

In analyzing prior case law, the Land Court said that it was important to determine:
a) whether there was language in the zoning bylaw or ordinance expressly providing

for direct appeal; and b) if not, whether the site plan decision had a discretionary element or not. If the reviewing board had discretion to refuse approval, the decision was considered in the nature of a special permit and immediately appealable pursuant to c. 40A, § 17.

However, the Court held that a town may adopt a zoning bylaw providing for immediate appeal of a site plan review decision under c. 40A, § 17, even if it is of the

“non-discretionary” type otherwise not appealable until the issuance of a building permit.

- Direct Appeal to the ZBA - In [Coco Bella, LLC v. Town of Hopkinton Board of Appeals](#), et. al (Land Court) Case 13 Misc. 480509 (2014), the court noted that “[t]he Hopkinton Bylaw explicitly provides that a party aggrieved by the Planning Board’s Site Plan Review decision may appeal directly to the Zoning Board of Appeals. Such an appeal is not predicated upon the issuance or denial of a building permit.” Relying on the Wildstar Farm case, the Land Court noted that where the town’s bylaw specifically provides for an appeal process from SPR decisions that does not rely on an “exhaustion of remedies” process, then the applicant is entitled to rely on the bylaw language.

7.0 – Special Permit/Site Plan Review

7.1 – SP/SPR – A number of communities have combined the site plan review process with a special permit process. It is important to know that whatever a community may call this combined process, it is, in fact, a special permit matter that requires adherence to all of the provisions related to special permits (procedures, timelines, hearings, decisions, appeals etc.) found in G.L. c. 40A § 9 and § 11.

7.2 – SPR PLUS SP – Other communities have adopted both a site plan review process and a special permit process and apply both to certain uses. Thus, a particular use is required to obtain both a SPR approval and a special permit approval. It is sometimes the case that one board, usually the planning board, will act on the SPR and another board, such as the zoning board of appeals, will act on the special permit. In those instances, the community should strive to have similar criteria and standards apply to the use for both of the permit processes in order to avoid confusion and to offer a degree of fairness to the applicant.

8.0 – Site Plan Review – Educational & Religious Institutions

8.1 – G.L. CHAPTER 40A, SECTION 3 – Among the uses in c. 40A, § 3, that have additional protections from zoning regulations are religious and educational institutions. In part, this section reads:

No zoning ordinance or by-law shall . . . prohibit, regulate or restrict the use of land or structures for religious purpose or for educational purposes on land owned or leased by the commonwealth or any of its agencies, subdivisions or bodies politic, or by a religious sect or denomination, or by a nonprofit educational corporation; provided however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements.

8.2 – DOVER USES – The language noted in Section 8.1 above refers to what are called Dover uses based on a court decision from the Town of Dover ([Attorney General v. Dover](#), 327 Mass. 601 (1951)). Site plan review, if untethered to a special permit, does not equip the site plan review board with the same latitude or discretion available to it when deciding on a special permit application. Where under a local ordinance or bylaw site plan review is required for uses enjoying the protections of G.L. c. 40A, § 3, the conditions imposed must remain within limits of regulatory power over so-called Dover uses set down in G.L. c. 40, § 3.

8.3 – REASONABLE REGULATIONS – Typically, this topic arises in the context of educational and religious uses. Very early in the history of site plan review, the Appeals Court addressed this point in [*The Bible Speaks v. Board of Appeals of Lenox*](#), 8 Mass. App. Ct. 19 (1979). In *Bible Speaks*, the Appeals Court discusses the differences between site plan and special permits. It held that portions of a town's zoning bylaw which imposed bulk, dimensional, and parking restrictions on educational uses were valid as the type of reasonable regulations authorized by G. L. c. 40A, § 3. Reasonable regulations were found to be severable from other portions of a bylaw or ordinance that went beyond the scope of regulations permitted under § 3.

Moreover, conditions imposed under site plan review cannot take away or seriously impair as of right uses or uses protected under § 3. Citing to *Bible Speaks*, the SJC in [*Trustees of Tufts College v. City of Medford*](#), 415 Mass. 753 (Mass., 1993), wrote that “a zoning requirement that results in something less than nullification of a proposed educational use may be unreasonable within the meaning of the Dover Amendment.”

Section 4-18

Public Hearing Notice Requirements

[G.L. c. 40A, § 11 & G.L. c. 4, § 13]

1.0 – Introduction

1.1 – STATUTORY REFERENCE – Notice requirements that communities must follow for zoning related public hearings are covered by [G.L. c. 40A, § 11](#). Effective January 1, 2017, a new section was added to G.L. c. 4, regarding electronic publication of legal notices. [G.L. c. 4, § 13](#) requires public legal notices to be posted electronically. (See Section 2.2 below.)

Compliance with the notice requirements of the Open Meeting Law (G.L. c. 30A, § 18 et. seq.) is always required in addition to those of G.L. 40A, § 11, and c. 4, § 13.^{7,8}

2.0 – Notice

2.1 – NOTICE REQUIREMENTS – G.L. c. 40A, § 11 – Public hearings notices shall comply with the following:

2.1.1 – Publication of Notice - Whenever a public hearing notice is required it shall be published in a newspaper of general circulation in the city or town in each of 2 successive weeks. The first publication shall not be less than 14 days before the day of the hearing. All days of the week count toward the 14 days, including those dates on which no hearing may be held. [See Section 5.1 below] The date of the hearing itself is not counted.

2.1.2 – Posting of Notice – In addition to publication, a notice of the public hearing shall be posted in a conspicuous place in the city or town hall for a period of not less than 14 days before the day of the hearing. All days of the week count toward the 14 days, but the date of the hearing itself is not counted.

2.1.3 – Mailing Responsibility – In all cases where notice to individuals or specific boards or other agencies is required, notice shall be sent by mail, postage prepaid. While certified mail is not mandatory, it is evidence of compliance with notice requirements.

The mailing of this notice must be done by the board or its agent; it cannot be delegated to the petitioner. [Kane v. Board of Appeals of Medford](#), 273 Mass. 97 (1930).

2.1.4 – Defect in Notice – G.L. c. 40A, § 5, states: “*No defect in the form of any notice . . . shall invalidate any zoning ordinances or bylaws unless such defect is found to be misleading.*”

In [Town of Burlington v. Dunne](#), 318 Mass. 216 (1945) the court established standards that

⁷See Chapter 4, Sections 4-32 and 4-33 for detailed tables and charts regarding timelines for zoning actions, including notice requirements.

⁸Public notice requirements for a by-right Site Plan Review process are determined by local bylaw, ordinance, or rules and regulations.

were required for hearing notices. In the this decision, the court determined that a notice that fails to provide information required by statute or fails to provide a clear description of the matter subject to the hearing would constitute a misleading notice.

The *Kane* decision also states that a defect in the general notice to the public cannot be overcome by the appearance of some citizens and the absence of objection to the defect. All citizens are entitled to the statutory notice and the opportunity to be heard after it is given.

2.2 – NOTICE REQUIREMENTS – G.L. c. 4, § 13 – In addition to the notice requirements in Section 2.1 above, c. 4, § 13, requires electronic publication of legal notices, which include public hearing notices. Notices shall comply with the following:

2.2.1 – Website Postings – In addition to the publication of the legal notice in the print edition of the local newspaper, it shall also be posted on the newspaper’s website as well as the statewide website established and maintained as a repository of legal notices. If a newspaper does not maintain a website, then the legal notice printed in the newspaper shall reference the statewide website.

2.2.2 – Website Requirements – When a legal notice is posted on the website of a newspaper and the statewide website, the operator of the website shall:

- ensure access by the public to the website at all times;
- make the full text of the legal notice available in a searchable format for the time period that the notice is required to be posted;
- ensure that the website substantially complies with the accessibility standards of § 508 of the federal Rehabilitation Act of 1972, as amended and codified at 29 U.S.C. section 794d and that it is capable of performing searches for notices on the website;
- provide access to view legal notices on the website, for free, provided that operators of newspaper websites may charge a fee for enhanced search and customized content delivery features;
- maintain an archive of legal notices for at least 90 days for notices that are no longer displayed on the website; and
- charge no additional fee for publication on a website in addition to the fee for publishing the notice in the print newspaper.

2.2.3 – Website Posting Errors – Any error in the posting of the legal notice on a local newspaper or statewide website that is the result of either (a) an error of the website operator, or (b) a temporary website outage or service interruption, which prevents the publication of the notice or the display of a legal notice on the website shall not constitute a defect in the publication of the legal notice. However, the legal notice is required to appear correctly in the newspaper’s print publication and it must satisfy all other legal requirements.

2.3 – WAIVER OF NOTICE – The permit granting authority or special permit granting authority is empowered to accept a waiver from any party to whom mailed notice is required but who did not receive a mailed notice. The PGA or SPGA may also accept an affidavit of actual notice to any successor record owner who may not have received a mailed notice; in this case, the board may give special notice to this person, giving not less than 5 nor more than 10 additional days to reply.

3.0 – Contents of Public Hearing Notice

3.1 – PUBLIC HEARING NOTICES – Notices of public hearings shall contain:

- the name of the petitioner;
- a description of the area or premises;
- street address, if any, or other adequate description of the location of the property;
- the date, time and place of the public hearing;
- the subject matter of the public hearing; and
- the nature of the action or relief requested, if any.

The statute does not specify the format of the notice. Letters or postcards can be used for mailings to the parties in interest.

4.0 – Parties in Interest

4.1 – PARTIES IN INTEREST – “Parties in Interest” shall mean all of the following:

- the petitioner;
- abutters;
- owners of land directly opposite on any public or private way;
- abutters to the abutters within 300 feet of the property line of the petitioner as they appear on the most recent tax list and including land of such property owners within an adjacent city or town;
- the planning board of the city or town where the property is located; and
- the planning board of every abutting city and town.

4.2 – ASSESSOR’S TAX LIST – The most recent tax list shall be used to determine the abutters’ list. The assessor shall certify to the permit granting authority or special permit granting authority the names and addresses of the parties in interest.

4.3 – OTHER BOARDS AND OFFICIALS – Notice may also be required by the zoning ordinance or bylaw – as distinct from state law – to the board of health, the planning board or department, the city or town engineer, the conservation commission, or any other town agency or board.

5.0 – Public Hearing Date Limitation

5.1 – CERTAIN DAYS EXCLUDED – No public hearing required by Chapter 40A for special permits, variances, and appeals shall be held on any day on which a state or municipal election, primary, or caucus is held in the city or town.

6.0 – Planning Board Consolidated Hearing

6.1 – SPECIAL PERMIT & SUBDIVISION REVIEW – When the planning board is the special permit granting authority for a development that is also subject to a definitive subdivision plan process, the board may hold a consolidated hearing for both special permit and the definitive subdivision plan. The board may publish and post a single advertisement giving notice of the consolidated hearing.

Section 4-19

Variances & Special Permits – Decision Notice; Effective Date; & Exercising Special Permit Rights

[G.L. c. 40A, § 11]

1.0 – Introduction

1.1 – OVERVIEW – In addition to the notice requirements for public hearings (see Chapter 4, §§ 4-18 for more information on notice requirements), [G.L. c. 40A, § 11](#), also covers the requirements for providing a copy of the decision to the applicant, the filing of a decision, the appeals period, and special provisions relating to exercising of special permit rights.

2.0 – Decision Considerations

2.1 – DECISION PROVIDED TO APPLICANT – Upon the granting of a variance or special permit, or any extension, modification, or renewal of the permit, the permit granting authority (PGA) or the special permit granting authority (SPGA) shall provide a copy of its decision to the owner, or applicant if other than the owner.

2.2 – COPIES OF DECISIONS PROVIDED TO CERTAIN PARTIES – Chapter 40A, § 9, requires that notice of the decision shall be mailed to the petitioner, to “parties in interest,” and to every person at the public hearing who requested that notice be sent to them and provided an address for that purpose.

The notice of the decision shall specify that any appeals of the decision shall be taken within 20 days of the filing of the decision with the city or town clerk.

2.3 – CONTENTS OF DECISION– The decision should first make clear what specifically is being granted or denied (special permit or variance) and shall include the following information:

- name & address of owner;
- identification of the land subject to the permit (best practice includes providing a title reference, since the decision must be recorded at the Registry of Deeds);
- a statement setting forth compliance with the statutory requirements for the issuance of the permit; and
- certification that copies of the decision and all plans referred to in the decision have been filed with the planning board and city or town clerk

In [Spaulding v. Board of Appeals of Leicester](#), 334 Mass. 688 (1956), the Court concluded that a mere written vote of the board that does not expressly on its face assert to be a decision granting a variance or special permit is not a valid decision and must be annulled.

2.4 – DECISION & STATEMENT OF COMPLIANCE – A statement of compliance with the statutory requirements for the issuance of a permit is necessary. This statement cannot be a mere repetition of the statutory words of either c. 40A or local zoning regulations, but must include adequate findings and facts that justify the decision of the board, particularly if the decision is for approval of the permit. As required by [G.L. c. 40A, § 15](#), (for the PGA) and [G.L. c. 40A, § 9](#), (for the SPGA), the board “*shall cause to be made a detailed record of its proceedings . . . setting forth clearly the reason for its decision and its official actions . . .*” (See Guidebook Chapter 8, § 8-05, for more information on “Findings.”)

3.0 – Effective Date, Filing of Decision and Appeal Period

3.1 – EFFECTIVE DATE – VARIANCE DECISION – No variance, or extension, modification, or renewal, shall take effect until a copy of the decision bearing the certification of the city or town clerk that 20 days have elapsed since the decision was filed with the clerk and no appeal has been filed, or that if an appeal has been filed, it has been dismissed or denied, has been recorded at the Registry of Deeds (or for registered land, noted on the owner’s certificate of title).

3.2 – VARIANCE APPROVED BY CONSTRUCTIVE GRANT – If the variance has been approved because the permit granting authority failed to act within the required time period for action, a copy of the variance application with the certification of the city or town clerk shall be recorded at the Registry of Deeds (or for registered land, noted on the owner’s certificate of title) prior to the variance becoming effective.

The clerk’s certificate shall state that the permit granting authority failed to act within the time required and either no appeal has been filed and therefore the permit has been granted by failure to act, or if an appeal has been filed it has been dismissed or denied.

3.3 – EFFECTIVE DATE – SPECIAL PERMIT DECISION – No special permit, or extension, modification, or renewal, shall take effect until a copy of the decision bearing the certification of the city or town clerk that 20 days have elapsed since the decision was filed with the clerk and that either no appeal has been filed, or that an appeal has been filed. If an appeal has been filed, an applicant may exercise the rights of the special permit during the appeal at their own risk. (See Section 4.1 below)

3.4 – SPECIAL PERMIT APPROVED BY CONSTRUCTIVE GRANT – If the special permit has been approved because the special permit granting authority failed to act within the required time period for action, a copy of the special permit application with by the certification of the city or town clerk shall be recorded at the Registry of Deeds (or for registered land, noted on the owner’s certificate of title) prior to the special permit becoming effective.

The clerk’s certificate shall state that the special permit granting authority failed to act within the time required and either no appeal has been filed and therefore the permit has been granted by failure to act, or if an appeal has been filed it has been dismissed or denied.

3.5 – RECORDING THE DECISION – The statute requires that the fee for recording the decision with the Registry of Deeds shall be paid by the owner or applicant. In addition, the statute requires all special permits and variances to be recorded before they take effect. No building permit or occupancy permit can be issued prior to the recording. The statute is silent as to who may record the decision.

3.6 – Tables – The two tables below provide information on “Recording the Variance and Special Permit Decision & Effective Date of the Decision”.

Variance - Recording and Effective Date			
Variance was approved by PGA and the decision was filed with municipal clerk within the time prescribed		PGA fails to act within time prescribed (Constructive Grant)	
No Appeal	Appeal	No Appeal	Appeal
Clerk certifies: (1) 20 days have elapsed since decision was filed with municipal clerk; (2) no appeal has been filed.	Clerk certifies: (1) 20 days have elapsed since decision was filed with municipal clerk; (2) an appeal has been filed; (3) the appeal has been dismissed or denied.	[Assuming that the “constructive grant” has been properly claimed – see Note at the bottom of Table below] Clerk provides a copy of petition, and certifies: (1) the PGA failed to act within the time prescribed; (2) no appeal from the constructive grant has been filed within 20 days of the applicants notice to the clerk claiming the constructive grant;; (3) the grant of the petition has become final.	[Assuming that the “constructive grant” has been properly claimed – see Note at the bottom of the Table below] Clerk provides a copy of petition, and certifies: (1) the PGA failed to act within the time prescribed; (2) an appeal from the constructive grant has been filed within 20 days of the applicants notice to the clerk claiming the constructive grant; (3) the appeal has been dismissed or denied.
Copy of decision bearing clerk’s certificate is recorded in the Registry of Deeds, whereupon the variance may be exercised provided if done so within the 1-year period prescribed by G.L. c. 40A, § 10.		Copy of petition and clerk’s certificate is recorded in the Registry of Deeds, whereupon the variance may be exercised provided if done so within the 1-year period prescribed by G.L. c. 40A, § 10.	
Note – Under G.L. c. 40A, §§ 9 and 15, constructive approval requires that the applicant, within 14 days of the date prescribed for the PGA to act on an application for a variance, give notice to the municipal clerk (and to parties in interest) that the application for the variance was constructively approved, the notice specifying that any appeal of the constructive approval must be made pursuant to G.L. c. 40A, § 17, within 20 days of the date notice filed with the municipal clerk.			

Special Permit - Recording and Effective Date			
Petition for Special Permit is approved by the PGA or SPGA and was filed with municipal clerk within the time prescribed		PGA or SPGA fails to act within time prescribed (Constructive Grant)	
No Appeal	Appeal	No Appeal	Appeal
Clerk certifies: (1) 20 days have elapsed since decision was filed with municipal clerk; (2) no appeal has been filed.	Clerk certifies: (1) 20 days have elapsed since decision was filed with municipal clerk; (2) an appeal has been filed.	[Assuming that the “constructive grant” has been properly claimed – see Note at the bottom of the Table] Clerk provides a copy of petition, and certifies: (1) the PGA or SPGA failed to act within the time prescribed; (2) no appeal from the constructive grant has been filed within 20 days of the applicants notice to the clerk claiming the constructive grant; (3) the grant of the petition has become final.	[Assuming that the “constructive grant” has been properly claimed – see Note at the bottom of the Table] Clerk provides a copy of petition, and certifies: (1) the PGA or SPGA failed to act within the time prescribed; (2) an appeal from the constructive grant has been filed within 20 days of the applicants notice to the clerk claiming the constructive grant; (3) the appeal has been dismissed or denied.
Copy of decision bearing clerk’s certificate is recorded in the Registry of Deeds, whereupon the special permit takes effect. (See Section 4.1 below)		Copy of petition and clerk’s certificate is recorded in the Registry of Deeds, whereupon special permit takes effect. (See Section 4.1 below)	
Note – Under G.L. c. 40A, §§ 9 and 15, constructive approval requires that the applicant, within 14 days of the date prescribed for the PGA or SPGA to act on an application for a variance or special permit, give notice to the municipal clerk (and to parties in interest) that the application for the variance was constructively approved, the notice specifying that any appeal of the constructive approval must be made pursuant to G.L. c. 40A, § 17, within 20 days of the date notice filed with the municipal clerk.			

4.0 – Exercising Special Permit Rights During an Appeal

4.1 – EXERCISING SPECIAL PERMIT RIGHTS DURING AN APPEAL – THE RISK – Unlike a variance, the special permit applicant may exercise the rights conferred by the special permit approval even when an appeal has been filed; but G.L. c. 40A, § 11 states: “*the person exercising rights under a duly appealed special permit does so at risk that a court will reverse the permit and that any construction performed*”

under the permit may be ordered undone.”

An unpublished decision of the Appeals Court that illustrates the risks of proceeding “at your own risk” is the 2011 decision in *Schey v. ZBA of Marblehead*, 80 Mass. App. Ct. 1103 (2011). In that case, the Appeals Court affirmed the Land Court’s earlier decision (See [Schey v. ZBA of Marblehead](#), Land Ct. Misc. 95-221634 (2011)) upholding the building inspector’s order to remove a dwelling constructed following the grant of a special permit and the issuance of a valid building permit. The landowner’s decision to build during the pendency of the appeal drew a warning from the Court that construction would be at the landowner’s own risk. The Court’s determination that ZBA had erred in granting the special permit set the stage for the building inspector to order the removal of the dwelling.

That no mistake be made about the seriousness of the Court’s decision, the Appeals Court confirmed the Land Court judge’s statement that he would entertain a motion for contempt on the part of the landowner if the dwelling were not removed by a stated date.

Proceeding at your own risk under G.L. c. 40A, § 11, during the pending of an appeal does not terminate or shorten the tolling of the 12 month period provided for by the second paragraph of G.L. c. 40A, § 6, which states:

A zoning ordinance or bylaw shall provide that construction or operations under a building or special permit shall conform to any subsequent amendment of the ordinance or bylaw unless the use or construction is commenced within a period of not more than 12 months after the issuance of the permit, and in cases involving construction, unless such construction is continued through to completion as continuously and expeditiously as is reasonable.

Section 4-20

Repetitive Petition

[G.L. c. 40A, § 16]

1.0 – Introduction

1.1 – BACKGROUND – [G.L. c. 40A, § 16](#), provides that if a special permit, variance, or appeals application has been “*unfavorably and finally acted upon*” by the special permit granting authority (SPGA) or permit granting authority (PGA), that application cannot normally be resubmitted to the authority for a period of 2 years. However, § 16 does allow for a procedure (Repetitive Petition) in which the application can be considered within the 2-year time period.

1.2 – ZONING AMENDMENT REPETITIVE PETITION – G.L. c. 40A, § 16, deals with appeals, special permits, and variances, which is the focus of this Section 4-20. Be aware, however, that there is another repetitive petition process for zoning adoption and amendments found in [G.L. c. 40A, § 5](#). Section 5 provides that no zoning ordinance, bylaw, or amendment which has been unfavorably acted upon shall be acted upon favorably by a city council or town meeting within 2 years of the date of the unfavorable action unless the planning board recommends adoption of the ordinance, bylaw, or amendment in its report to town meeting at the time of reconsideration.

1.3 – PURPOSE & TIMELINE – In [Ranney v. Board of Appeals of Nantucket](#), 11 Mass. App. Ct. 112 (1981), the Court noted that the purpose underlying § 16 is to provide for “*finality to administrative proceedings and to spare affected property owners from having to go repeatedly to the barricades on the same issue.*” In [Building Inspector of Attleboro v. Attleboro Landfill, Inc.](#), 384 Mass. 109 (1981), the SJC stated that the clock begins on the 2-year period when the decision of unfavorable action is filed with the city or town clerk.

2.0 – Procedures

2.1 – ACTION STEPS, DATES, VOTES – In order for a repetitive petition to be considered within the 2-year time period, a number of action steps must be taken which are covered in the table below. For certain actions in the repetitive petition process where a vote is required, the statute is silent as to the required vote. Where a statute is silent, by default, the quantum of vote should be understood to mean a simple majority of the board. For other actions, the applicable statute prescribes a higher quantum, such as 2/3rds, 4/5ths, or “*all but one.*” For details, see the following table.

“A” = Action

Repetitive Petition			
Action		Action Date	Comment
A1	PGA/SPGA Action – The board acts unfavorably on an appeal, application, or petition for special permit or variance (“petition” for purposes of this table)		Final action occurs with the filing of the unfavorable decision with the municipal clerk.

Repetitive Petition			
Action		Action Date	Comment
A2	The petition is refiled after to two-year period has lapsed.	Can be filed after the 2-year time period or can be filed within 2 years of unfavorable final action. (See comment to the right.)	The statute does not actually prohibit reconsideration filing within the 2-year period; only that favorable action on the refiled petition must be deferred until the 2-year period has elapsed.
A3	The petition is refiled within the two-year time period. Conditions Satisfied – For any petition refiled within the 2-year period to advance within that 2-year time period and to be acted upon favorably by the PGA/SPGA, the following 2 conditions must be satisfied: All but one member of the planning board, after notice to all parties in interest, consents “thereto” and, The PGA/SPGA finds, by a unanimous vote of a board of 3 members or by a vote of 4 members of a board of 5 members or two-thirds vote of a board of more than 5 members, “<i>specific and material changes in the conditions upon which the previous unfavorable action was based.</i>”	The statute is silent on both: (i) the time period within which the planning board must consider and vote its consent and (ii) the time period within which the SPGA or PGA has must consider and vote on the repetitive petition. For the SPGA/PGA, it would make sense that body follow the same required time periods for public hearing and decision making used for the original application. For the planning board, it should act in a reasonable time period in considering the matter.	The statute is silent on which board acts first, the planning board in giving its “consent” or the PGA/SPGA in making the requisite finding. Moreover, the statute is ambiguous as to what the planning board’s “consent” relates to, whether merely to the refilling itself, the changed conditions, or the PGA/SPGA findings. However, in Paquin v. Board of Appeals of Barnstable , 27 Mass. App. Ct. 577, (1989), the court noted that it is likely that “consent” refers to the planning board’s approval for the reconsideration of the application based on specific and materials changes.
A4	Planning Board Notice - The board must give notice to all parties in interest of the time and place of the meeting where the board will consider the petitioner’s request for its refiled petition to proceed within the 2-year period.	The statute is silent on a timeline for this notice.	While the statute itself is silent on how notice is to be given, practical steps should be taken to assure that all parties in interest receive actual mailed notice of the public meeting of the board in which the matter is to be considered.

Repetitive Petition			
Action		Action Date	Comment
A5	Planning Board Vote – All but one member of the planning board (the entire board membership, not taking vacancies into account and not just a quorum) must vote consent for the repetitive petition.		Thus the required vote of the board would be: 4 of 5 for a 5 member board 6 of 7 for a 7 member board 8 of 9 for a 9 member board
A6	New Application - If both of the forgoing conditions are satisfied – i.e., planning board consent and PGA/SPGA findings of specific and material changes – the refilled appeal, special permit, or variance application will be treated as a new application and must then be acted upon in the same way as if an initial filing.		The courts appear to accept local decisions relating to sequencing and consolidating the board actions so long both of the statutory conditions are satisfied. The authors are aware of no court case dispelling the murkiness surrounding the unfortunate wording of the statute.
A7	SPGA/PGA Public Hearing on the New Application – A new public hearing is required to be held by the SPGA/PGA; but if the board has made the statutory findings for a repetitive petition at a public hearing for which full statutory notice has been given, the board will have the authority also to act at that hearing on the substantive matter of the application without the need for further notice.	Notice and timelines are in accordance with the provisions of Chapter 40A for the individual permit, i.e., special permit, variance, or appeals.	A hearing on a repetitive petition application is not limited to evidence received at the hearing on the first application.
A8	SPGA/PGA Vote – A supermajority vote is required for the board to act on the new application.		The supermajority vote is of the entire membership, not just the quorum present and voting.
A9	Findings – The SPGA or the PGA must make findings of specific and material changes in the conditions upon which the previous unfavorable action was based, and must describe such changes in the record of its proceedings.		For a decision addressing what “ <i>specific and material changes</i> ” means, see Ranney v. Board of Appeals of Nantucket , 11 Mass. App. Ct. 112 (1981) and Section 3.2 below.
A10	Withdrawal - The petitioner for a variance or special permit may withdraw the petition “without prejudice”.	The withdrawal must occur prior to the publication of the notice of the public hearing.	This means that the withdrawal would not trigger the 2-year bar to re-filing, and the matter may be re-filed at any time. However, once the notice of the public hearing on the initial filing has been published, the petition may be withdrawn “without prejudice” only with the approval of the SPGA or PGA.

2.2 – SUMMARY – If the repetitive petition is filed more than 2 years after unfavorable final action, it is simply a new petition and shall be processed by the petition board in that manner. While the petition may be filed less than 2 years after unfavorable action, it may not be processed as a new petition until after 2 years following unfavorable final action.

Alternatively, it may be processed on the “accelerated” track within the 2 years as a repetitive petition request provided for in G.L. 40A, § 16.

The following therefore focuses solely on the “accelerated” repetitive petition track:

Action #1 – Repetitive Petition Filing – The petition is filed with the board that issued the unfavorable final action.

Action #2 – The Section 16 Request – The applicant requests the planning board grant its “consent,” and requests from the board that issued the unfavorable final action its new “findings” consistent with § 16. If the planning board functions as both boards, these 2 requests can be consolidated.

Action #3 – The Repetitive Petition Hearing – If the applicant has obtained both the “consent” of the planning board, and the “findings” of the board that issued the unfavorable final action, then after the appropriate statutory notice required for the repetitive petition, the hearing on the underlying petition may proceed as if it were a new petition. The board hearing the petition may choose to consolidate its hearing on the new petition with its action on the request for findings under Action #2. Of course, all statutory notice requirements for the petition must have been met.

3.0 – Additional Considerations

3.1 – WHEN IS ACTION “UNFAVORABLE”? – When a petition is “denied,” the conclusion is that the action was final and “unfavorable;” but when a petition is granted with conditions that the applicant considers overly burdensome, the 2-year bar to re-filing may still apply. In [Hall v. Zoning Board of Appeals of Edgartown](#), 40 Mass. App. Ct. 918, 919 (1986), the plaintiff argued entitlement to re-file within 2 years of an approval with onerous conditions. The Court acknowledged that “*sometimes a condition of a special permit is so burdensome that the grant of an application with conditions is a decision from which an appeal can be taken pursuant to G. L. c. 40A, s. 17.*”

The lower court in *Hall* observed that if the statute were interpreted to allow any “*disappointed applicant . . . [to] evade the manifest statutory purposes as well as the exclusivity provisions of c. 40A, s. 17, by seeking to shed a disagreeable condition through repetitive applications at frequent intervals, . . .*” the policy which underlies the statutory text of giving finality to administrative proceedings and of sparing affected property owners from having to go repeatedly to the barricades on the same issue would be frustrated, citing [Ranney v. Board of Appeals of Nantucket](#), 11 Mass. App. Ct. 112 (1981).

Thus, the statutory prohibition of re-filing the petition within 2-year period is also applicable to the circumstance in which approval had been granted with onerous conditions.

3.2 – WHAT IS A “SPECIFIC AND MATERIAL CHANGE”? – The statute is silent on an important element of this procedure, and the courts provide only general guidance. In a 1981 Appeals Court decision – [Ranney v. Board of Appeals of Nantucket](#), 11 Mass. App. Ct. 112 (1981) – the Court said that it is principally

for the local board to determine “whether the plans or surrounding conditions have changed sufficiently to justify reapplication.” (Emphasis added.) The Court stated that the “*specific and material changes*” which this section requires must be something less than differences so radical that they would preclude scrutiny under the statute altogether.

In *Ranney* the Court found that the planning board was warranted in concluding that the changes noted in the applicant’s revised application for a special permit, which were responsive to the reasons the board gave in its rejection of the first application, were “*specific and material*” within meaning of § 16.

The board has discretion to determine what the specific and material changes are based on the evidence of record, and to make written findings of those specific and material changes in its decision. Considerable deference is given to the board’s discretion in determining what conditions to attach to the permit and the materiality of any changes in circumstances. [*Klein v. Planning Bd. of Wrentham*](#), 31 Mass. App. Ct. 777 (1992).

3.3 – TYPE OF RELIEF REQUESTED – Where an application seeks relief of a different or alternative sort (e.g., a variance) than the relief sought in the original unfavorable decision (e.g., a special permit), then the 2-year prohibition of “*repetitive applications*” does not apply.

The 2-year prohibition is neither applicable where the prior action was dismissed as “untimely”, nor where the prior action had been withdrawn “without prejudice.” [*Griffith v. Board of Appeals of Framingham*](#), 40 Mass. App. Ct. 918 (1989).

Section 4-21

Enforcement

[G.L. c. 40A, § 7 and G.L. c. 40, § 21D]

1.0 – Introduction

1.1 – OVERVIEW – Zoning enforcement is covered by [G.L. c. 40A, § 7](#). In addition, [G.L. 40, § 21D](#), provides an alternative method of enforcement to the criminal proceedings found in § 7. Violations of municipal ordinances and bylaws are criminal in nature, and in the absence of the “non-criminal” disposition provisions of G.L. c. 40, § 21D, they must be prosecuted as misdemeanors. (See Section 4.0 below).

2.0 – Enforcement

2.1 – ZONING ENFORCEMENT OFFICER – The zoning enforcement officer shall be charged with enforcing the zoning ordinance or bylaw and may be the inspector of buildings, building commissioner, or local inspector. If none of the above are in a town, then it may be either the board of selectmen or a person or board designated by bylaw.

2.2 – PERMIT ISSUANCE/WITHHOLDING – The zoning enforcement officer shall withhold a permit for the construction, alteration, or moving of any building or structure if the construction, alteration, or moving activity would be in violation of any zoning ordinance or bylaw. No permit or license shall be issued for a new use of a building, structure, or land where such use would be in violation of any zoning ordinance or bylaw.

2.3 – REQUEST FOR ENFORCEMENT – If the officer charged with enforcement is requested in writing to enforce a bylaw or ordinance against a person allegedly in violation of the same, and the officer declines to act, then that officer, within 14 days of receipt of the request, shall notify the party requesting enforcement in writing and provide reasons for declining to act.

Under Massachusetts law, there is no appealable decision until and unless the officer charged with enforcement has issued a written denial of request to enforce the ordinance or bylaw. In [Elio v. Zoning Board of Appeals of Barnstable](#), 55 Mass. App. Ct. 424 (2002), it was held that the 14-day requirement in G.L. c. 40A, § 7, is directory and not mandatory and that the officer’s failure to respond within that time neither constitutes a constructive denial nor an issue appealable to the ZBA. It does, however, start the clock running on the 30-day court appeal period under G.L. c. 40A, § 15. [See also [Vokes v. Lovell, Inc.](#), 18 Mass. App. Ct. 471 (1984) and [Connors v. Annino](#), 460 Mass. 790 (2011)]

Reliance on opinions expressed by the building inspector or other local public officials is not sufficient to protect the owner from enforcement under this section. [Building Inspector of Malden v. Werlin Realty, Inc.](#), 349 Mass. 623 (1965). Municipalities are not ordinarily bound by acts of its officers from enforcing its zoning bylaw or ordinance. [Building Inspector of Lancaster v. Sanderson](#), 372 Mass. 157 (1977).

2.4 – ENFORCEMENT OF PERMIT CONDITIONS – Section 7 may also be used to enforce conditions imposed in special permits, variances, and site plan review decisions. An alleged violation under § 7 can be a violation of an zoning ordinance or bylaw, or a violation of the conditions of a variance or special permit.

In [*Wyman vs. Zoning Board of Appeals of Grafton*](#), 47 Mass. 635 (1999), the court determined that conditions of a variance or special permit are “*subsumed in the provisions of c. 40A . . . they are part of the zoning law to be enforced.*”

2.5 – AGGRIEVED PARTY – A person who requests in writing that the enforcement officer enforce the zoning bylaw need not be an aggrieved party. However to go beyond that stage, if the request for enforcement is rejected, a party must be a “person aggrieved” by the official’s action or non-action. [*Warrington v. Zoning Bd. of Appeals of Rutland*](#), 78 Mass. App. Ct. 903 (2010).

The right of appeal arises when the enforcement officer acts on the request or after 14 days have elapsed without official action. “Aggrievement” to challenge a decision requires a showing of more than minimal harm. The adverse effect on a plaintiff must be substantial enough to constitute actual aggrievement such that there can be no question that the plaintiff should be afforded the opportunity to seek a remedy. [*Kenner v. Zoning Bd. of Appeals of Chatham*](#), 459 Mass. 115 (2011).

2.6 – PENALTY/FINES – The bylaw or ordinance shall not assess a penalty of more than \$300 for a zoning violation. The bylaw or ordinance may specify that each day a violation continues it shall constitute a separate offense; however, monetary penalties for violations of a bylaw or ordinance silent on continuing violations are limited to \$300 total.

3.0 – Limitations on Enforcement

3.1 – OVERVIEW – Section 7 governs any action, suit, or proceeding in any court or administrative agency “*to recover a fine or damages or to compel the removal, alteration, or relocation of any structure or part of a structure or alteration of a structure*” for violation of the zoning ordinance or bylaw in accordance with G.L. c. 40A, §§ 8 and 17. There are 2 major limitations on any such effort, however.

3.1.1 – Six-Year Limitation (Uses and Structures) – Original Building Permit – The first limitation involves building permits and property that has been improved and used in accordance with the terms of the original building permit. There is a 6-year statute of limitations on zoning enforcement under this provision, from the commencement of the violation.

In this case any effort to recover a fine or damages or to compel the abandonment, limitation, or modification of the use allowed, or the removal, alteration, or relocation of any structure or part of a structure or alteration of a structure must be brought, and notice filed in the registry of deeds, within 6 years after the commencement of the violation.

3.1.2 – TEN-YEAR LIMITATION (STRUCTURES) – ZONING & PERMIT VIOLATIONS – The second limitation is more extensive in scope and involves structures – not uses – that violate the zoning ordinance or bylaw, or conditions of a special permit or variance, where such structures have not been improved or used in accordance with a building permit. There is a 10-year statute of limitations on enforcement under this provision.

This limitation provides that:

[N]o criminal or civil action intended to compel the removal, alteration, or relocation of a structure by reason of an alleged violation of this chapter or of an ordinance or by-law adopted under this chapter or the conditions of a variance or special permit shall be maintained unless the action, suit or proceeding is commenced and notice of the action, suit or proceeding is recorded in the registry of deeds for each county or district in which the land lies or, in the case of registered land, the notice is filed in the registry district in which the land lies within 10 years of the commencement of the alleged violation.

3.1.2.1 – STRUCTURE VERSUS USE – Note that unlike structural violations for which no permit was obtained, which enjoy a 10-year statute of limitations period, no such protection is afforded to use violations unsanctioned by any permit which are enforceable without limitation of time. [Moreis v. Oak Bluffs Bd. of Appeal](#), 62 Mass. App. Ct. 53 (2004),

3.1.2.2 – Illegal Structure Versus Legal Nonconforming Structure – Prior to November 2, 2016, the expiration of the 10-year statute governing enforcement of a zoning regulation did not remove the illegality of an unlawful structure; it simply protected it from enforcement action. A corollary of this had been that such a structure did not acquire the status of a lawful nonconforming structure and was thus barred from the latitude accorded under G.L. c. 40A, § 6, governing expansion and extension of nonconformities. [Patenaude v. Zoning Bd. of Appeals of Dracut](#), 82 Mass. App. Ct. 914 (2012), review denied, 464 Mass. 1104. (2013).

However, by § 2 of Chapter 184 of the Acts of 2016, effective November 2, 2016, such structures were accorded “legally non-conforming” status for purposes of G.L. c. 40A, § 6, as well as for any local ordinance or bylaw relating to non-conforming structures. The following 3 paragraphs were inserted into G.L. c. 40A, § 7:

If real property has been improved by the erection or alteration of 1 or more structures and the structures or alterations have been in existence for a period of at least 10 years and no notice of an action, suit or proceeding as to an alleged violation of this chapter or of an ordinance or by-law adopted under this chapter has been recorded in the registry of deeds for the county or district in which the real estate is located or, in the case of registered land, has been filed in the registry district in which the land is located within a period of 10 years from the date the structures were erected, then the structures shall be deemed, for zoning purposes, to be legally non-conforming structures subject to section 6 and any local ordinance or by-law relating to non-conforming structures.

Notice of an action, suit or proceeding shall include the name of not less than one of the owners of record, the name of the person initiating the action and adequate identification of the structure and the alleged violation.

The superior court and the land court shall have the jurisdiction to enforce the provisions of this chapter, and any ordinances or by-laws adopted thereunder, and may restrain by injunction violations thereof.

What this means is that property owners enjoying the enhanced benefits accorded under the 2016 statutory amendment and who wish to alter, extend or reconstruct a non-conforming structure may now apply for a G.L. c. 40A, § 6, “finding” or special permit in lieu of having to seek a variance.

3.2 – NOTICE – The notice of zoning enforcement under 3.1.1 and 3.1.2 above shall include the names of one or more of the owners of record, the name of the person initiating the action, adequate identification of the structure, and the violation alleged.

4.0 – Non-criminal Disposition

4.1 – INTRODUCTION – In lieu of enforcing zoning violations through the criminal proceedings of § 7, above, [G.L. 40, § 21D](#), equips cities and towns to adopt an ordinance or bylaw that provides for non-criminal disposition of violations of any ordinance or bylaw or rule or regulation, the violation of which is subject to a specific penalty.

4.2 – PROCESS – Any person empowered to enforce a local ordinance or bylaw may give a person who violates an ordinance or bylaw written notice to appear before the clerk of the district court not later than 21 days after the date of the notice. Any person notified may take one of the following actions:

- appear before the clerk of the district court and confess to the violation;
- pay the penalty for the violation to the city or town clerk; or
- if the person wishes to contest the notice they may, within 21 days of the date of the notice, request a hearing, in writing, before the district court.

4.3 – PENALTIES – Penalties shall not exceed \$300. Any penalties imposed under § 21D shall be paid to the city or town for use as it may decide. If the local ordinance or bylaw so provides, then each day of the violation shall be deemed a separate offense. It is important to note that § 21D cannot be used by the city or town when the penalty established in the ordinance or bylaw is expressed as a range – e.g., “an amount not to exceed \$300” – but is available for use only where the penalty is a specific amount – e.g., \$300.

Fines cannot be collected in civil enforcement proceedings. In [Burlington Sand & Gravel, Inc. v. Town of Harvard](#), 31 Mass. App. Ct. 261 (1961), the Appeals Court held that the Town of Harvard, which brought a zoning bylaw enforcement action under G.L. c. 40A, § 7, lacked authority under that section to seek the assessment of civil penalties (fines) but, instead, was limited to pursuing criminal prosecutions under G. L. c. 40, § 21, or noncriminal proceedings pursuant to G. L. c. 40, § 21D.

Section 4-22

Administrative Appeals

[G.L. c. 40A, §§ 8 & 15]

1.0 – Introduction

1.1 – OVERVIEW – This section focuses on administrative appeals which are governed by [G.L. c. 40A, § 8](#) (Basis for Appeal), and by [G.L. c. 40A, § 15](#) (Appeals Procedure). Appeals to the courts, often referred to as judicial review, are governed by [G.L. c. 40A, § 17](#), and covered in Section 4-23 of this Zoning Chapter.

2.0 – Basis for Appeal ([G.L. c. 40A, § 8](#))

2.1 – APPEALS TO THE PGA – Administrative appeals under §§ 8 and 15 are appeals to the permit granting authority (PGA) brought by any person aggrieved by reason of inability to obtain a permit (often a building permit) or enforcement action from any administrative officer under the provisions of this chapter (ordinarily the building inspector pursuant to [G.L. c. 40A, § 7](#)). The PGA may be either the zoning board of appeals or the zoning administrator.

Administrative appeals are available with respect to decisions of the building inspector for issuing permits that violate local zoning, or for withholding permits that would not violate local zoning.

2.2 – AGGRIEVED PERSON – An appeal to the permit granting authority may be taken by the following:

- any person aggrieved because of inability to obtain a permit or enforcement action by any administrative officer;
- the regional planning agency; or
- any person, including an officer or board of the city or town or of an abutting city or town, aggrieved by an order or decision of the building inspector or other administrative person, in violation of any provision of G.L. c. 40A or any bylaw or ordinance adopted under Chapter 40A.

The courts have held that an appeal by a municipal officer or board presumes the existence of official duties relating to the building code or local zoning, without which standing will not be recognized. This is discussed in [Planning Board of Marshfield v. Zoning Board of Pembroke](#), 427 Mass. 699 (1998). In addition, the Appeals Court also determined that while the planning board of Marshfield was a party in interest, that fact alone did not confer standing in order to appeal the decision of the zoning board of Pembroke.

2.3 – APPEAL OF A SITE PLAN REVIEW/APPROVAL – The thinking of the courts has evolved as to the appeal procedure for a site plan review/approval decision. While the early cases on this subject determined that an appeal of a Site Plan Review/Approval by the planning board is not appealable under § 8, later cases determined that cities and towns could include specific language in their zoning bylaw or ordinance that specified a particular appeal procedure.

In 2000, the Appeals Court has determined that the planning board's issuance of a site plan approval is not appealable under § 8, it being only a condition precedent to the issuance of a building permit. [*Dufault v. Millennium Power Partners, L.P.*](#), 46 Mass. App. Ct. 137 (2000).

Likewise, the denial of a site plan approval was determined to not be appealable under § 8, since it is the denial of the building permit by the building inspector that must be appealed. [*Cumberland Farms, Inc. v. Planning Board of Bourne*](#), 67 Mass. App. Ct. 67, 69 (2006)

More recently courts have determined that, if a local zoning bylaw or ordinance includes explicit language as to how to appeal a SPR, such language will prevail. Some cities and towns allow for direct appeal of a SPR decision to the Superior Court or Land Court under Chapter 40A, § 17, and at least one town has language that provides for direct appeal of a planning board SPR decision to the zoning board of appeals, without waiting for a decision on the building permit by the building inspector.

See Section 4-17, subsection 4.6 of this Guidebook, for more detailed information regarding appeals of SPR decisions.

2.4 – ACTION TIMELINES – Decisions of the building inspector relating to requests for enforcement of the zoning ordinance or bylaw under [G.L. c. 40A, § 7](#), are due within 14 days of a request, and are thus distinguishable from the 30 day appeal period from the issuance of a building permit. Failure by the building inspector to act within 14 days of an enforcement request, however, does not result in a constructive approval or denial; rather, such failure serves as the trigger of the right of administrative appeal to the PGA.

2.5 – LOCAL ZONING VS. STATE BUILDING CODE – The building inspector or building commissioner typically wear 2 hats, one (local) worn when enforcing the zoning ordinance or bylaw, and the other (state) worn when enforcing the state building code. It is only with respect to local zoning and not the state building code that building permit decisions of the building inspector are appealable to the permit granting authority. Building permits may be withheld for a new use of a building, structure, or land which use, building, or structure would be in violation of the local zoning ordinance or bylaw, even if compliant with the state building code. With respect to the state building code, appeals are to be filed with the state Board of Building Code Appeals.

3.0 – Appeals Procedure ([G.L. c. 40A, § 15](#))

3.1 – SECTION 8 APPEAL – An appeal under § 8 is commenced when a notice of appeal is filed with the city or town clerk within 30 days from the date of the order or decision being appealed. Separate from an appeal for failure to act within the 14-day deadline, the key date for determining an appealable decision of the zoning enforcement official is the date of the official's written decision, regardless of whether that is within or beyond the 14-day period in which it had become due. [*Vokes v. Avery W. Lovell, Inc.*](#), 18 Mass. App. Ct. 471 (1984).

The appeal shall specify the grounds of the appeal, and a copy of the appeal, including certification by the city or town clerk as to date and time filed, shall be filed with the officer or board whose decision is being appealed and to the PGA. That officer or board shall transmit to the PGA all documents of the record of the case in which the appeal has been taken. *“The statutory requirement that Section 15 appeals from the decisions of building inspectors ‘specify the grounds thereof’ we understand as mandatory rather than directory. Generally, boards of appeals are without power to act upon appeals in the absence of public hearings of which the public has been previously notified.”* See

[*DiGiovanni v. Board of Appeals of Rockport*](#), 19 Mass. App. Ct. 339, 344 (1985).

3.2 – CHALLENGES TO BUILDING PERMITS – Challenges to the issuance of a building permit have given rise to a curious line of cases that make an aggrieved person's standing to appeal under § 8 dependent on what the aggrieved person knew, or should have known, and when it was known. With knowledge, the aggrieved person must appeal within 30 days; without knowledge, enforcement may be sought for a period of 6 years under G.L. c. 40A, § 7.

In [*Connors v. Annino*](#), 460 Mass. 790, 795 (2011), the SJC barred a § 8, appeal by the plaintiff whose visit to town offices ought to have put plaintiff on notice that a building permit had been issued to an abutter, notwithstanding that plaintiff filed the appeal within 30 days of a formal notice but 35 days after the permit had been issued.

In the earlier case of [*Gallivan v. Town of Wellesley Zoning Board of Appeals*](#), 71 Mass. App. Ct. 850, 859 (2008), the Appeals Court commented that it would be unfair for an aggrieved person who did not have reasonable notice and an opportunity to appeal under § 8, to be deprived of the right to pursue enforcement under § 7.

Finally, in [*Richardson v. Board of Appeals of Chilmark*](#), 81 Mass. App. Ct. 912 (2012), the Appeals Court offered guidance on how to determine whether an aggrieved person had sufficient notice to bar a § 7, request for enforcement, thus limiting the plaintiff to the 30 day window of appeal under § 8.

Prudent recipients of a building permit have often taken steps to put persons of interest and the public on notice when a permit has been issued as insurance against an enforcement action by a party aggrieved during the 6-year period under § 7.

3.3 – APPEAL FROM THE ZONING ADMINISTRATOR – Any appeal to the board of appeals from a decision of a zoning administrator shall be taken within 30 days of the date of decision and shall be filed with the city or town clerk, specifying the grounds of the appeal, and a copy of the appeal, including certification by the clerk as to date and time filed, shall be filed with the office of the zoning administrator. The zoning administrator shall forward all case records to the board of appeals.

3.4 – NOTICE OF PUBLIC HEARING – A notice of a public hearing on the administrative appeal required by §15, is governed by procedures set forth in [G.L. c. 40A, § 11](#). This includes publication in a newspaper once in each of 2 successive weeks, the first not less than 14 days before the hearing; posting for not less than 14 days before the hearing; and, where otherwise required, notice by mail to individuals, boards, or agencies. Notices of public hearings shall contain:

- the name of the petitioner;
- a description of the area or premises;
- street address, if any, or other adequate description of the location of the property;
- the date, time and place of the public hearing;
- the subject matter of the public hearing; and
- the nature of the action or relief requested, if any.

3.5 – PROCEDURAL DEADLINES – The zoning board of appeals shall hold a public hearing within 65 days of the receipt of notice from the clerk of the filing of an appeal and shall make a decision within 100 days after the filing of an appeal. The required time limits for the public hearing or the decision may be extended by written agreement between the applicant and board of appeals with a copy of the

agreement filed in the office of the city or town clerk.

3.6 – PUBLIC HEARING – The hearing shall be open and accessible to the public. When the parties have concluded the presentation of evidence, the board should formally vote to close the hearing, or at least the evidentiary portion of the hearing, leaving time for the board to deliberate over its decision in a public meeting within the 100-day statutory period.

3.7 – REQUIRED VOTE – The vote required to reverse any order or decision of the administrative official shall be:

- concurring vote of all members of a 3-member board; or
- concurring vote of 4 members of a 5-member board.

3.8 – DECISION RECORD & FILING – The board shall make a detailed record of the proceedings, indicating the vote of each member, or if a member was absent or failed to vote. The record shall clearly indicate the reasons for its decision. The board shall file its decision with the city or town clerk within 14 days of making the decision. Note that the decision may be filed as late as the 114th day after the filing of the appeal if the board had made its decision on the 100th day.

3.9 – DECISION NOTICE – Notice of the decision shall be mailed to the person who appealed, to parties in interest, and to everyone at the public hearing who requested that notice be sent to them. The notice shall state that any appeal from the board's decision must be made within 20 days of the filing of the decision in the city or town clerk's office and shall be filed in accordance with G.L. c. 40A, § 17.

3.10 – CONSTRUCTIVE GRANT – Failure of the board to commence the hearing within 65 days, except for excessive or unjustified delay, does not result in a constructive grant; however, failure by the board to make its decision within 100 days of the filing of the appeal or extended time, if applicable, shall be deemed to be a constructive grant (approval) of the appeal, application or petition.

Failure either to file the decision with the city or town clerk or to file it within 14 days after the 100-day decision window may lead to a constructive grant.

In either case, and within 14 days of the expiration of the time limit, the appellant must notify the city or town clerk that the appeal has been constructively granted and that notice has been sent to all parties in interest that any appeal under [G.L. c. 40A, § 17](#), must be filed within 20 days of the filing of notice of constructive grant with the city or town clerk.

3.11 – APPEAL TO COURT; TIME PERIOD & NOTICE – Any court appeal of the permit granting authority decision on an administrative appeal shall be filed with the court within 20 days after the decision has been filed with the city or town clerk. Notice of having commenced the court appeal, plus a copy of the complaint filed in court, must then be filed by the appellant with the city or town clerk within that same 20 day time period (or by the next business day if the 20th day falls on a weekend or on a holiday in which the clerk's office is closed). Failure to meet this deadline is fatal. See [Bingham v. City Council of Fitchburg](#), 52 Mass. App. Ct. 566 (2001).

The notice need not be detailed, it being sufficient if the dispute appealed from is identified. The copy of the decision itself provides the details. (See Section 4-23 of this Zoning Chapter for more information regarding court appeals.)

Section 4-23

Court Appeals

[G.L. c. 40A, § 17]

1.0 – Introduction

1.1 – OVERVIEW – This section focuses on the procedures for initiating court appeals of special permits, variances, and administrative appeals decisions. Court appeals, often referred to as “judicial review”, are governed generally by [G.L. c. 40A, § 17](#). Administrative appeals are governed by [G.L. c. 40A, § 8](#), and are addressed in Zoning Chapter, Section 4-22, and administrative appeal procedures are governed by [G.L. c. 40A, § 15](#), also addressed in Section 4-22. The actual court trial procedures for a zoning appeal are beyond the scope of this Guidebook.

2.0 – Appeals Process

2.1 – ACTIONS APPEALABLE – The following may be appealed:

- a decision by a permit granting authority (PGA) or the special permit granting authority (SPGA);
- a failure by the board of appeals to take final action on a variance or appeals application within the time required;
- a failure by the SPGA to take final action on a special permit application within the time required; and
- a decision on a site plan review application only if there is specific language in the zoning bylaw or ordinance specifying a § 17 appeal.

2.2 – PARTIES IN THE APPEAL– The appellants may include persons who are aggrieved by the decision of any municipal officer or board relating to the zoning or the building code. In addition to the board whose decision is being appealed, the defendants could also be the original applicant, or petitioner in the matter that is appealed. Moreover, other persons may be permitted by the court to intervene in the case upon a motion to do so if they can demonstrate aggrieved status. Where the appellant is itself a municipal board the municipal attorney should be consulted regarding appeal procedures.

2.3 – STANDING – “Standing” is a legal term that is applied to determine whether a person claiming to be aggrieved has made a sufficient case to justify the appeal. Any of the “parties in interest”⁹ in the matter appealed from will enjoy a threshold presumption of being a “person aggrieved,” but this presumption can be challenged by the defendant(s). If the defendant challenges the aggrieved status of the appellant and states a reasonable basis for doing so, the burden shifts back to the appellant to establish some special kind of injury based on legitimate zoning concerns but different from impacts upon the community at large.

⁹ “Parties in interest” means “the petitioner, abutters, owners of land opposite on any public or private street or way, and abutters to abutters within three hundred feet of the property of the petitioner as they appear on the most recent applicable tax list.” [G.L. c. 40A, § 11](#).

In [*Planning Board of Marshfield v. Zoning Board of Pembroke*](#), 427 Mass. 699 (1998), the Supreme Judicial Court discussed this issue of standing in some detail. (Planning board appealing decision of board of appeals in another town.)

The Court in [*Barvenik v. Board of Aldermen of Newton*](#), 33 Mass. App. Ct. 129 (1992), expressed the concept of “standing” as being someone who is affected in the following manner: “ . . . if not a diminution in the value of his property, at least in his property or legal rights being more adversely affected by the activity authorized by the permit than (a) they are by present uses and activities or (b) they would be as a result of the uses and activities permitted as of right on the defendant’s locus.”

In [*Central Street, LLC v. Zoning Board of Appeals of Hudson*](#), 69 Mass. App. Ct. 487 (2007), the Court held that a claim of “ . . . diminution of property values must be derivative of or related to cognizable interests protected by the applicable zoning scheme.”

Other cases hold that general aesthetic concerns alone do not confer standing. It is frankly difficult to discern a history of clear guidance from the courts on standing to sustain an appeal under § 17; it is instead an aspect of appeals that are likely to be decided on a case-by-case basis.

2.4 – COURT JURISDICTION – An appellant may file an appeal with the following courts:

- Land Court
- Superior Court
- In Hampden County, or any other county with such a court, the appellant may also file with the Housing Court
- District Court, except in Hampden County

Note that if an appeal is filed in district court, any party has the right to file a claim for trial in the superior court within 25 days after service of the appeal is completed.

2.5 – APPEAL TIME PERIOD & NOTICE – The appeal shall be filed with the court within 20 days after the decision has been filed with the city or town clerk. Notice of having commenced the court appeal, plus a copy of the complaint filed in court, “ . . . shall be given to such city or town clerk so as to be received *within such twenty days*”. (or by the next business day if the 20th day falls on a weekend or on a holiday in which the clerk’s office is closed).

The notice to the clerk has been held to be “jurisdictional,” and failure to meet this deadline is fatal. See [*Bingham v. City Council of Fitchburg*](#), 52 Mass. App. Ct. 566 (2001). The notice need not be detailed, as long as the dispute appealed from is identified. The copy of the decision provides the details.

2.6 – WHAT CONSTITUTES “FILING” WITH THE MUNICIPAL CLERK? – While the requirement to file notice of appeal with the city or town clerk might appear to set a clear standard, notice to the clerk has been found to have been “given” in the statutory sense on facts short of the notice having actually been “filed” with the clerk. In [*Hickey v. ZBA of Dennis*](#), 93 Mass. App. Ct. 930 (2018), the Appeals Court’s approach amounted to: what did the clerk know, and when did the clerk know it?

In *Hickey* the appellant had timely commenced an appeal of the ZBA decision to Land Court. In an effort to comply with notice requirements of c. 40A, § 17, the appellant sent copies of the Land Court complaint to the members of the ZBA and a copy by certified mail addressed to the ZBA Chairman at town hall. Notice was not given to the town clerk; but the ZBA gave a copy to the town planner, who

in turn “told” an assistant town clerk that the ZBA had received notice of appeal – all of this within the 20-day period. *“Neither the town clerk nor the assistant town clerk saw a copy of the complaint prior to May 5th. On May 5th, the town clerk certified that she had not received notice of any appeal, . . .”*

Relying on its prior decision in [*Konover Management Corp. v. Planning Board of Auburn*](#), 32 Mass. App. Ct. 319 (1992), the Court found that the facts in *Hickey* to be sufficient to satisfy the notice requirements of § 17. In *Konover* the successful appellant had at least tried to send notice to the town clerk. Two notices were prepared, one for the town clerk and one for board; but the process server sent both in one envelope to the board. The town planner showed the assistant town clerk the front page of the complaint, but no formal notice was filed with the town clerk. In *Konover*, the Appeals Court found that the town clerk had actual notice of the appeal within 20 days, and this notice was sufficient to satisfy the statute. In a dissenting opinion in *Hickey*, however, Justice Singh noted that [unlike *Konover*] the plaintiffs made no attempt to provide the town clerk with timely notice as required by statute.

In conclusion it can only be said that while the mandatory notice to the clerk is jurisdictional and failure to give it can be fatal, appellate courts might well find that some unique chain of events amounts to an adequate notice under § 17.

2.5 – CONTENTS OF APPEAL – The complaint shall include the following:

- allegation that the board exceeded its authority;
- inclusion of any facts pertinent to issue; and
- a request that the decision be annulled.

A copy of the decision being appealed from, bearing the date it was filed, certified by the city or town clerk, shall also be attached to the complaint.

2.6 – NOTICE TO DEFENDANTS – If the complaint is filed by someone other than the original applicant, then the original applicant and all members of the entire board of appeals or SPGA, with their addresses, shall be named as defendants.

The plaintiff shall, within 14 days after filing the complaint in court, send written notice of having done so, along with a copy of the complaint, by delivery or certified mail to all defendants. The plaintiff shall, within 21 days of filing of the complaint with the clerk of the court, file with the clerk of court an affidavit that this required notice to defendants has been given. If no affidavit is filed within the 21 days, the complaint shall be dismissed.

In contrast to the fatal consequences of not filing the “notice of appeal” with the town clerk within the 20 days prescribed by § 17, the 14-day notice to the defendants and the 21-day affidavit of service are treated more flexibly by the courts, where the courts find no prejudice resulting from the late

notice or affidavit. See [*Pierce v. Board of Appeals of Carver*](#), 369 Mass. 804 (1976).

2.7 – DEFENDANTS RESPONSE – No answer to the complaint is required of the defendants; but if an answer is filed with the court, then notice of the filing with a copy of the answer and an affidavit that notice has been given shall be provided to all parties within 7 days after filing of the answer.

2.8 – COURT ACTIONS – Other persons may be permitted by the court to intervene in the case upon a

motion to do so. The clerk of the court shall give notice of the court hearing to all parties. The court shall hear all pertinent evidence and determine the facts. If the court finds the board has exceeded its authority it shall annul the decision or make some other decree as justice and equity may require. The foregoing remedy shall be exclusive, notwithstanding any defect of procedure of notice other than notice by publication, mailing, or posting as required by Chapter 40A.

2.9 – PROCEDURAL DEFECTS APPEAL – TIME LIMIT – Any appeal regarding a procedural defect or with respect to the notice by publication, mailing, or posting of the original matter appealed from shall be commenced within 90 days after the decision has been filed with the city or town clerk. Note that this is an exception to the requirement that the appeal from a special permit, variance, or administrative decision be commenced within 20 days.

2.10 – COURT APPEAL TIMELINE SUMMARY TABLE – “A” = Action.

Court Appeal Timeline Summary		
	Action	Action Dates
A1	Decision is filed with municipal clerk.	
A2	Complaint is filed in court.	Within 20 days of A1. Failure to file is fatal.
A3	Notice of having filed the complaint plus a copy of complaint is filed with the municipal clerk.	Within 20 days of A1. Failure to file is fatal.
A4	Notice of appeal plus a copy of the court complaint is served on each defendant by delivery or certified mail.	Within 14 days of A2.
A5	An affidavit is filed with the clerk of court that the required notice to defendants (A4) has been given.	Within 21 days of A2. If no affidavit is filed within the 21 days, the complaint shall be dismissed.
A6	Defendant files an answer to the complaint with the court.	No answer is required. There is no deadline for filing an answer, but defendants are advised to file an appearance in the case within 21 days of A2.
A7	If defendant files an answer, defendant sends notice of the filing of the answer with a copy thereof and an affidavit that notice has been given shall be provided to all parties.	Within 7 days of A6.
A8	Any appeal that is filed regarding a procedural defect or with respect to the notice by publication, mailing, or posting of the original matter appealed from.	Within 90 days of A1. This is an exception to the requirement that the appeal from a special permit, variance, or administrative decision be commenced within 20 days.

3.0 – Municipal Appeal of Board of Appeals or Special Permit Granting Authority (SPGA) Decision

3.1 – INDEPENDENT LEGAL COUNSEL – A city or town may provide any officer or board of the city or town with independent legal counsel for appealing a decision of the board of appeals or SPGA and for taking other subsequent action as the parties are authorized to take.

4.0 – Court Costs

4.1 – COSTS AGAINST THE BOARD – Costs shall not be allowed against the board of appeals or SPGA unless the court determines that the board or SPGA, in making its decision, acted with gross negligence, in bad faith or with malice.

4.2 – COSTS AGAINST THE APPLICANT – Costs shall not be allowed against the party appealing from the decision of the board or SPGA unless the court determines that the appellant acted in bad faith or with malice in making its appeal to the court.

4.3 – SURETY OR CASH BOND – Prior to 2020, the requirement that an appellant under § 17 post a surety or cash bond was limited to appeals from an approval of a definitive subdivision plan. However, Section 25 of Chapter 358 of the Acts of 2020 added a new section to G.L. c. 40A, § 17.

The court, in its discretion, may require a plaintiff who is appealing a decision to approve a special permit, variance, or site plan to post a surety or cash bond in the amount not to exceed \$50,000 to secure payment of costs if the court finds that the harm to the defendant or to the public interest resulting from delays caused by the appeal outweighs the financial burden of the surety or cash bond on the plaintiffs. The court shall consider the relative merits of the appeal and the relative financial means of the plaintiffs and defendant.

Section 4-24

Determination of Zoning Validity & Applicability

[G.L. c. 240, § 14A]

1.0 – Introduction

1.1 – OVERVIEW – The Massachusetts Land Court, under [G.L. c. 240, § 14A](#), and [G.L. c. 185, § 1\(j½\)](#), has the authority to make a determination as to the validity of a zoning bylaw or ordinance regulation adopted under the provisions of Chapter 40A or under any special law related to zoning.

Section 14A provides the means by which the validity and the applicability of zoning ordinances and bylaws may be ascertained. This is sometimes referred to as “validity” questions (facial) and “extent” questions (as applied).

- “Validity” answers the question of whether the zoning provision is legal or valid on its face.
- “Applicability” addresses the effect a zoning provision has as applied to a specific property.

1.2 – APPLICABILITY TO OTHER PERMITS & REGULATIONS – G.L. c. 40A, § 14A does not include challenges to the validity or applicability of permits, special permits, or variances, which are governed by G.L. c. 40A, §§ 7, 8, 15, and 17, or to challenges to the validity of general ordinances and bylaws.

Additionally, the statute cannot be invoked to determine the validity of subdivision regulations adopted under G.L. c. 41, § 81Q. In an unreported case (*Ranieri v. Town of Heath*, Misc. Case No 173041 (Land Court 1994)), the Land Court concluded that it does “. . . *not have jurisdiction to pass on the validity of subdivision rules and regulations . . . except in the context of Section 81BB appeals.*”

1.3 – PURPOSE – Chapter 240, § 14A, can be used for the following purposes:

- For a landowner to determine in advance how the landowner’s property may be used or developed prior to devoting time and money in the pursuit of permits and approvals, in short “*to quiet doubts*” about the nature and extent of land use regulations; in other words, whether and how an ordinance or bylaw shall be applied to the property in question. See [Addison Wesley Publishing Co. v. Town of Reading](#), 354 Mass. 181, 185 (1968).

In [Whitinsville Retirement Soc’y v. Town of Northbridge](#), 394 Mass. 757, 762-763 (1985), the Supreme Judicial Court of Massachusetts noted that:

. . . the primary purpose of [this chapter and section] is to provide a procedure for declaratory judgment that will resolve doubts relating to bylaw restrictions or the requirements of a zoning ordinance The evil to be remedied is a situation where someone may be forced to invest in land before being able to find out whether there are restrictions.”

- For someone to determine the validity or applicability of land regulations adopted under Chapter 40A on another person's property.

1.4 – ALTERNATIVE CHALLENGE MECHANISM – In certain cases, as an alternative to G.L. c. 240, § 14A, the Superior Court and the Land Court may have jurisdiction under the declaratory judgment statute ([G.L. c. 231A](#)) to render judgment on the validity or applicability of zoning ordinances and bylaws. A key difference is that under Chapter 231A an “actual controversy” must be shown plus the exhaustion of all available administrative remedies; such conditions are not required under Chapter 240, § 14A.

In [Mastriani v. Building Inspector of Monson](#), 19 Mass. App. Ct. 989, 990 (1985), the Appeals Court explained that historically there have been 2 distinct ways to challenge the validity of a zoning regulation. The Court stated that “. . . [t]he type of action to be brought and the proper court to hear the matter depend on whether an actual controversy is present.”

Under G. L. c. 240, § 14A, a landowner may petition the Land Court for a decision “. . . concerning the validity or invalidity of any zoning restriction applicable to his land An abutter may bring such a petition if the zoning amendment directly and adversely affects the permitted use of his land.” The Land Court is given exclusive jurisdiction of all complaints brought pursuant to G. L. c. 240, § 14A, where there is no actual controversy. “The other method that may be used to challenge the validity of a zoning ordinance or by-law is by bringing an action pursuant to G. L. c. 231A, provided an actual controversy exists,” and both the Superior Court and the Land Court would have jurisdiction.

In *Mastriani*, the plaintiff brought a “spot zoning” challenge under the declaratory judgment statute (G.L. c. 231A), but failed to allege an actual controversy. “The plaintiffs have never requested that the building inspector take any action in regard to the amendment to the zoning ordinance. Therefore, the plaintiffs, because of the absence of a controversy, should have brought their complaint in the Land Court pursuant to G. L. c. 240, Section 14A.”

1.5 – STATUTE OF LIMITATIONS FOR APPEAL – There is no statute of limitations under either of the 2 remedies, but the defense of “laches” (meaning, “you waited too long”) may bar claims relating to uses of another person's land.

2.0 – Criteria & Process

2.1 – STANDING – A landowner need not show adversity to their land in order to seek a determination under § 14A, making the standard less rigorous than that required for judicial review in zoning appeals generally. Standing qualifies both a landowner seeking to use, improve, or develop property they own, and a landowner where there is a direct effect on their land of the zoning enacted through the permitted use of other land. See [Harrison v. Town of Braintree](#), 355 Mass. 651, 655 (1969).

In order to file a petition with the Land Court under § 14A, the person must be a property owner. The property subject to the petition need not be owned by the petitioner. A landowner potentially affected by a zoning regulation related to other land may also file such a petition.

2.2 – ADDITIONAL CONSIDERATIONS – Other considerations in this process include:

- Objections to the filing of a petition under § 14A cannot be based on the mere fact that a judgment is being sought unaccompanied by any claim of controversy.

- The petition may seek a determination as to the validity of a zoning ordinance, bylaw, or regulation that purports to restrict or limit the present or future use, enjoyment, improvement or development of the land or any part thereof or of present or future structures thereon, including alteration or repairs.
- The petition may seek a determination as to the validity of a zoning ordinance, bylaw, or regulation as to the extent to which it affects a proposed use, enjoyment, improvement, or development of the land by the erection, alteration, or repair of structures thereon or otherwise as set forth in the petition.
- A landowner may also seek a determination that a zoning ordinance, bylaw, or regulation provision as it relates to their land is valid.
- The right to file a petition shall not be affected by the fact that no permit or license to erect structures or to alter, improve, or repair existing structures on the land has been applied for nor by the fact that no architect's plans or drawings for the erection, alteration, improvement, or repair have been prepared.
- Exhaustion of available administrative remedies is not a prerequisite for bringing an action under § 14A.

3.0 – Land Court

3.1 – DECISION OF THE LAND COURT – The jurisdiction and authority of the Land Court of § 14A includes the right to make binding determinations and to grant requested relief, based on its interpretation of the bylaw, ordinance, or regulation. Know that every presumption is to be made in favor of local ordinances, bylaws, and regulations, and that so long as its reasonableness is fairly debatable, the court will sustain their validity. See [Sturgis v. Town of Chilmark](#), 380 Mass. 246, 256 (1980).

4.0 – Notice to Attorney General in Challenges to Validity

4.1 – ATTORNEY GENERAL – The Attorney General is a vital party to any action in which the facial constitutionality of a municipal ordinance or bylaw is raised. [G.L. c. 231A, § 8](#), provides in part:

In any proceeding which involves the validity of a municipal ordinance or by-law . . . the municipality . . . shall be made a party and shall be entitled to be heard. If a question of constitutionality is involved in any proceeding under this chapter, the attorney general shall also be notified of the proceeding and be entitled to be heard.

Additionally, [Rule 24\(d\)](#) of the Massachusetts Rules of Civil Procedure, provides:

When the . . . constitutionality or validity of an ordinance of any city or the by-law of any town is drawn in question in any action to which the Commonwealth or an officer, agency, or employee thereof is not a party, the party asserting the unconstitutionality of the act or the unconstitutionality or invalidity of the ordinance or by-law shall notify the attorney general within sufficient time to afford him an opportunity to intervene.

Under Rule 24(d), the obligation to notify the attorney general that the constitutionality or validity of a municipal ordinance or bylaw is being questioned in the action is placed upon the party asserting its unconstitutionality.

Section 4-25

Expedited Permitting

[G.L. c. 43D]

1.0 – Introduction

1.1 – BACKGROUND – In August 2006, [G.L. c. 43D](#), Expedited Permitting was enacted into law, allowing communities to establish an inventory of Priority Development Sites (PDS). Communities that opt into Chapter 43D may target areas with a streamlined local permitting process.

The program was amended on Aug. 7, 2012 in [Section 25 of Chapter 238 of the Acts of 2012](#). The Executive Office of Housing & Economic Development (EOHED) has adopted regulations at [400 C.M.R. 2.00](#) et seq.

An expedited permit regime for state agencies was concurrently enacted by the Legislature in [G.L. c. 43E](#), with implementing regulations at [400 C.M.R. 3.00](#) et seq.

The Chapter 43D Expedited Local Permitting Program is part of the [Community One Stop for Growth](#), a single application portal and collaborative review process of community and economic development grant programs that make targeted investments based on a Development Continuum. Chapter 43D applications may be initiated using the One Stop for Growth application process or can be submitted separately via email using a link on the 43D information page, for which there is link to that page in the paragraph below.

For more material on this program see the EOHED website for specific information about [Chapter 43D](#). Also, the Massachusetts Association of Regional Planning Agencies (MARPA) published the [Best Practices Model for Streamlined Local Permitting](#).

1.2 – CAVEAT – Section 4-25 provides only an overview of the Expedited Permitting program. It is not intended as an in-depth look at c. 43D. For more information and up-to-date information on c. 43D, refer to the resources listed, and linked, in section 1.1 above.

1.3 – PURPOSE – This program offers communities a tool to promote targeted economic and housing development and to incentivize prompt municipal action. It provides an efficient local permitting process on priority development sites. The program also enables the state to maintain an inventory of promising development parcels for commercial, residential, and mixed-use development.

1.4 – BENEFITS – In return for adopting Chapter 43D, participating cities and towns receive:

- priority consideration for the MassWorks Infrastructure Program grants, brownfields remediation assistance and other financing through quasi-public organizations;
- online marketing of the site and promotion of the community's pro-business regulatory climate;
- improved municipal planning, and permitting efficiencies; and
- the collection of special fees for Priority Development Site applications.

1.5 – INTERAGENCY PLANNING BOARD (IPB) – The composition of the IPB is specified in the statute. The IPB is chaired by the State Permit Ombudsman.

2.0 – Adoption

2.1 – LOCAL OPTION – This is a local option statute for cities and towns. The legislative body (town meeting or city or town council, or a charter equivalent) must vote to accept c. 43D. A majority vote is required.

3.0 – Criteria & Requirements

3.1 – PRIORITY DEVELOPMENT SITE (PDS) – DEFINITION – The amendment to Chapter 43D, § 2, adopted by the Legislature on Aug. 7, 2012 in § 25 of Chapter 238 of the Acts of 2012, revised the definition of “Priority Development Site”. This definition of PDS is:

Priority development site”, a privately or publicly owned property that is: (1) eligible under applicable zoning provisions, including special permits or other discretionary permits, for the development or redevelopment of a building at least 50,000 square feet of gross floor area in new or existing buildings or structures; and (2) designated as an appropriate priority development site by the board. Several parcels or projects may be included within a single priority development site. Wherever possible, priority development sites should be located adjacent to areas of existing development or in underutilized buildings or facilities or close to appropriate transit services.

3.2 – WHAT IS A PRIORITY DEVELOPMENT SITE (PDS)? – A PDS is a private or public property that includes the following:

- zoned for commercial, industrial, residential, or mixed use;
- eligible under applicable zoning provisions, including special permits or other discretionary permits, for the development or redevelopment of a building of at least 50,000 square feet of gross floor area in new or existing buildings and structures;
- approved by the local governing authority; and
- designated and approved as a PDS by the State Interagency Permitting Board.

3.3 – MUNICIPAL REQUIREMENTS – The municipality must identify a parcel as a PDS and obtain the permission of the property owner (for a private site). Within 120 days of adopting the provisions of Chapter 43D, the community must do the following:

- appoint a single municipal point of contact for streamlined permitting;
- amend local rules, regulations, bylaws, etc. to conform to Chapter 43D, including compliance with the 180 day permit timeline;
- determine and make available the requirements for each permit, including fees;
- establish a procedure for identifying necessary permits for a project;
- establish a procedure for determining the completeness of the required application submissions; and
- after the 120-day phase-in period is complete, the municipality must render permitting decisions on PDS within 180 days.

3.4 – PDS DESIGNATION TIME LIMIT & REMOVAL – PDS locations will maintain that designation for no less than 5 years. After 5 years, the municipality may request that the designation be removed. If no request is issued, the designation will remain in place.

4.0 – Process & Permits

4.1 – MUNICIPAL PERMIT ISSUING BODY – The issuing authority is the board or department reviewing a specific permit. For the purposes of this law, the issuing authority can be any or all of the following: Planning Board, Conservation Commission, Zoning Board of Appeals, Public Works, Fire Chief, Board of Health, and Historic Commission.

4.2 – PERMITS COVERED BY 43D – The following permits are covered by the provisions of c. 43D:

- special permits
- flammable materials license
- orders of conditions and wetlands decisions
- site plan review
- Title V and septic permits
- historic district certificate of appropriateness or other certificates

Not included are building permits, subdivision approvals, and Approval Not Required (ANR) plans under [G.L. c. 41, §§ 810](#) through 81W, and comprehensive permits under [G.L. c. 40B, §§ 20-23](#).

4.3 – FEES – Additional fees to be assessed on priority development site permit applications may be adopted by the governing body for use by the municipality in implementing chapter 43D.

4.4 – SUBMISSIONS – If submissions are incomplete, the governing body has 20 days to inform the applicant. Resubmission of an application and materials shall start a new 30-day review period. If an issuing authority determines that additional materials are required, it shall notify the applicant immediately and shall complete action on the submitted permit within 30 days if no hearing or public notice is required. If public notice or hearing is required, the issuing authority shall complete action on the permit 30 days from the close of the hearing or comment period.

4.5 – 180-DAY TIME PERIOD – The community is required to process designated permits within a 180-day time period from the date on which notice is sent to an applicant that its application is “complete.” This timeline is suspended if the governing body determines that:

- an application is incomplete;
- an application contains false or misleading information; or
- that substantial changes to the project affect the information on the permit application since the original submission.

4.6 – TIME EXTENSION – The 180-day review period may be extended in the following circumstances:

- if an additional and originally unforeseen permit or predevelopment review is required, the timeline may be extended for a maximum of 30 days;
- if action by another federal, state or municipal government agency is required before the issuing authority may act;
- if judicial proceedings affect the ability of the issuing authority or applicant to proceed with the application;

- if enforcement proceedings that could result in revocation of an existing permit and denial of the application have been commenced, the timeline may be extended; or
- if the governing body and the applicant mutually request that the 180-day review period be waived or extended.

There is also an extension of time for referral of permits to the Cape Cod Commission and Martha's Vineyard Commission in compliance with Chapter 716 of the Acts of 1989 and Chapter 831 of the Acts of 1977, respectively.

4.7 – CONSTRUCTIVE (AUTOMATIC) GRANT – If the issuing authority does not make a decision within the 180-day time limit, the application is deemed approved. The applicant has 14 days after the expiration of the applicable, or extended, time period to file an affidavit claiming constructive grant with the city or town clerk. There are, however, circumstances that avoid an automatic grant. Illustratively, where the application has been found to be incomplete, or where project modification has rendered a project application ill-suited for decision, or where the application is found to have included false or misleading information.

4.8 – PERMIT EXPIRATION – If not used within 5 years from the date of the applicable appeal period for the permit, permits issued pursuant to this law expire. Where permits cover multiple buildings, commencement, and continuation of construction of one building shall preserve the permit validity of all permits issued for that PDS.

4.9 – OTHER PROVISIONS – Additional permit and process provisions include the following:

- Permits shall not transfer automatically unless the permit expressly allows transfer without local approval.
- Issuing authorities may develop procedures for simplified renewals; otherwise renewals shall be governed by this chapter.
- Issuing authorities shall make every reasonable effort to review permit modification requests within as short a period as is feasible to maintain the integrity of the expedited permit process.
- Issuing authorities shall inform the applicant within 20 business days if the request for modification is approved, denied, determined to be substantial, or additional information is required. If the modification is determined to be substantial, the time periods of an original application shall apply.

5.0 – Appeals

5.1 – APPEALS TIME LIMIT – Appeals from issuing authority decisions or from a grant by operation of law shall be filed within 20 days after the last individual permitting decision has been rendered or within 20 days after the conclusion of the 180-day period, whichever is later. The 180-day period shall be increased by the number of days in any extension granted.

The expedited appeal procedures established by the statute and regulations do not include, however, appeals relating to an order of conditions by local conservation commissions under the Wetland Protection Act, which are handled separately from expedited appeals.

5.2 – APPEALS AUTHORITY – Appellants may bring consolidated appeals before the Division of Administrative Law Appeals (DALA) to obtain a decision within 90 days in accordance with G.L. c.

43D, § 10(b). Appeals from DALA decisions may be filed within 20 days of the decision with Superior Court or Land Court. Appellants may also bring an appeal directly to Superior Court or Land Court without going through the DALA process (see [G.L. c. 185, § 3A](#)).

6.0 – State Permits

6.1 – MASSACHUSETTS ENVIRONMENTAL POLICY ACT OFFICE (MEPA) & MASSACHUSETTS HISTORIC COMMISSION PERMITS – The law requires MEPA and the Massachusetts Historic Commission reviews be conducted concurrent with the 180-day municipal review period. It would be anticipated that the MEPA filing will be initiated in the 180 days, but may not be completed, as the MEPA review is not abbreviated.

7.0 – Other Considerations

7.1 – CHANGES IN THE LAW – Once issued, a permit under Chapter 43D enjoys a “freeze” or “vested right status” from changes in the law enacted after issuance, but does not limit the full availability of zoning protections otherwise available under the Zoning Act (Chapter 40A).

Section 4-26

Smart Growth Zoning Overlay District Act & Starter Home Zoning District [G.L. c. 40R]

Smart Growth School Cost Reimbursement [G.L. c. 40S]

1.0 – Introduction

1.1 – OVERVIEW – In 2004 (40R) and 2005 (40S) the Legislature adopted 2 smart growth acts. [G.L. c. 40R](#) is the Smart Growth Zoning Overlay District Act (referred to as “Smart Growth Zoning and Housing Production”), and [G. L. c. 40S](#) is the “Smart Growth School Cost Reimbursement.” The Department of Housing and Community Development is the regulatory agency for 40R and adopted [760 CMR 59.00](#) that establishes rules, standards, and procedures for the Smart Growth Zoning Overlay District. The Department of Revenue is the regulatory agency for the 40S program.

G.L. c. 40R was amended by the Legislature through the enactment of Sections 37-54 of Chapter 214 of the Acts of 2016. This legislation creating a new “Starter Homes Zoning District”. This enactment took effect on January 1, 2017. Effective December 29, 2017, DHCD amended the Chapter 40R Regulation and adopted Guidance for Chapter 40R and the 40R Regulation. See the amended 760 CMR 59.00 at this link [760 CMR 59.00](#). Further revisions to Chapter 40R were made in Chapter 5 of the Acts of 2019.

Chapter 40R was additionally amended by [Chapter 358 of the Acts of 2020](#). Additional details on these changes are provided below.

For guidance on Smart Growth Zoning Districts and Starter Home Zoning Districts go to the [DHCD Guidance](#) document.

1.2 – DISCLAIMER – It is important to understand that Section 4-26 regarding G.L. c 40 R and c. 40S, as well as the Starter Home Zoning District initiative, provides an overview of the programs. It is not intended to provide complete information on these topics. In addition c.40R, c. 40S, and the relevant CMRs and DHCD guidance documents have been regularly amended and may very well be again in the future. Readers should consult with the most current and accurate [c. 40R](#) and [c 40S](#), [760 CMR 59.00](#) and the latest DHCD guidance on these programs, and with the [DHCD 40R](#) website.

2.0 – Smart Growth Zoning Overlay District Act

2.1 – PURPOSES – This act is intended to encourage the following:

- mixed-use zoning districts that increase affordable housing opportunities by creating a range of housing types;

- compact design of distinctive and attractive communities;
- preservation of open space, farmland, natural, and other critical environmental areas;
- strengthening of existing communities;
- providing a variety of transportation choices;
- making development decisions predictable; and
- collaboration among the community and stakeholders in the development process.

2.2 – DEFINITIONS – Definitions are found in both the Statute and in the Regulations and include:

• affordable housing	• approved smart growth zoning district
• approved starter home zoning district	• area of concentrated development
• comprehensive housing plan	• density bonus payment
• department	• developable land area
• eligible locations	• historic district
• housing production plan	• housing production summary
• letter of eligibility	• mixed use development
• multi-family housing	• new construction
• open space	• plan approval authority
• production bonus payment	• project
• smart growth zoning district	• starter home zoning district
• trust fund	

Note that Chapter 358 of the Acts of 2020 made the following changes to the list of definitions:

- Deleted “Approving authority”
- Added “Plan approval authority”

2.3 – KEY DEFINITIONS – Statutory and Regulatory definitions to be most familiar with include:

2.3.1 – “Affordable Housing” – Housing affordable for and occupied by individuals and families whose annual income is equal to or less than 80 percent of the area-wide median income as defined by the U.S. Department of Housing and Urban Development. Affordability shall be assured for not less than 30 years by the use of a restriction as defined in G.L. c. 134, § 31.

2.3.2 – “Density Bonus Payment” – This is one-time payment to a municipality from the trust fund for each housing unit of new construction that is created in a smart growth district. Note that the Regulations clarify that “substantial rehabilitation” (e.g., mill redevelopment) also qualifies for the payment.

2.3.3 – “Developable Land Area” – This is an area in an approved smart growth district or starter home district that can feasibly be developed into residential or mixed use development in accordance with the regulations of DHCD. It shall not include the following:

- land already substantially developed, including existing parks and dedicated perpetual open space with such substantially developed portion;
- open space designated by the city or town as provided for in § 6 of Chapter 40R; or areas exceeding ½ acre of contiguous land that are unsuitable for development

because of topographic features or for environmental reasons, such as wetlands.

Developable land shall also include land area occupied by or associated with underutilized residential, commercial, industrial, or institutional buildings or uses that have the potential to be recycled or converted into residential or mixed use developments.

2.3.4 – “Eligible Locations” – Eligible locations are areas that by virtue of their infrastructure, transportation access, existing underutilized facilities, or location make highly suitable locations for residential or mixed use smart growth zoning districts or starter home zoning districts, including without limitation:

- areas near transit stations, including rapid transit, commuter rail, bus, and ferry terminals;
- area of Concentrated Development – a center of commercial activity within a municipality, including town and city centers, other commercial districts in cities and towns, and existing rural village district .

2.3.5 – “Smart Growth Zoning District” – A zoning district adopted by a city or town that is superimposed over one or more zoning districts in an eligible location, within which a developer may elect either to develop a project in accordance with the smart growth district ordinance or bylaw or to develop in accordance with the underlying zoning.

2.3.6 – “Starter Home Zoning District – A zoning district consisting of not less than 3 contiguous acres of developable land area, adopted by a city or town pursuant to Chapter 40R, that is superimposed over 1 or more zoning districts in an eligible locations, within which a developer may elect to either: (1) develop starter homes in accordance with requirements of the starter home district ordinance or bylaw or (2) develop a project in accordance with requirements of the underlying zoning district, and otherwise consistent with department guidance.

2.4 – MINIMUM REQUIREMENTS OF A SMART GROWTH DISTRICT – A smart growth overlay district shall satisfy the following requirements:

- It shall be located in an eligible area.
- Residential zoning shall allow for a variety of housing types.
- Housing density shall be at least:
 - 20 units/acre for multi-family housing
 - 8 units/acre for single-family housing
 - 12 units/acre for 2 and 3 family housing

Note that for cities or towns with a population of fewer than 10,000 persons DHCD may approve, for hardship reasons, densities in the district lower than otherwise required.

- Not less than 20% of the units in projects with more than 12 housing units shall be affordable units and not less than 20% of all residential units constructed in the district shall be affordable.
- The proposed district shall allow in-fill housing on vacant lots as well as additional housing units in existing buildings consistent with neighborhood building and use patterns.
- A smart growth district shall not be subject to bylaws or ordinances limiting building permits

for residential uses or to a local moratorium on issuing these building permits.

- There shall not be any age or other occupancy restrictions on in the district. Specific projects for the elderly, the disabled or assisted living are allowable *“provided that DHCD shall adopt regulations limiting the percentage of units in the district that qualify for density bonus payments that may be subject to restrictions that limit occupancy exclusively for the elderly, disabled or assisted living”*. (Section 37 of Chapter 358 of the Acts of 2020.) Not less than 25% of the units shall be affordable housing.
- All housing in the district shall comply with federal, state, and local fair housing laws.
- A proposed district may not exceed 15% of the total land area of the city or town. DHCD may approve a larger land area upon request.
- All smart growth districts may not exceed 25% of the total land area of a city or town.
- Housing density shall not overburden existing infrastructure.
- The proposed smart growth ordinance or bylaw shall define the procedure for review to be used by the approving authority in the city or town.

2.5 – DIMENSIONAL STANDARDS MODIFICATION – A city or town may modify or eliminate dimensional standards of the underlying zoning where a smart growth district is located. These may include:

- height
- setbacks
- lot coverage
- parking ratios & locations
- roadway design standards

Modified standards may be applied as-of-right throughout all, or a portion, of a smart growth district, or on a project specific basis.

2.6 – OPEN SPACE – A city or town may designate certain areas in the district as dedicated in perpetuity to open space through the use of a conservation restriction or other effective means. The amount of this open space shall not be included as developable land area within the district. Open space may equal up to 10% of otherwise developable land area if that area is less than 50 acres and 20% of otherwise developable land area if that area is more than 50 acres.

2.7 – MIXED USE DEVELOPMENT – A smart growth zoning district or starter home zoning district may provide for mixed use development. Residential uses must be included in a mixed-use development. *“In a starter home zoning district, mixed use development shall only be permitted if the proposed density achieves a minimum of 4 units pr acre.”* (Section 37 of Chapter 358 of the Acts of 2020.)

2.8 – HISTORIC DISTRICTS – A smart growth district may encompass an existing historic district or districts. A city or town may approve, with DHCD approval, a historic district within an approved smart growth district.

2.9 – AFFORDABILITY – A city or town may require more affordability than required by Chapter 40R, both in the percentage of required affordable units and in the levels of income for which the affordable units must be accessible, provided that the modified affordability levels do not unduly restrict opportunities for development.

2.10 – EXISTING LOCAL ZONING – A city or town may apply for approval of an existing zoning district as a smart growth zoning district if it meets the requirements for such a district, including the affordability and density requirements.

2.11 – LOCAL ZONING BYLAW OR ORDINANCE AND VOTING REQUIREMENTS – Nothing in Chapter 40R affects a city or town’s authority to amend its bylaws or ordinances under Chapter 40A, as long as the amendments do not affect the smart growth district. Section 27 of Chapter 358 of the Acts of 2020 amended c. 40R to require a simple majority vote of all members of a city or town council or a simple majority vote of a town meeting when adopting a smart growth zoning district or starter home zoning district ordinance or bylaw.

Furthermore, 40R was revised by Section 38 of Chapter 358 to require that any zoning amendment or repeal of a zoning ordinance or bylaw affecting a smart growth district or starter home district shall not be effective without the written approval of DHCD. No amendment or repeal shall be effective until the city or town has made the payment required under subsection (b) of Section 14 of c. 40R. Each amendment or repeal shall be submitted to DHCD with an evaluation of the effect on the number of projected units that will remain developable, if any, in relation to the number of units that have been built and the number of units that determined any corresponding zoning incentive payment paid to the city or town. Amendments shall be approved only to the extent that the district remains in compliance with c. 40R. If DHCD does not respond to a complete request for approval of an amendment or repeal within 60 days of receipt, the request shall be deemed approved.

2.12 – AS-OF-RIGHT ZONING – In a smart growth zoning district, residential use shall be an as-of-right use. Business, commercial, and other uses consistent with residential uses may also be permitted.

2.13 – LETTER OF ELIGIBILITY – Prior to a city or town voting on a smart growth zoning amendment, it shall submit an application to DHCD for a determination of the eligibility of the proposed district for smart growth zoning. This application shall include the information required by [G.L. c. 40R, § 5](#). If DHCD so determines, it shall issue a letter of eligibility to the municipality. If DHCD denies the eligibility, it shall inform the city or town of the deficiencies of the proposal.

After issuance of a letter of eligibility and upon application with proof of the adoption of the smart growth zoning district by the city or town, DHCD shall confirm its approval within 30 days of the receipt of the application.

2.14 – AMENDMENT OR REPEAL OF LOCAL SMART GROWTH ZONING – Any amendment or repeal of the local smart growth bylaw or ordinance shall not be effective without the written approval of DHCD.

2.15 – CERTIFICATE OF COMPLIANCE – On or before October 1 of each year, DHCD shall send a certificate of compliance to each city or town with an approved district. In order to receive the certificate, the city or town must submit an Annual Update verifying the following:

- The city or town has adopted a smart growth district.
- The certification has not been revoked by DHCD.
- The district is being developed in accordance with requirements for housing density and affordability.
- The approving authority has not unreasonably denied project plans.

If DHCD is unable to certify compliance, it shall hold a public hearing. If DHCD determines the city or town is in noncompliance, the department may revoke the certification. Any revocation of the certificate shall not affect the validity of the smart growth zoning ordinance or bylaw.

2.16 – 40R COMPREHENSIVE HOUSING PLAN – A city or town shall prepare a comprehensive housing plan

for the Chapter 40R district for DHCD's review and approval. This shall be submitted prior to or concurrently with its application for a letter of eligibility. The plan shall include the estimated number of new units projected to be constructed in the proposed district. If the city or town already has a comprehensive housing plan it shall submit, along with the plan, a description to DHCD of how the proposed district will further the goals of the plan as well as an estimate of the number of new units projected to be constructed.

2.17 – SMART GROWTH PAYMENTS – A city or town with a smart growth district shall be entitled to payments as follows:

- Within 10 days of approval of the district by DHCD and receipt of a completed Zoning Incentive Payment Request form, the Commonwealth shall issue a contract for payment for Smart Growth Zoning Districts that allow, as of right, the net increases, shown in the table below, in Incentive Units (i.e., units in excess of what would otherwise be allowed as of right on the same parcel(s) of "Developable Land").

Zoning Incentive Units and Payments	
Incentive Units	Zoning Incentive Payment
Up to 20 Incentive Units	\$ 10,000
21 to 100 Incentive Units	\$ 75,000
101 to 200 Incentive Units	\$200,000
201 to 500 Incentive Units	\$350,000
More than 500 Incentive Units	\$600,000

- **Density Bonus** – The Commonwealth shall also pay a one-time density bonus to a city or town with an approved district. The payment shall be \$3,000 for each eligible housing unit that is created pursuant to the Smart Growth Zoning. This shall be paid on a unit-by-unit basis after submission by the city or town to DHCD of proof of building permit issuance.

2.18 – DESIGN STANDARDS – A city or town may adopt design standards for projects within a district. The standards may address:

- the scale and proportion of the building
- the width and grade of streets and sidewalks
- the type and location of infrastructure
- the location of building and garage entrances
- off-street parking
- the protection of significant natural features
- the location and design of on-site open spaces, exterior signs, and buffering in relation to adjacent properties

Design standards shall not be adopted if they will add unreasonable costs to residential or mixed-use development. They shall not unreasonably impair the economic feasibility of proposed projects.

Note that DHCD has prepared a [Guidebook to Creating Design Standards for 40R Districts](#) that can be found on the DHCD website.

2.19 – 40R PLAN REVIEW PROCESS – There are a number of steps and provisions to be aware of

regarding the process for applying for Plan Approval under 40R. The major ones are listed below.

2.19.1 – Application – A city or town may incorporate/authorize in its bylaw or ordinance, directly or by reference, regulations for the smart growth or starter home district that prescribe the essential contents of a project application. The regulations need not be adopted into the zoning bylaw or ordinance but must at least be referenced therein.

The regulations may also provide for the referral of the application to other municipal boards, agencies, and officers for comment. Comments shall be provided within 60 days of receipt of the application.

2.19.2 – Consulting Fees – The regulations may also require the applicant to pay reasonable consulting fees for peer review of the Project application. The fees shall be handled in a manner similar to fees provided for in [G.L. c. 44, § 53G](#).

2.19.3 – Applicable Zoning Provisions – An application to the local approving authority shall be governed by the zoning ordinance or bylaw in effect at the time of the submission, while the plan is being processed, during any appeal, and for a period of 3 years thereafter.

If an application is denied, the zoning provisions in effect at the time of the submission of the application shall remain in effect with respect to any further application filed within 2 years after the date of denial except as the applicant may otherwise choose.

2.19.4 – Application Filing – An application shall be filed with the city or town clerk and a copy with the filing date certified by the clerk shall be filed with the approving authority.

2.19.5 – Public Hearing – The approving authority shall hold a public hearing with notice given in accordance with [G.L. c. 40A, § 11](#).

2.19.6 – Decision Filing and Notice Timeline – The decision of the approving authority shall be filed with the city or town clerk within 120 days of the receipt of the application by the clerk. The required time limits for action may be extended by written agreement between the applicant and the approving authority, with a copy of the agreement filed with the clerk.

The approving authority shall provide a copy of its decision to the applicant certifying that it has been filed with the city or town clerk. After 20 days have passed following the filing of the decision with the clerk if no appeal has been filed the city or town clerk shall so certify on the decision. A copy of the decision with this certification shall be recorded in the registry of deeds by the applicant.

2.19.7 – Decision Conditions – The project shall be approved subject only to those conditions that are necessary, such as:

- to ensure substantial compliance of the project with the requirements of the smart growth zoning district ordinance or bylaw; or
- to mitigate any extraordinary adverse impacts of the project on nearby properties.

2.19.8 – Denial – An application may be denied only on the grounds that:

- the project does not meet the conditions and requirements of the smart growth

- district ordinance or bylaw;
- the applicant failed to submit adequate information or fees required by the ordinance or bylaw; or
- it is not possible to mitigate significant adverse project impacts on nearby properties by means of suitable conditions.

2.19.9 – Constructive Grant (Approval) – Failure of the approving authority to take action within the 120 days, or extended time, shall be deemed to be an approval of the application. An applicant seeking approval by reason of constructive grant shall notify the city or town clerk in writing within 14 days from the expiration of the 120 days or extended time for the decision, and that the applicant has sent notice to the parties in interest informing them that there is a 20-day appeal period from the filing of the notice of constructive grant.

2.20 – COURT APPEALS – Any court authorized to hear appeals under [G.L. c. 40A, § 17](#), shall also be authorized to hear an appeal by a party aggrieved by a decision under this section. The appeal shall be brought within 20 days of the filing of the decision with the city or town clerk and notice of the appeal shall be filed with the city or town clerk.

2.20.1 – Process – The plaintiff shall, within 14 days of filing of the appeal, send written notice with a copy of the complaint to all defendants and shall within 21 days of filing the appeal file with the clerk of the court an affidavit that this notice has been given. Failure to file this affidavit shall result in the complaint being dismissed.

2.20.2 – Allegations – A complaint shall allege the specific reasons why the project fails to satisfy the requirements of this chapter and allege specific facts as to how the plaintiff is aggrieved by the decision.

2.20.3 – Bond – The plaintiff shall post a bond in an amount set by the court that is sufficient to cover twice the estimated annual carrying costs of the property owner; and the defendant's attorney's fees

2.20.4 – Applicant Appeal – An applicant who appeals from a denial or conditional approval shall identify in its complaint the specific reasons why the approving authority's decision fails to satisfy the requirements of this chapter.

2.20.5 – Court Review – The court shall review the appeal based on the record of information and plans presented to the approving authority.

2.21 – REPETITIVE PETITION – The provisions of [G.L. c. 40A, § 16](#), regarding repetitive petitions shall not apply to this chapter.

2.22 – PROJECT APPROVAL TIMELINE – A project approval shall run with the land indefinitely provided that construction has commenced within 2 years of the decision being issued. This time period may be extended by the time required to adjudicate any appeals, by the time required to pursue other required permits, or for other good cause.

2.23 – REPAYMENT OF SMART GROWTH PAYMENTS – In the absence of finding good cause, DHCD shall require cities and towns to repay all monies paid to them under Chapter 40R if no construction has been started within 3 years of a zoning incentive payment. The 3 years may be extended by DHCD for

good cause in accordance with the department's regulations.

Section 45 of Chapter 358 of the acts of 2020 added the following language.

Within 60 days of receiving written approval by the department of an amendment of a zoning ordinance or by-law affecting an approved smart growth zoning district or starter home zoning district in accordance with subsection (g) of section 6, the city or town shall repay to the department any portion of the zoning incentive payment received in excess of the zoning incentive payment that would have been payable based on the sum of (i) the number of units that have been built and (ii) the number of units, if any, that will remain developable under the smart growth zoning or starter home zoning. The department may include under clause (ii) in the preceding sentence any units that are developable in 1 or more adopted smart growth zoning district or starter home zoning district for which no zoning incentive payment has been paid but for which the city or town is nonetheless eligible if the associated units would have the effect of replacing some or all of the units that will no longer be developable as a result of the proposed amendment or repeal. All monies repaid to the department under this section shall be credited to the funding source from which the payment originated.

3.0 – Starter Home Zoning District

3.1 – INTRODUCTION – [G.L.c. 40R](#), Smart Growth and Housing Production, was amended by the Legislature through the enactment of Sections 37-54 of Chapter 214 of the Acts of 2016. This legislation created a new “Starter Home Zoning District”. This enactment took effect on January 1, 2017.

3.2 – STARTER HOME ZONING DISTRICT (SHZD) – The SHZD provides that communities may create these districts based on the criteria noted below. The SHZD is an Overlay District superimposed over one or more underlying zoning districts in an “eligible location”. The SHZD must meet, at a minimum, the following criteria:

- The land area shall be 3 acres or greater of contiguous developable acres.
- The minimum density shall be at least 4 units/acre.
- Homes may be no larger than 1850 square feet of heated living area.
- A community may also allow an accessory dwelling unit of 600 square feet or less on the same lot as the starter home.
- Fifty percent of the units shall have 3 bedrooms.
- At least 20% of the homes must be affordable and occupied by households with incomes at or below 100% of the Area Median Income as determined by the U.S. Dept. of HUD. The affordable units shall include an affordable housing restriction of not less than 30 years.
- Minimum dimensional requirements may differ from the underlying zoning requirements.
- Cluster development, common open space and low-impact development techniques are encouraged.

3.3. – ENVIRONMENTAL & HEALTH REGULATIONS – SHZDs are not subject to local environmental and health regulations that exceed state regulations unless:

- DEP has determined that specific local conditions warrant imposition of more restrictive local standards. or

- The imposition of such standards will not render infeasible the development contemplated under the comprehensive housing plan, housing production plan, or housing production summary submitted.

4.0 – Smart Growth School Cost Reimbursement – G.L. c. 40S

4.1 – INTRODUCTION – [G.L. c. 40S](#) in conjunction with Chapter 40R, provides reimbursement for cities and towns for the additional costs that may be incurred for educating new school-age children moving into smart growth districts.

4.2 – STATE REIMBURSEMENT – Communities will be reimbursed for the net cost of educating students living in new housing in smart growth districts. The reimbursement equals the cost of educating students living in new housing in smart growth districts less an amount equal to the sum of:

- new property and excise taxes in the smart growth district multiplied by the average percent of total local spending on education across the Commonwealth (about 52%), and
- any increase in other state education funding that is directly a result of these new students.

4.3 – STATUTORY PROVISIONS – Chapter 40S includes 4 sections each of which is covered below.

4.3.1 – Chapter 40S, Section 1 – Definitions – This section includes definitions for 11 terms. These are:

○ Additional chapter 70 aid	○ Local smart growth excise tax revenues
○ Average actual net school spending per student	○ Local smart growth revenues for education
○ Division of local services	○ New smart growth development
○ Eligible Student	○ Smart growth zoning district
○ Education percentage	○ Total education cost for eligible students
○ Local smart growth property tax revenues	

4.3.2 – Chapter 40S, Section 2 – School Cost Reimbursement – Subject to appropriation, any city or town that has established a smart growth zoning district may apply for and, if eligible (e.g. the community has actually permitted units meeting all applicable requirements of the smart growth zoning district) receive a school cost reimbursement. This reimbursement shall be equal to the positive difference, if any, between:

- the total education cost for eligible students, and
- the sum of the local smart growth revenues for education plus additional chapter 70 school aid.

The Department of Education shall add the smart growth school cost reimbursement amounts to each district's required net school spending as defined in G.L. c. 70. For the purposes of the net school spending calculation, the department shall allocate a municipality's smart growth school cost reimbursement among the districts to which it belongs in proportion to the number of eligible students from the municipality attending each district.

4.3.3 – Chapter 40S, Section 3 – This section includes a variety of topics noted below.

- Smart Growth Address List – DHCD shall provide a list of all addresses of a new development to the municipality, the Department of Education, the Division of Local Services in the Department of Revenue, and the Registry of Motor Vehicles.
- Smart Growth Reporting Officer – The chief executive officer of each community with a smart growth district shall appoint a reporting officer who is responsible for collecting all data and transmitting it to the appropriate state agencies. The officer shall also transmit the smart growth address list to the superintendent of schools. The superintendent shall provide the officer a list of eligible students from each school who shall in turn transmit the list to the Department of Education.
- Student List – The department of education shall certify that all students on the list are living in the smart growth zoning district. The department shall then calculate the additional Chapter 70 aid amount and shall transmit this to the Division of Local Services and the municipal reporting officer.
- Assessors Report – The municipal assessors shall provide the municipal reporting officer with a list of the commercial and residential development in the smart growth district and all vehicle garaged therein, with the information required by this section. The list shall be transmitted to the Registry of Motor Vehicles and the Division of Local Services.
- Calculation of Smart Growth Revenues – The Registry shall verify the list of vehicles and excise taxes paid thereon and provide this to the Division of Local Services who shall then calculate the local smart growth excise tax revenues, tax revenues, and smart growth revenues for education.
- Calculation of Cost Reimbursement – The Division of Local Revenues shall calculate the school cost reimbursement. A single payment shall be made to the municipality.
- Regulations – The Commissioner of Revenue shall adopt regulations necessary to carry out this chapter.

4.4 – Chapter 40S, SECTION 4 – ANNUAL REPORT – The Commissioners of Revenue and Education, the Director of Housing and Community Development and the Registrar of Motor Vehicles shall report annually on the cost and effectiveness of the reimbursement program in accordance with the requirements of this section.

Section 4-27

Comprehensive Permit (c. 40B) Low & Moderate Income Housing

[C. 40B, §§ 20—23]

1.0 – Introduction

1.1 – OVERVIEW – [G.L. c. 40B, §§ 20-23](#), and only §§ 20-23 of that Chapter, (generally referred to in this Section as “40B”) comprise the Low and Moderate Income Housing Law, often what is meant when “40B” is mentioned in the context of affordable housing. This is a state statute that conditionally overrides local zoning and other local permit or approval requirements otherwise applicable to the construction of affordable housing. It enables local zoning boards of appeals (the “ZBA” or “board”) to approve affordable housing developments when they are proposed by certain entities. (See Section 5.2 below.)

In addition to the 40B statute, much of the substantive content of the Comprehensive Permit Law is found in the Code of Massachusetts Regulations, at [760 CMR 56.00](#), et seq..

The permit is called a “comprehensive” permit because, by a single application to the zoning board, separate applications to other applicable local boards or commissions for local permits are not required. Moreover, the ZBA will then possess the powers of the other local boards and will act as those boards in processing the 40B application and rendering its decision. For local boards that have state law jurisdictions with regard to local permits, see Section 7.1 below.

Chapter 40B in its totality is titled “Regional Planning” and has many sections before Section 20 and following Section 23 on topics unrelated to the Comprehensive Permit Law.

1.2 – SCOPE & DISCLAIMER – The scope of this section of the Guidebook focuses solely on the zoning aspects of c. 40B and the role of the ZBA. The entire c. 40B process is rather involved and includes numerous issues such as the project eligibility letters, financing issues, the role of local housing committees, appeals procedures, the Housing Appeals Committee (“HAC”), and many more, which are not covered by this section.

1.3 – ADDITIONAL RESOURCES – For information about other aspects of the 40B process, there are links to many source materials on the [HAC website](#) of the Massachusetts Department of Housing and Community Development (“DHCD”) including the [Guidelines to G.L. c. 40B Comprehensive Permit Projects and Subsidized Housing Inventory](#).

In addition, the Massachusetts Housing Partnership has a [Chapter 40B Handbook for Zoning Board of Appeals](#).

1.4 – THRESHOLD DETERMINATIONS – The powers conferred upon the ZBA for a comprehensive permit are dependent on whether the override of local zoning is applicable. It must be first determined

whether local zoning is “consistent with local needs”; and under [G.L. c. 40B, § 20](#) (the “definitions” section of the statute) local zoning is deemed to be “consistent with local needs” if the city or town has met one of the statutory minima for low or moderate income housing. (See Section 1.5 below.)

1.5 – STATUTORY REQUIREMENTS – MET OR NOT MET – If the city or town has not met one of the statutory minima, then the conditional override of local zoning applies. If the city or town has met one of the statutory minima, the ZBA may, but is not required to, override local zoning.

1.6 – STATUTORY REQUIREMENTS Minima – The statutory minima are:

- where low or moderate income housing exists which is in excess of 10% of the housing units reported in the latest federal decennial census of the city or town;
- where low or moderate income housing exists on sites comprising 1.5% or more of the total land area zoned for residential, commercial or industrial use; and,
- where the application before the board would result in the commencement of construction of housing on sites comprising more than three-tenths of 1% of such land area or 10 acres, whichever is larger, in any one calendar year.

Land area owned by the United States, the Commonwealth or any political subdivision thereof, or any public authority shall be excluded from the total land area referred to above when making a determination of consistency with local needs.

1.7 – COMPREHENSIVE PERMIT LAW – The statute allows for the issuance of a single – or comprehensive – permit for an affordable housing development that qualifies under Chapter 40B and 760 CMR 56.00. Although known under several titles the statute is most often referred to as the Comprehensive Permit Law, or simply “Chapter 40B” (or “40B”) for short; but understand that it is the statute, the regulations at 760 CMR, and local rules adopted by the ZBA thereunder that collectively regulate the substantive and procedural aspects of comprehensive permits.

Four sections of c. 40B are specifically associated with low and moderate income housing. They are:

[Section 20](#) Definitions

[Section 21](#) Low and moderate income housing; applications for approval of proposed construction; construction; hearing; appeal

[Section 22](#) Appeal to Housing Appeals Committee; procedure; judicial review

[Section 23](#) Hearing by Housing Appeals Committee; issues; powers of disposition; orders; enforcement

2.0 – Comprehensive Permit Regulations

2.1 – [760 CMR 56.00](#) – This section of the Code of Massachusetts Regulations provides detailed information about the 40B program and its regulations. These include:

56.01: Background and Purpose

56.02: Definitions

56.03: Methods to Measure Progress Toward Local Affordable Housing Goals

56.04: Project Eligibility; Other Responsibilities of Subsidizing Agency

56.05: Local Hearings

56.06: Procedural Regulations for Appeals to the Housing Appeals Committee

3.0 – Zoning Board of Appeals Power

3.1 – COURT DETERMINATION OF ZBA POWER – The ZBA power to grant the comprehensive permit even where the permit granted may conflict with local regulations was clearly established not long after enactment of the state enabling legislation. The foundational decision supporting this statute interpretation is [*Board of Appeals of Hanover v. Housing Appeals Committee*](#), 363 Mass. 339 (1973).

3.2 – POWER TO ISSUE 40B PERMITS WHERE COMMUNITY EXCEEDS 10% THRESHOLD – The Supreme Judicial Court, in [*Boothroyd v. Zoning Board of Amherst*](#), 449 Mass. 333, 341 (2007), confirmed the authority of the ZBA to issue comprehensive permits even where the community has reached one of the statutory minima found in G.L. c. 40B, § 20. Thus, even after the “ten percent threshold” has been satisfied, the board retains discretionary authority to weigh regional housing needs against local needs, and to grant the comprehensive permit overriding local requirements.

4.0 – Rules of Procedure

4.1 – ADOPTION OF LOCAL RULES – The ZBA shall adopt rules, not inconsistent with G.L. c. 40B, §§ 20 - 23, for the conduct of its business and file a copy of those rules with the city or town clerk. The rules shall be consistent with the purpose of providing a streamlined permitting process that overcomes regulatory barriers to the development of low or moderate income housing.

Rules adopted by a board shall be presumed consistent with 40B to the extent that they conform to 760 CMR 56.05. A board may seek non-binding advice from DHCD as to whether a proposed set of local rules is consistent with the statute and the regulations. If a board does not adopt and file rules, it shall by default conduct business pursuant to 760 CMR 56.05.

4.2 – APPEALS OF LOCAL RULES – The HAC may, in the course of an appeal properly before it, determine that a particular local rule is or is not consistent with the statute; but no appeal shall be heard solely for the purpose of determining the validity of a rule, unless the rule is the sole basis for the denial or conditioning of the comprehensive permit.

5.0 – Application Process Information

5.1 – APPLICATION DISTRIBUTION – Although the ZBA acts with the authority not only of the zoning board of appeals but also with the authority of other local boards whose action would otherwise be required for the project, it is both reasonable and required that the application be distributed to other local boards. In light of their special knowledge, the other boards’ recommendations may assist the ZBA in acting on the permit application. (See Section 6.2 below)

5.2 – APPLICANT – The following entities may apply for a comprehensive permit:

- a public agency
- a non-profit organization
- a limited dividend organization

5.3 – SITE/PROJECT ELIGIBILITY – Before filing a comprehensive permit application, a developer must first receive a project or site eligibility letter from the state or federal subsidizing agency. The critical regulations outlining the requirements for site eligibility determination and application to the ZBA are described in 760 CMR 56.04.

5.4 – APPLICATION MATERIALS – The ZBA should review an application immediately to determine whether it adequately describes the proposed housing development.

The following information should generally be submitted as part of an application:

- evidence of project eligibility
- site condition report
- subdivision plan
- existing site and area plan
- environmental assessment
- abutters' list
- proposed housing information (buildings, units, bedrooms, etc.)
- preliminary drawings
- evidence of site control
- utilities plan
- projects impacts
- requested exemptions
- other information required by the ZBA

5.5 – INCOMPLETE APPLICATION – If essential information is missing from the application, the ZBA must nevertheless open the public hearing within the 30-day period prescribed by the statute or within such other time agreed upon by the applicant and the board. Failure to do would result in a constructive grant of the comprehensive permit. Once the hearing is open, the missing information would then either be provided during the hearing process, including continued hearings, or be cited as a basis for the denial of the permit.

Where the applicant has failed to comply with the ZBA's reasonable requests for additional information, the board can deny the application for lack of sufficient information, but only if the board has made a clear written record in advance of issuing its decision as to exactly what necessary information the applicant failed to provide.

Denying the application for missing essential information is without prejudice, after which a new application would have to be made, new notices given, and a new hearing held.

5.6 – ADDITIONAL INFORMATION – It is common for the ZBA to need additional information after the application is filed or during the hearing. The board is entitled to ask for whatever information is reasonably needed to make a sound decision, bearing in mind that the developer need only submit preliminary plans, not final construction drawings. The board, however, may not ask for unwarranted information.

Examples of unreasonable requests include:

- submission of final plans prior to acting on the comprehensive permit
- irrelevant information
- pro formas
- excessively broad information (for example requiring town wide studies of an issue rather than site specific studies)
- unduly burdensome information (for example requiring information that is not required of similar projects or of market rate housing development proposals of similar density, design and location)

5.7 – APPLICATION FEE – The board may require the payment of a reasonable filing fee, if it is comparable to fees charged for subdivision approval, cluster zoning permits, and other fees reasonably assessed by the municipality for costs designed to defray the direct expenses of processing applications; however, in setting the fee, consideration should be given to the statutory goal of encouraging affordable housing development.

5.8 – ZBA CONSULTANT – In accordance with [760 CMR 56.05\(5\)](#) the ZBA may retain a consultant to review technical aspects of a 40B application, and may require the applicant pay a reasonable review fee. See [G.L. c. 44, § 53G](#) (Employment of Outside Consultants). Legal fees for general representation of the board or other local boards shall not be imposed on the applicant while legal fees for legal consultation regarding the statute or for the review of documents are arguably consistent with these regulations.

6.0 – Notices & Recommendations of Local Boards

6.1 – NOTICE REQUIREMENTS – The provisions of [G.L. c. 40A, § 11](#), shall be followed for the notice requirements, including notice to abutters.

6.2 – LOCAL BOARD NOTICE – The ZBA shall notify and seek recommendations from the following boards and departments once a comprehensive permit application has been filed:

- city council
- planning board
- conservation commission
- historical commission
- water/sewer commission
- police department
- building inspector
- other applicable boards/commissions/departments
- board of selectmen
- board of health
- board of survey
- public works department
- fire department
- traffic department
- planning department

Section 21 of Chapter 40B states: "*The board of appeals shall request the appearance at such hearing of such representatives of said local boards . . . and, in making its decision on said application, shall take into consideration the recommendations of the local boards. . .*"

6.3 – 40B SUBDIVISION APPLICATION – Note that when a comprehensive permit application includes a subdivision that would otherwise be reviewed by the planning board under the Subdivision Control Law, it is important for the planning board to provide a complete review and recommendation to the ZBA, as the ZBA would not likely have sufficient familiarity with the subdivision control statute ([G.L. c. 41, §§ 81K – 81 GG](#)).

7.0 – Boards with State Law Jurisdiction

7.1 – CONSERVATION COMMISSION & BOARD OF HEALTH – The conservation commission and the board of health have independent state jurisdiction, which are not subsumed within the authority of the ZBA in the comprehensive permit process. They should conduct separate hearings relating to state requirements in their areas (i.e., the Wetlands Protection Act and "Title 5" septic regulations).

However, where, in addition to their authority under state law, these boards also exercise authority

under local laws and regulations – such as a local wetlands bylaw – they retain only their state jurisdiction. Their local powers and duties fall to the ZBA under 40B. Thus, where a local bylaw is more restrictive than state requirements, the ZBA has the authority of the other local board and may waive those requirements if the applicant so requests and if they are consistent with local needs.

8.0 – Public Hearing & Decision

8.1 – PUBLIC HEARING AND DECISION CONSIDERATIONS – The following is an excerpt from DHCD’s website that addresses the public hearing.

The zoning board of appeals holds a public hearing to ensure that local concerns are properly addressed. Local concerns include health, safety, environmental, design, open space, and other concerns raised by town officials or residents. In making its decision, the board acts on behalf of all other town boards and officials, but only with regard to matters where local restrictions are more stringent than state requirements. The board can issue a single comprehensive permit, which subsumes all local permits and approvals normally issued by local boards. It can also issue a comprehensive permit with conditions or deny the permit. If a comprehensive permit is granted, the applicant, prior to construction, must normally present final, detailed construction plans to the building inspector or similar officials to ensure that the plans are consistent with the comprehensive permit and state requirements.

8.2 – ACTION DATES – The following actions shall be taken and deadlines shall be met for the public hearing and decision process. (“A” = Action.)

Chapter 40B - Comprehensive Permit - Timeline			
Action		Action Date	Comment
A1	Comprehensive Permit Application is filed with ZBA		
A2	ZBA notifies other boards, commissions, departments	Forthwith after A1	
A3	ZBA advertises public hearing notice, notifies interested parties, posts notice in city/town hall	At least 14 days prior to A4	
A4	Public hearing is opened	Within 30 days of A1, unless extended by mutual agreement	<u>Failure to open the hearing is fatal, and the permit may be constructively approved.</u>
A5	Public hearing is closed	Depends on amount of time needed for information and testimony. However, the hearing shall not extend beyond 180 days from A4 – as per 760 CMR 56.05(3) except with the written consent of the applicant.	Continuing the hearing without need for additional evidence or testimony could result in constructive approval. (See the Pheasant Ridge case cited in § 8.6 below)

Chapter 40B - Comprehensive Permit - Timeline			
Action		Action Date	Comment
A6	Decision is rendered	Within 40 days of A5, unless extended by written agreement of the board and the applicant (760 CMR 56.05(8)(a))	Unlike special permits, there is no statutory requirement that the written decision must be filed within 90 days of A5.
A7a	Written decision is filed with the municipal clerk;	The decision shall be filed within 14 days with the municipal clerk	Copies also to be delivered to applicant and recorded in registry of deeds
A7b	or Written decision is not filed with municipal clerk within the 14 days of A6.		Applicant may file a constructive grant certificate with the city or town clerk or may have to file a mandamus action in court or appeal to HAC to obtain certificate of constructive grant. Private parties wishing to appeal a constructive grant must do so within 60 days of A5.
A8	Appeal to HAC or to Superior Court (See Section 9.0 below)	a) Appeal by the applicant shall be filed with the HAC within 20 days of A7a. b) Appeal by aggrieved persons shall be filed with the Superior Court within 20 days of A7a.	An appeal shall be taken within 20 days after the written decision of the Board has been filed in the office of the city or town clerk (A7a). An appeal may also be taken if no written decision is filed within 40 days after A5. See: 760 CMR 56.06(4) (g). Any person aggrieved by the issuance of a comprehensive permit or approval may appeal to the court as provided in Section 17 of Chapter 40A.
A9	ZBA's Answer to HAC	Within 10 days of service in A8	An answer is permitted but not required.
A10	HAC hearing	Within 20 days of A8	G.L. c. 40B, § 22

8.3 – PUBLIC HEARING – CONTINUANCE – The hearing may be continued for a reasonable period if additional time is needed to address substantive questions. Though the board should not close a hearing before it has received all information necessary to make a sound decision, repeated continuances can raise due process concerns. If the applicant believes that the hearing has been extended so long and unnecessarily that the delay constitutes a constructive denial of the permit, the applicant may appeal to the HAC.

8.4 – RESTRICTIONS - The general principle governing hearings before the board and the HAC is that all local restrictions, as applied to the proposed affordable housing, be "*consistent with local needs.*" Chapter 40B, § 20, defines consistency with local needs as being:

... reasonable in view of the regional need for low and moderate income housing considered with the number of low income persons in the city or town affected and the need to protect the health or safety of the occupants of the proposed housing or of the residents of the city or town, to promote better site and building design in relation to the surroundings, or to preserve open spaces, and if such requirements and regulations are applied as equally as possible to both subsidized and unsubsidized housing.

If less than 10% of municipality's total housing units are subsidized low and moderate income units, there is a presumption that there is a substantial housing need which outweighs local concerns. [*Board of Appeals of Hanover v. Housing Appeals Committee*](#), 363 Mass. 339 (1973).

8.5 - CLOSING THE HEARING – The provisions of [G.L. c. 40A, § 11](#), which relate to hearings and decisions, shall apply to 40B hearings before the ZBA. When the board has received all necessary information and public testimony, it shall close the hearing.

In [*Pheasant Ridge Assocs. L.P. v. Burlington*](#), 399 Mass. 771 (1987), the SJC held that the public hearing is deemed terminated when the right of interested parties to appear, present information, and argue the merits of the application is cut off. Since failure to render a decision within 40 days of the end of the hearing will cause the application to be deemed constructively granted, it is very important that the ZBA make clear that continuing the purpose of the hearing is to accept further testimony or evidence. See [*Cardwell v. Board of Appeals of Woburn*](#), 61 Mass. App. Ct. 118 (2004).

8.6 – BOARD VOTE – Within 40 days of the close of the hearing, the board shall render a decision by majority vote. Failure to do so may result in automatic approval (constructive grant) of the comprehensive permit or in an appeal to the HAC.

8.7 – THE WRITTEN DECISION – NOTICE & FILING – A written decision shall be issued and delivered by certified mail or by hand to the applicant. A copy of the decision shall be filed with the city/town clerk, and shall also be recorded at the registry of deeds.

There is no specific form that the written decision must follow. However, the decision should refer to the drawings or plans upon which it is based and include a list of waivers being granted.

8.8 – CONDITIONS – In considering conditions to be imposed, the ZBA should focus on the health, safety, environmental, design, open space, and planning impacts of the development. The board may impose conditions either to eliminate or to mitigate potential adverse impacts.

In addition, the ZBA may impose conditions that relate to the operation of the project or to the housing benefit that the community receives. Any such condition, must, however, be permissible within the constraints of the relevant subsidy program. Conditions must not be imposed in a manner that places additional burdens on an affordable housing development that would not be imposed in similar circumstances upon market-rate housing.

The ZBA may not attach conditions to the permit that:

- require further project approval by local boards, except for technical reviews prior to construction;
- require the applicant to return to the ZBA or to any other local board for subsequent reviews and approvals;

- are inconsistent with the guidelines of the subsidizing agency (for example, it may not require that a project include less than the minimum percentage of affordable units required by the subsidy program); or
- restrict profit in a manner inconsistent with the guidelines of the housing program

8.9 – SAFE HARBORS – The statutory minima for “safe harbors” are:

- The number of low or moderate income housing units in the city or town is more than 10 percent of the total number of housing units reported in the most recent federal (decennial) census on sites comprising 1.5 percent or more of the community’s total land area zoned for residential, commercial or industrial use
- The comprehensive permit before the ZBA would lead to construction of low or moderate income housing on sites comprising more than 0.3 of 1 percent of the community’s total land area zoned for residential, commercial or industrial use, or 10 acres, whichever is larger, in one calendar year.

By regulation, DHCD has created certain other thresholds (“safe harbors”) beyond the statutory minima laid down in [G.L. c. 40B, § 20](#). The “safe harbors” that, if met, will equip the ZBA to deny or condition a comprehensive permit. They include:

- The number of low and moderate income housing units in the city or town is more than 10 percent of the total number of housing units reported in the most recent federal census.
- Low or moderate income housing exists on sites comprising 1.5 percent or more of the community’s total land area zoned for residential, commercial, or industrial use.
- The comprehensive permit before the ZBA would lead to the construction of low or moderate income housing on sites comprising more than 0.3 of 1 percent of the community’s total land area zoned for residential, commercial, or industrial uses, or 10 acres, whichever is larger, in one calendar year.
- DHCD has certified that the community complies with its affordable housing production goal under its approved Housing Production Plan
- The community has met DHCD’s “recent progress” threshold (760 CMR 56.03(1)(c) and 56.03(5)). Within the last 12 months the community has created new SHI units equal to or greater than 2 percent of the total year-round housing units reported in the most recent federal census.
- The project before the ZBA is a project that exceeds DHCD’s definition of a “large project” under 760 CMR 56.03(1)(d), where the definition of “large” project varies by the size of the municipality (see 760 CMR 56.03(6)).

8.10 – ZBA DENIAL OR CONDITIONAL APPROVAL BASED ON SAFE HARBORS – If a board considers that, in connection with an application, a denial of the permit or the imposition of conditions or requirements would be consistent with local needs on the grounds that the *Statutory Minima* defined at 760 CMR 56.03(3)(b or c) have been satisfied or that one or more of the grounds set forth in 760 CMR 56.03(1) have been met, it must do so according to the following procedures:

- Within 15 days of the opening of the local hearing for the Comprehensive Permit, the board shall provide written notice to the applicant, with a copy to DHCD, that it considers that a denial of the permit or the imposition of conditions or requirements would be consistent with local needs, the grounds that it believes have been met, and the factual basis for that position, including any necessary supportive documentation.

- If the applicant wishes to challenge the board's assertion, it must do so by providing written notice to DHCD, with a copy to the board, within 15 days of its receipt of the board's notice, including any documentation to support its position.
- The Department shall thereupon review the materials provided by both parties and issue a decision within 30 days of its receipt of all materials. The board shall have the burden of proving satisfaction of the grounds for asserting that a denial or approval with conditions would be consistent with local needs, provided, however, that any failure of the Department to issue a timely decision shall be deemed a determination in favor of the municipality.
- If either the board or the applicant wishes to appeal a decision issued by the Department pursuant to 760 CMR 56.03(8)(a), including one resulting from failure of the Department to issue a timely decision, that party shall file an interlocutory appeal with the Committee on an expedited basis, pursuant to 760 CMR 56.05(9)(c) and 56.06(7)(e)(11), within 20 days of its receipt of the decision, with a copy to the other party and to the Department. The zoning board's hearing of the project shall thereupon be stayed until the conclusion of the appeal, at which time the hearing shall proceed in accordance with 760 CMR 56.05. Any appeal to the courts of the Committee's (HAC) ruling shall not be taken until after the Board has completed its hearing and the HAC has rendered a decision on any subsequent appeal.

8.11 – PERMIT EXPIRATION – An applicant must begin construction within 3 years after the ZBA decision or after the last appeal becomes final or the permit shall expire.

9.0 – Appeals to the Housing Appeals Committee or Superior Court

9.1 – GROUNDS & TIMELINE FOR INITIAL APPEAL – There are 2 separate appeal processes related to a ZBA decision on a comprehensive permit.

9.1.1 – Appeal by Applicant – If a ZBA denies a comprehensive permit or grants a permit with conditions that the applicant believes render the development financially infeasible, then an appeal may be taken to the HAC.

The developer shall file the appeal with the HAC within 20 days after receipt of the ZBA's decision. The question on appeal is limited to whether, if a denial, the decision was reasonable and consistent with local needs, or whether, in an approval with conditions, the conditions and requirements make the construction or operation of the housing project uneconomic and not consistent with local needs.

The HAC has broad authority to vacate the board's decision or to order the board to modify the decision.

9.1.2 – Appeal by "Parties Aggrieved" – A "party aggrieved" by a decision of the ZBA to approve a comprehensive permit shall file the appeal with the Superior Court within 20 days after receipt of the board's decision.

9.2 – COURT APPEAL OF HAC DECISION – Appeals from HAC decisions are "record appeals," not "de novo," and are governed by [G.L. c. 30A, § 14](#). The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony may be taken in the court on that subject matter.

9.3 – ZBA BURDEN OF PROOF – If the board denies an application, it has the burden of proving on appeal

to the HAC that there is a valid health, safety, environmental, design, open space, planning, or other local concern that supports the denial. It must prove - normally through expert witness testimony - that the proposed project will have a serious adverse effect on the health or safety of the occupants of the project or town residents, that the design of the site or the housing is seriously deficient, or that the development would substantially impair legitimate local concerns in some other way.

9.4 – APPLICANT BURDEN OF PROOF – If the board approves a project with conditions, the initial burden is on the applicant to prove that, as a result of the conditions, it is not economically feasible to build or operate the proposed housing. Alternatively, the applicant may prove that local requirements have been applied unequally to the proposal as compared to market-rate development. Only if applicant proves that the conditions make the project uneconomical does the burden shift to the board to show that the conditions are consistent with local needs.

10.0 – Substantial Change

10.1 – PROJECT CHANGES – After a comprehensive permit has been issued by the ZBA or the HAC, it is the developer's responsibility to inform the board if there are any changes in the project, including a change in the funding program. The board must then decide, within 20 days, whether the change is substantial or not. Typically, changes of a sort that would not have affected the board's decision are considered insubstantial.

10.2 – RE-HEARINGS – The board may determine that a change is insubstantial without holding a hearing. Based on such a determination, or if the board fails to respond to the applicant within 20 days, the permit is deemed modified to incorporate the change. If the board determines that the change is substantial, it must hold a hearing within 30 days to decide whether to permit the change.

At the hearing only the changes themselves or aspects of the proposal affected by the changes are at issue; the board may not reconsider unchanged aspects of the project. If the applicant is dissatisfied with the board's decision, they may appeal to the HAC. No question concerning a change in the proposal may be brought to the HAC until the ZBA has reviewed it.

11.0 – Design Handbook

11.1 – HANDBOOK – DHCD, along with other Massachusetts housing agencies, have developed a [Design Review Handbook](#) for 40B developments. The Handbook provides guidelines for the ZBA to use when reviewing the design and siting of proposed 40B development.

The design elements below are listed in the implementing regulations found at 760 CMR 56.04(4)(b) and (c).

- that the site of the proposed project is generally appropriate for residential development
- that the conceptual project design is generally appropriate for the site on which it is located

12.0 – Comprehensive Permits and Master Plans

12.1 – MASTER PLANS AND CHAPTER 40B COMPREHENSIVE PERMITS – Consistency with a city or town's master plan (or comprehensive plan) is a matter that may be considered by the board of appeals in reviewing a 40B application and by the courts in appeals from the denial of a comprehensive permit

under G.L. c. 40B, although the resulting decision may not be favorable to the town's denial of the comprehensive permit.

12.2 – COURT DECISIONS – A number of court decisions provide some guidance to ZBAs as to how consideration of a city or town master plan may be used in a comprehensive permit process.

- Upholding the decision of the Housing Appeals Committee directing the ZBA to issue a comprehensive permit, the SJC, in [*Zoning Board of Appeals of Lunenburg vs. Housing Appeals Committee*](#), 464 Mass. 38 (2013), found that substantial evidence supported the HAC's findings and conclusion that the proposed project was not inconsistent with the town's master planning and would not undermine those plans.
- In another case the court noted there is a very high standard required to show that an element of the master plan is a valid basis to rebut the strong presumption that there is a substantial housing need which outweighs local concerns. In [*Zoning Bd. of Appeals of Sunderland v. Sugarbush Meadow, LLC*](#), 464 Mass. 166, 171 (2013), the Court agreed with the HAC which found that even though the town had a *bona fide* affordable housing plan, the town had not met its “heavy burden” of demonstrating that the town's master plan adequately promoted the creation of affordable housing.
- A plan that has not actually resulted in the construction of a substantial amount of affordable housing shall not be given considerable weight in the balancing test. [760 CMR 56.07\(3\)\(g\)](#). See [*Scituate Zoning Board of Appeals v. Herring Brook Meadows*](#), 20 LCR 376 (2012) The HAC in that case determined that Scituate's plan failed adequately to promote affordable housing.

12.3 – MUNICIPAL AND REGIONAL PLANNING CONSIDERATIONS – The courts have held that municipal and regional planning issues are valid local concerns. In evaluating such concerns, HAC considers:

- a municipality's master plan, comprehensive plan, housing plan, housing production plan, or community development plan, and the regional policy plan; and
- the results of the municipality's efforts to implement such plans; these then, are subject to a 3 prong test that effectively weighs these planning concerns against the need for regional housing.

12.4 – THREE PRONG TEST OF PLANS – Under the standard adopted by HAC, the ZBA must present sufficient evidence to establish that:

- there is a bona fide plan;
- the plan promotes affordable housing; and
- the plan has been implemented in the area of the project.

Only if these 3 elements are established by the board, will the master plan and its effectiveness be then weighed against the regional housing need.

Section 4-28

Growth Rate Regulation & Moratorium

1.0 – Introduction

1.1 – BACKGROUND – There are many motives for a city or town to consider regulating the rate of growth or to impose a temporary moratorium on development, ranging from the clearly defensible purpose of fashioning a master plan for the community's future in the face of demonstrated development pressure, to thwarting unwanted development proposals otherwise allowable under existing zoning.

There are no specific Massachusetts statutes that directly address these topics. However, the courts have addressed issues related to growth rate regulations and moratoriums.

1.2 – BALANCE OF RIGHTS – Landowners' rights to use or develop their land has to be fairly balanced against the community's right to regulate land use equitably for legitimate public purposes. Insufficient attention to the impacts of growth inures to the detriment of the community and could result in inappropriate and detrimental growth. Excessive land use regulation under which the use of land is restricted in ways not related to valid planning purposes could potentially result in a regulatory takings claim. Within imprecise boundaries between these 2 extremes lies sustainable growth aimed at linking the community's plans for its future with reasonable rates of development compatible with the achievement of the community's plans.

2.0 – Growth Rate Regulation

2.1 – EXAMPLES – There are a variety of techniques communities have used to regulate the rate of growth. These include such tools as:

- a limitation on the overall number of building permits issued per year for residential units; and
- a limitation on the number of building permits issued per year within each new subdivision.

It is the latter technique that has been the most common practice adopted in Massachusetts.

2.2 – COURT CASES – Listed below are 2 relevant court decisions on growth rate restrictions.

2.2.1 – [*STURGES V. CHILMARK*](#), 380 MASS. 246 (1980) – In *Sturges* the Supreme Judicial Court upheld a restrictive rate of development zoning bylaw adopted by the town of Chilmark to control the rate of growth for a limited period. Building permits were limited to one-tenth of the lots in a subdivision per year for a 10-year period. This was intended to allow time for the town to carry out various planning studies and to implement various measures necessary to protect the water supply and to ensure proper sewage disposal.

2.2.2 – [*ZUCKERMAN V. HADLEY*](#), 442 MASS. 511 (2004) – This case perhaps best explains growth

rate regulation in Massachusetts. The landowner brought action against the Town of Hadley for a declaratory judgment that a zoning restriction on rate of development (ROD) was unconstitutional. Hadley's ROD bylaw was intended to control growth for an unlimited duration to assist the town in better managing its fiscal resources and in preserving its character, in this case, agricultural.

The Land Court entered summary judgment in favor of landowner, and the Town appealed. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court, and held that Hadley's restriction did not reference any valid planning purpose and was unconstitutional under the due process clause: "*Absent exceptional circumstances, restrictions of unlimited duration on a municipality's rate of development are in derogation of the general welfare and thus are unconstitutional under the due process clause of the United States Constitution.*"

The SJC said that the state law permits cities and towns to adopt any and all zoning provisions that are constitutionally permissible, subject only to limitations expressly stated in the state constitution, the Zoning Act, or in other limiting legislation. The Court emphasized that "due process" requires a zoning bylaw bear a rational relation to a legitimate zoning purpose, and that courts make every presumption in favor of a bylaw and measure its constitutional validity under the due process clause against any permissible public objective that the legislative body may be said to have been pursuing.

In a footnote, the Court in *Zuckerman* stated, "... within reason, such bylaws might include, for example, large-lot or cluster zoning, expanded frontage requirements, the development of exclusive agricultural use districts, or any other measure permitted by statute."

Hadley's ROD bylaw restricted the number of building permits that could be issued in any given year to each developer of lots. The court found that the ROD did not serve a legitimate zoning purpose because the restriction applied for an indefinite or unlimited period, reallocated population growth to and imposed burdens on other communities, and prevented the entrance of newcomers in order to avoid burdens upon the public services and facilities. In light of this, the ROD did not serve the general welfare and was not a valid public purpose, despite the perceived benefits that enforced isolation could bring to a town facing a new wave of permanent home seekers.

The Court in *Zuckerman* concluded with the following observation:

- *Rate of development bylaws such as the one at issue here are restrictions not on how land ultimately may be used, but on when certain classes of property owners may use their land. Where classic zoning bylaws keep the pig out of the parlor, see [Village of Euclid, Ohio v. Ambler Realty Co.](#) 272 U.S. 365 (1926), rate of development bylaws tell the farmer how many new pigs may be in the barnyard each year. In their intent and in their effect, rate of development bylaws reallocate population growth from one town to another, and impose on other communities the increased burdens that one community seeks to avoid. Through zoning bylaws, a town may allow itself breathing room to plan for the channeling of normal growth; it may not turn that breathing room into a choke hold against further growth. [Simon v. Needham](#), 311 Mass. 56 (1942).*

2.3 – LIMITED VS. UNLIMITED TIME PERIODS – Thus, any bylaw adopted for the purpose of limiting the rate of growth for an indefinite or unlimited period and not for the purpose of conducting studies or planning for future growth, is inherently and unavoidably detrimental to the public welfare and therefore not a legitimate zoning purpose. On the other hand, bylaws restraining growth would pass constitutional muster where they provide for time limitations or where it is abundantly clear that they are temporary, and that they are enacted to assist a particular planning process.

2.4 – EXTENSION OF TIME PERIOD OF GROWTH RATE RESTRICTIONS – In the *Zuckerman* case, the Court acknowledged that where the needs of a town to plan for an aspect of growth prove to exceed the time limits of a bylaw, the town may extend the restriction for a period of limited time as is reasonably necessary to affect its specific purpose.

3.0 – Moratorium

3.1 – INTRODUCTION – The purpose of adopting a moratorium is to temporarily “suspend” development or a particular type of development or development within a certain zoning district or districts for the purposes of allowing time for a study to be conducted related to growth issues. This is sometimes also referred to as interim zoning. Two cases on this topic are noted below.

3.2 – COURT CASES – Following are 2 relevant court decisions on growth rate restrictions enacted by municipalities.

3.2.1 – [*COLLURA V. ARLINGTON*](#), 367 MASS. 881 (1975) – In this case the Court upheld an interim zoning bylaw that prohibited construction of new apartment buildings in certain districts within the town of Arlington for a 2-year period while the town developed a comprehensive plan. The court indicated that interim zoning can be considered a beneficial device in the process of preparing a comprehensive zoning plan to be employed to prevent disruption of the ultimate plan itself.

3.2.2 – [*W. R. GRACE & CO. - CONN. V. CITY COUNCIL OF CAMBRIDGE*](#), 56 MASS. APP. CT. 559 (2002) – Here the Appeals Court upheld the city’s imposition of what was effectively a 23 month moratorium (which the court refers to as “interim zoning”) on development within a particular industrial zoning district. The purpose was to allow time for a zoning analysis to be conducted in order to draft a new zoning scheme for the district.

The court noted that:

... the weight of authority is that reasonable interim zoning provisions may be enacted within the scope of a general zoning enabling act, without reliance on specific statutory authorization for interim ordinances. The desirability of thoughtful consideration before a municipality reconciles the variety of competing interests that affect any zoning change constitutes the rational reason that justifies a temporary halt to private activities.

However, the court also made clear that “the burden was on the city to make a *prima facie* showing of a rational reason for its action.”

Section 4-29

Linkage & Inclusionary Zoning

1.0 – Introduction

1.1 – BACKGROUND – While affordable housing production in Massachusetts has largely focused on those provisions of Chapter 40B comprising the Comprehensive Permit Law ([G.L. c. 40B, §§ 20-23](#)) and the regulations promulgated thereunder ([760 CMR 56.00](#)) [See Section 4-27 of this Chapter], alternative approaches have been explored.

1.2 – CAVEAT – The subject of affordable housing is one of complexity with many aspects beyond zoning. This section is not intended to address the subject in a comprehensive manner. It briefly describes a few zoning techniques that are being used in the state.

1.3 – FEES VS. TAXES – A major issue with respect to linkage and inclusionary zoning is the constitutional limitation on the municipality's power to tax. Under the Home Rule Amendment, the power to tax is reserved exclusively to the Commonwealth, except as the power to do so has been delegated by the Legislature. In G.L. c. 44, the Legislature has established an assortment of taxes that cities and towns are authorized to impose; and if not found in an express legislative delegation, a "fee" imposed by the city or town must pass muster as a "fee" and not as an "unauthorized tax."

The principal case in which this distinction has been drawn is [Emerson College v. City of Boston](#), 391 Mass. 415 (1984). The *Emerson* "3 prong test", so-called, provides that fees have the following common traits that distinguish them from taxes:

- they are charged in exchange for a particular government service which benefits the party paying the fee in a manner *'not shared by other members of society'* ("First Prong");
- they are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge ("Second Prong"); and
- the charges are collected not to raise revenues but to compensate the governmental entity providing the services for its expenses ("Third Prong").

If a disputed charge under *Emerson* fails any of the 3 factors in the test, it is considered a tax and not a fee. See *Emerson* at 424 (holding that the Court *"need go no further to sustain the judge's conclusion that the charge is not a fee"* after the Court determined that the charge failed the first and second factors); the third prong need not be separately satisfied in order to strike down a purported fee as a tax. Moreover, the nature of the monetary exaction *"must be determined by its operation rather than its specially descriptive phrase."*

The burden of proving that the charges are taxes and not fees rests on those who challenge their legality. [Southview Coop. Housing Corp. v. Rent Control Bd. of Cambridge](#), 396 Mass. 395, 403 (1985).

2.0 – Linkage

2.1 – OVERVIEW – As the term suggests, the zoning ordinance or bylaw links relief from certain

provisions of local zoning otherwise applicable to a development to the payment of a fee or the provision of a public amenity. There is no clear statutory authority for linkage, and there is the risk that fees that go into the municipality's general fund are not fees but rather an unauthorized tax. Apart from that consideration, there must be a "rational nexus" between the development and any amenity to be funded by the municipality or it would likely be scrutinized by the courts.

2.2 – COURT GUIDANCE – The issues noted above were addressed by the Supreme Judicial Court in [*Iodice v. City of Newton*](#), 397 Mass. 329 (1986). Citing its earlier decision of [*Middlesex & Boston Street Railway v. Aldermen of Newton*](#), 371 Mass. 849 (1977), which raised the same issues, the Court expressly left unanswered the question of whether Newton's imposition of a 10% affordability condition would be constitutionally permissible. The Court in *Middlesex & Boston* left unanswered the question of whether the imposition of such a condition would be constitutionally permissible "... if it were (a) authorized by the General Court as part of The Zoning Enabling (sic) Act or otherwise and the power to impose it were delegated to the board by municipal ordinance, or (b) authorized by the operation of the Home Rule Amendment and by an ordinance enacted pursuant thereto."

The Court acknowledged, however, that [G.L. c. 40A, § 9](#), expressly contemplates local zoning provisions that provide for conditioning special permits that increase "... the permissible density of population or intensity of a particular use in a proposed development" on the provision of "certain open space, housing for persons of low or moderate income, traffic or pedestrian improvements, or other amenities." Local zoning should thus contemplate linking the public benefits, including affordable housing, to a compensatory density bonus.

3.0 – Inclusionary Zoning

3.1 – OVERVIEW – Inclusionary zoning is best understood by recalling that its opposite – "exclusionary" zoning – either expressly, or by demonstrated effects, constitutes an unlawful obstacle to housing opportunities for persons of low and moderate income. Typically inclusionary zoning requires a certain number of affordable housing units, or sometimes a payment in lieu thereof, as a condition of a discretionary permit. Another alternative would be a dedication of land suitable for the construction of inclusionary units.

Inclusionary zoning can thus be seen as one way for a municipality either to remediate past exclusionary practices or to achieve and secure a community housing inventory that includes housing for persons of low and moderate income.

As with linkage, the Zoning Act includes no reference to "inclusionary zoning," leaving cities and towns, under the Home Rule Amendment, a wide field within which to legislative its affordable housing goals, limited only by constitutional limitations and inferences to be drawn from the text of § 9 of the Zoning Act quoted in Section 2.2 above.

3.2 – CASE LAW – State case law offers scant guidance on inclusionary zoning. That said, federal cases dealing with development impact fees, exactions, and takings unaccompanied by just compensation serve as the guardrails within which cities and towns are well advised to remain. So long as the burden imposed on the developer is roughly balanced – in kind and degree – with the benefits to be achieved by the city or town, federal constitutional law should impose no impediment to achieving an adequate level of affordable housing through inclusionary zoning.

In the State's [Smart Growth / Smart Energy Toolkit, the Model Inclusionary Bylaw](#) is prefaced with

the observation that “. . . mandatory provisions combined with strong incentives are most effective in promoting affordable housing development.” The text of the model bylaw then offers an assortment of compensatory features that include an FAR bonus, a density bonus, and a voluntary inclusionary housing bonus.

3.3 – MANDATORY vs. VOLUNTARY – One issue about inclusionary zoning is what permitting procedures are used to impose inclusionary requirements. As noted above in Section 2.2 above, the Court referenced G.L. c. 40A, § 9, as a mechanism that can be used in a special permit process for this purpose.

However, can inclusionary zoning be imposed on a by-right process? While not specifically on topic, the [*Wall Street Development Corporation vs. the Planning Board of Westwood*](#), 72 Mass. App. Ct. 844 (2008), is instructive as to how a community can, or cannot, act regarding a by-right definitive subdivision plan. The Court noted:

In our view the by-law and the power it gives to the board to reject so called "conventional plans" (i.e., plans in total compliance with applicable laws and regulations) may be more easily seen as presenting a facial conflict with the subdivision control law, specifically with G. L. c. 41, § 81M, as amended by St. 1957, c. 265 . . .

It is the intent of the subdivision control law that any subdivision plan filed with the planning board shall receive the approval of such board if such plan conforms to the recommendation of the board of health and to the reasonable rules and regulations of the planning board pertaining to the subdivision of land . . .

3.4 – PRACTICAL CONSIDERATIONS – If a community is contemplating an inclusionary bylaw or ordinance there are a number of considerations the community should address in drafting a bylaw or ordinance. The list¹⁰ below highlights some of the more important considerations.

- Does the community have a housing plan with which inclusionary zoning provisions can be consistent?
- What does the community wish to accomplish by inclusionary zoning and what alternatives has the community considered, including non-zoning incentives?
- What are the housing needs in the community across the full spectrum of income levels?
- What type of projects should be subject to inclusionary zoning?
- What is the community willing to offer in order to obtain inclusionary units? Examples are:
 - Additional market rate units
 - Density bonus
 - Streamlined review and decision process
 - Fee waivers
 - Cash subsidies
- Should the community consider off-site units, and if so how will the community evaluate proposals for them, such as housing quality (age, condition, and location), proximity to other affordable housing, income level integration, etc.?
- Should the community consider allowing developers to pay a fee in lieu of affordable units, and if so how will the fee be calculated, when and how will it be paid, how will the community commit the funds received to an increase in affordable housing, and what management plans should be put in place to assure continued affordability?

¹⁰ This information is based on an Inclusionary Zoning Paper prepared by Judi Barrett.

3.5 – ADDITIONAL CONSIDERATIONS – In addition to the list above, communities should also consider the following aspects when proposing the adoption of an inclusionary bylaw or ordinance.

- Is the inclusionary requirement mandatory or voluntary?
- Should there be a minimum size of the project that triggers the requirement?
- Should there be thresholds for inclusionary units in different size developments?
- What percent affordability is required and at what levels?
- Should there be different thresholds for providing affordable housing to different income levels?
- What additional incentives might be offered (e.g., reduced parking, lot size, and dimensional reductions)?
- Should there be requirements for the number of bedrooms in the units?

Section 4-30

Overlay Zoning Districts

1.0 – Introduction

1.1 – BACKGROUND – While there is no specific statutory language regarding the use of overlay zoning districts in Chapter 40A, or any other G.L. Chapter, this is a common land use option used by many cities and towns. There are also court decisions regarding the use of overlay districts.

1.2 – DEFINITION – Overlay districts are defined in a variety of planning resources, some of which have been referred to by Massachusetts courts.

The Complete Illustrated Book of Development Definitions, Harvey S. Moskowitz, Carl G. Lindbloom, David Listokin, Richard Preiss & Dwight H. Merriam, authors, states: “An Overlay Zone is a zoning district that encompass one or more underlying zones and that imposes additional requirements beyond those required by the underlying zones.”¹¹

It further notes that overlay zones address special situations that are not appropriate to a specific zoning district or that apply to several zoning districts.

1.3 – COURT DECISION – DEFINITION – In [Maryann Doherty vs. Planning Board of Scituate](#), 467 Mass 560 (2014), the Supreme Judicial Court noted: “An overlay district imposes a regulatory scheme on top of an underlying, existing district, often for the purpose of further regulation or restricting certain permitted uses.”

1.4 – MAPPING – An overlay zone is often depicted on a zoning map using a specific color scheme, a cross-hatched design, or similar device to distinguish the overlay district from underlying districts.

2.0 – Purpose, Benefits, & Examples

2.1 – PURPOSE – An overlay district is a zoning option that provides various development regulations across a specific geographic area, even if that area has multiple underlying zoning districts. The overlay will supplement or supersede existing regulations with a set of regulations designed for the specific purposes of the overlay zone.

The boundaries of an overlay may not necessarily coincide with those of the underlying district and may also cover sections of more than one underlying zoning district.

2.2 – BENEFITS – Overlay districts can be useful when a community seeks to address an identified issue by treating all of the land affected by that issue in a uniform manner. The overlay district can be adopted without necessarily having to amend all of the zoning regulations or maps for the underlying zoning district or districts. Modifications to an overlay district can also be made without having to amend the underlying district or districts.

¹¹ Used with the permission of Dwight H. Merriam FAICP

An overlay district may impose more restrictive requirements than the underlying zoning district, less restrictive requirements than the underlying zoning district, or provide greater flexibility for development proposals than would otherwise be allowed. A municipality should be clear as to what the planning goals of an overlay district are and draft zoning language that specifically carries out those goals.

Among the most common benefits sought by the use of overlay districts are the following:

- to protect valuable resources
- to provide design guidelines that encourage/require a more consistent appearance of an area
- to maintain certain existing zoning requirements while addressing a special need of a particular geographic area
- to implement specific recommendations of a master plan or other community planning strategy

2.3 – EXAMPLES – Overlay zoning districts are used for a variety of purposes. Examples include:

- Resource protection – aquifers, watersheds, groundwater recharge, coastal resources areas
- Important land uses – farmland/agricultural areas, significant landscapes
- Distinctive land uses – institutional uses, government uses
- Commercial design standards & regulations – commercial corridors, parking
- Design Review districts – town centers, village centers, industrial and/or office areas, unique residential areas
- View shed protection – view corridors toward a particular site, building, place, or landscape

3.0 – Court Cases

3.1 – [KCI MANAGEMENT, INC. VS. BOARD OF APPEAL OF BOSTON](#), 54 MASS. APP. CT. 254 (2002) – While this case has several aspects to it, it does specifically address overlay zoning district considerations.

Boston has a Greenbelt Protection Overlay District (GPOD). While the underlying zoning allowed the building of single family homes by-right, the overlay district required a “*conditional use permit*” (the equivalent to a “special permit” under Chapter 40A) and a site plan review from the city.

Among the conclusions of the court were the following:

- Validity of the Overlay District – A regulatory scheme establishing a greenbelt overlay district was valid, where the governing greenbelt regulations permissibly imposed conditions on uses that were otherwise permitted as-of-right in the underlying district.
- Uniformity Requirements – The applicant claimed that an overlay district violated the uniformity requirements of the Boston zoning enabling act (equivalent to Chapter 40A, § 4.) because it transformed by-right uses into conditional uses. The Court noted that the Boston zoning provided that the zoning board shall grant a conditional use permit “... *only if it finds that all of the following conditions are met.*” The zoning then enumerated a number of conditions that must be met for projects that are subject to the requirements of the GPOD overlay zone. If those conditions are met, then a conditional use permit would issue.

In addition, the GPOD requires certain projects to obtain a site plan review approval, again subject to meeting certain conditions.

The court concluded that the GPOD did not universally transform by-right uses into conditional uses but subjected certain designated projects within the GPOD to the regulations of the GPOD. In addition, the Boston zoning code specifically stated that while certain projects, as defined, located in a GPOD, would be required to obtain both a conditional use permit and a site plan review approval, the code also enumerated the specific conditions that, if met, would result in the issuance of the conditional use permit and site plan review application.

The court determined:

. . . that the GPOD regulations prescribe valid general rules for application to developments within a GPOD in accordance with the standards stated in Article 29, as well as applicable sections of Article 80, and provide a procedural mechanism that includes obtaining approval from the board in the form of a conditional use permit, as provided by article 6. The regulatory scheme subjects uses allowed by right in the underlying district to conditions which, through site plan review, regulate the use but do not prohibit it.

The court concluded that, as structured by the Boston zoning code, the GPOD did not constitute a violation of the uniformity requirement.

3.2 – SARAH FARRINGTON V. CITY OF CAMBRIDGE, 81 MASS. APP. CT. 1135 (2012) – This is a 2012 unpublished opinion of the Appeals Court, in which the Court rejected the plaintiff's argument regarding 2 issues. Among the conclusions of the court were the following:

- Overlay District Superimposed Over Another Overlay District – The plaintiff claimed that the zoning ordinance does not permit one overlay district to be superimposed on another. Cambridge's zoning ordinance was silent as to whether one overlay district may be imposed on another. The Court concluded that *" . . . absent such a restriction, we owe deference to the legislative act of the city and will not read such a restriction into the zoning ordinance where one does not explicitly exist."*
- Permissive Standards of an Overlay District – The plaintiff also argued that the purpose of an overlay district is to impose more restrictive zoning requirements than the underlying zoning and therefore cannot be less restrictive. The Court noted that the language in the Cambridge zoning ordinance (*"in lieu of"* the underlying zoning regulations) indicates that any legal overlay district may substitute, rather than supplement, existing zoning regulations. Restrictions in the overlay provisions of the ordinance may thus be more restrictive or less stringent than the underlying zoning regulations, so long as the amendment is a legitimate exercise of legislative power, which it is.

The Court concluded:

[T]here is no case law requiring that an overlay district impose more stringent zoning requirements than the underlying zoning area. The plaintiffs' reliance on [KCI Management, Inc. vs. Board of Appeal of Boston](#), 54 Mass. App. Ct. 254 (2002), is of no avail. The court in that case reflected on the characteristics of a typical overlay district, but did not incorporate this discussion in its holding because the issue whether overlay district regulations must be more stringent than the underlying zoning regulations was not before the court. Id. at 259-261.

Section 4-31

City of Boston

[Chapter 665 of the Acts of 1956]

1.0 – Introduction

1.1 – BOSTON ZONING LEGISLATION– Special legislation has long governed land use controls in Boston. The authority for Boston zoning derives from its enabling legislation, [Chapter 665 of the Acts of 1956](#), entitled “An Act Authorizing the City of Boston to Limit Buildings According to Their Use or Construction to Specified Zoning Districts” (the “Enabling Act”). The Zoning Code was adopted in 1964, and has been amended over the ensuing years. Since 1966, upon adoption of the Home Rule Amendment, all cities and towns, including Boston, are constitutionally equipped to enact local zoning laws beyond the limited authority previously conferred by old Chapters 40A and 665.

1.2 – CHAPTER 40A, §3 – While Chapter 40A largely does not govern Boston, there is one exception. [G. L. c. 40A, § 3](#), does include Boston regarding congregate living arrangements. This paragraph states:

Notwithstanding any general or special laws to the contrary, local land use and health and safety laws, regulations, practices, ordinances, by-laws, and decisions of a city or town shall not discriminate against a disabled person. Imposition of health and safety laws or land-use requirements on congregate living arrangements among non-related person with disabilities that are not imposed on families and groups of similar size or other unrelated persons shall constitute discrimination. The provision of this paragraph shall apply to every city or town, including, but not limited to, the city of Boston . . .

1.3 – DISCLAIMER – This section provides a short overview of Boston zoning and does not present a detailed description of zoning and land use in Boston. For that information, go to the Boston Planning and Development Agency (BPDA) website ([Boston Planning and Development Agency](#)) and the Inspectional Services Department website ([Boston Inspectional Services Department](#)). Or visit those offices in City Hall.

2.0 – The Enabling Act

2.1 – SCOPE OF THE BOSTON ENABLING ACT –The Enabling Act provides for the following:

- Zoning Commission – Establishes the Zoning Commission which adopts zoning regulations and amendments to the Zoning Code of Boston.
- Purposes – Specifies the Purposes and Applicability of the Zoning Regulations.
- Board of Appeal – Establishes the Board of Appeal to hear appeals under the Zoning Act and State Building Code.
- Zoning Relief – Authorizes the Board of Appeal to grant variances.
- Judicial Review – Provides for judicial review of decisions of the Zoning Commission and Board of Appeal.

3.0 – Article 80

3.1 – BACKGROUND – In 1996 the City adopted a new zoning code article – [Article 80](#) – *Development Review and Approval*. This article revised and recodified the Zoning Code’s requirements for the review of plans and projects by the BPDA. The intent was to create a more unified and consistent set of regulations and procedures for project review. To see the entire [Zoning Code](#) click on this link.

3.2 – APPLICABILITY & REQUIREMENTS – Article 80 applies citywide. This article sets forth citywide regulations for development review by the BPDA. These development review requirements provide procedures for development review while recognizing appropriate differences between:

- Downtown
- Harborpark (waterfront)
- Neighborhoods

In addition Article 80 establishes 4 separate development review processes.

- Large Project Review
- Small Project Review
- Planned Development Area (PDA) Review
- Institutional Master Plan Review

For Planned Development Area Review and Institutional Master Plan Review both the BPDA and the Zoning Commission must approve the development plans.

4.0 – Other Land Use Review

4.1 – INTRODUCTION – In addition to the BPDA and Zoning Commission, there are 2 other Boston commissions that may be involved in the review of development plans.

4.2 – BOSTON CIVIC DESIGN COMMISSION (BCDC) – Article 28 of the Zoning Code establishes the Boston Civic Design Commission to review projects that affect the public realm. Its authority is advisory and it advises the Mayor and the BPDA. Projects that are significant because of their size, visual proximity to important buildings or public areas, or their effect on public spaces are reviewed by the BCDC.

4.3 – LANDMARKS COMMISSION – DEMOLITION DELAY – Article 85 of the Zoning Code establishes the procedures under which a proposed demolition of a building is reviewed by the Landmarks Commission. The review is to determine whether the building’s significance merits a demolition delay. The Commission may require a delay of up to 90 days during which time the applicant must meet with the Commission, city staff and others to examine alternatives to demolition.

5.0 – Subdivisions

5.1 – REGULATION OF SUBDIVISIONS – The Massachusetts Subdivision Control Law, [G. L. c. 41, §§ 81K-81GG](#), does not apply to the City of Boston. In addition, neither the Boston Enabling Act nor the Boston Zoning Code regulates subdivisions in the city. Issues related to the subdivision of land are under the authority of the Inspectional Services Department.

6.0 – Board of Appeal

6.1 – OVERVIEW – The Zoning Board of Appeal is authorized to hear requests for conditional use permits, variances, expansion, or alteration of nonconforming uses and structures, and appeals of interpretations of the Zoning Code by the Commissioner of Inspectional Services.

Unlike Chapter 40A which refers to zoning board of appeals (plural), the Boston Enabling Act refers to zoning board of appeal (singular).

6.2 – APPEAL FILING & NOTICE – An applicant must file an appeal within 45 days of the decision being appealed. (Note that appeals taken under [G.L. c. 40A § 8](#) and § 15 for all other cities and towns are required to be filed within 30 days of the decision being appealed.). The Board of Appeal must give 20 days' written notice of the hearing by publication in a newspaper of general notice, and by mailing the notice to the applicant, all property owners "affected" by the appeal, any person who has filed a written request to receive such notices, and to the BPDA.

6.2 – PUBLIC HEARING – The Board of Appeal must hold the hearing within a reasonable time (unlike the 65 days from filing required under [G.L. c. 40A, § 15](#)).

6.3 – DECISION – The Board of Appeal must file its decision with the Commissioner of Inspectional services within 90 days after the hearing. Notice of the decision must be mailed to parties in interest, the BPDA, to everyone who received notice of the hearing, and to everyone who attended the hearing and requested notice of the decision.

6.4 – APPEALS – Any appeal to the Superior Court, Boston Housing Court (for a housing/dwelling related issue), or Land Court of a decision of the Board of Appeal must be filed within 20 days of the Board's filing of the decision.

Section 4-32

Zoning - Action Date Timelines

[G.L. c. 40A, §§ 5, 8, 9, 10, 11, 15, and 16]

Special Permits

Variances

Administrative Appeals

Zoning Adoption or Amendment

1.0 – Introduction

1.1 – STATUTORY REFERENCES FOR ACTION DATES – The timelines for the special permit granting authority to act on special permits, for a zoning board to act on variances and appeals, and for the city or town to act on zoning amendments are in the following statutory sections of Massachusetts General Law.

- Special Permits [G.L. c. 40A, § 9](#) and [§ 11](#)
- Variances [G.L. c. 40A, §§ 10, 11, 15](#) and [§ 16](#)
- Administrative Appeals [G.L. c. 40A, § 8](#) and [§ 15](#)
- Zoning Adoption/Amendments [G.L. c. 40A, § 5](#)

1.2 – OVERVIEW – Each of these land use procedures is also covered in specific sections of the Guidebook Zoning Chapter and those sections include detailed information about the timelines and other procedures for these actions. However, this section is intended to provide an overview of action date timelines for easy reference.

1.3 – CHART AND TABLES – There is one chart and 4 tables on the following pages. The chart is an overview of action date timelines for special permits, variances, and administrative appeals. The tables separately cover the following:

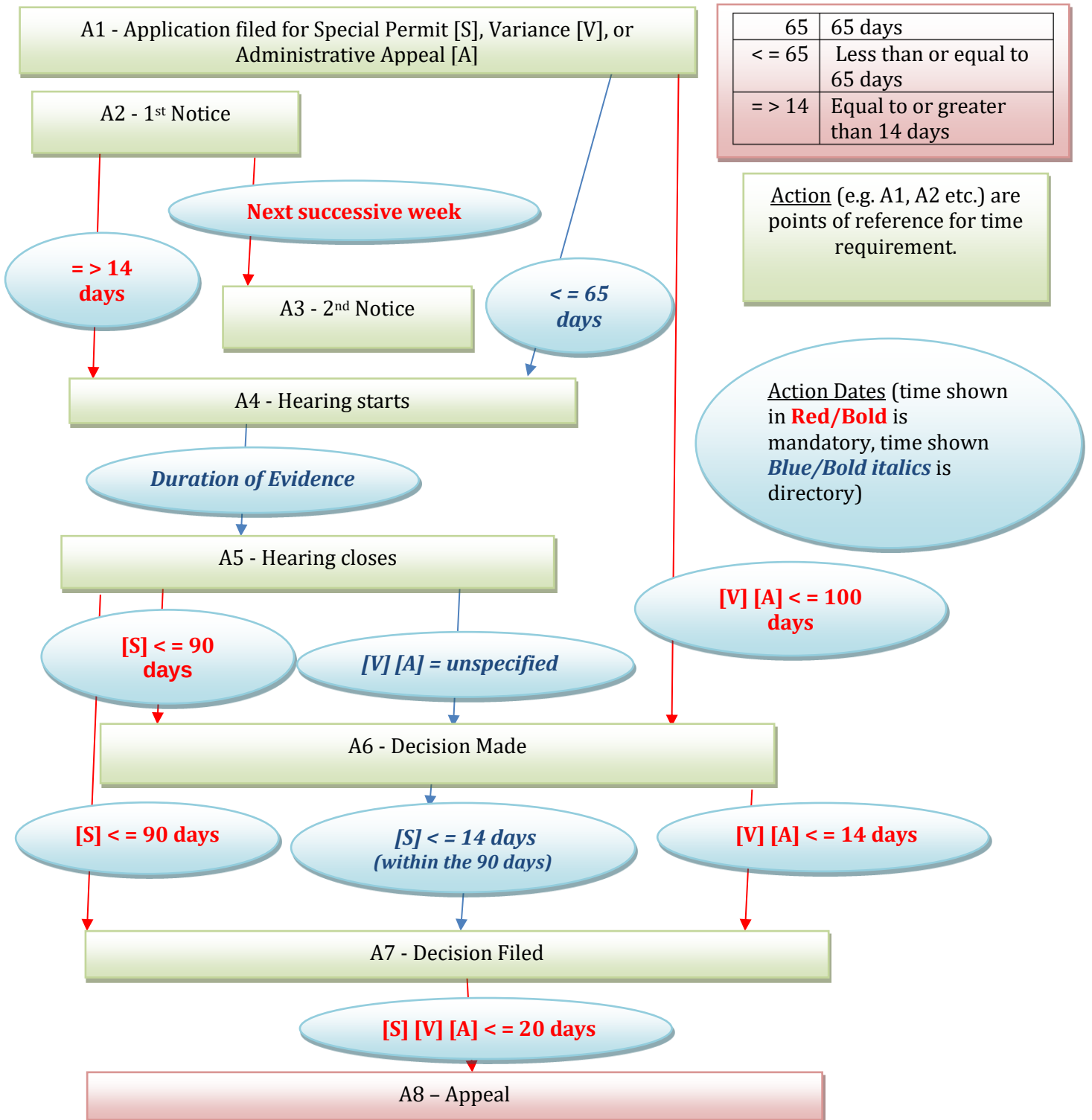
- special permits
- variances
- administrative appeals
- zoning adoption & amendment

1.4 – USE OF CHART AND TABLES – In Sections 2.1, 3.1, 3.4, 3.7, and 3.10, the letter designation “A” signifies “Action”. The tables in Sections 3.1 – 3.4 are found on separate pages so that at such time as the Guidebook may become available for download or in print they may be used by planning and zoning boards and others to track individual applications.

2.0 – Timelines for Special Permits, Variances, & Administrative Appeals

2.1 – TIMELINES CHART – Bold/red language is mandatory; italicized/blue language is directory.

Special Permits, Variances, & Administrative Appeals



3.0 – Timeline Tables for Special Permits, Variances, Administrative Appeals, and Zoning Adoption & Amendment

3.1 – SPECIAL PERMIT – TIMELINE

A = Action; SPGA = special permit granting authority

Special Permit Timeline			
Action		Action Date	Enter Date, or n/a
A1	Application filed		
A2	1 st Notice of hearing ^a	= > 14 days prior to A4	
A3	2 nd Notice of hearing ^b	Within the next successive week following A2	
A4	Public hearing ^c	< = 65 days of A1	
A5	Public hearing closed	After evidentiary sessions are completed	
A6	Decision is made	< = 90 days of A5	
A7	Decision is filed ^d	Within 14 days of A6, but not later than 90 days of A5	

^aA2 – The hearing date (A4) determines the date (A2) by which the 1st Notice of public hearing must be published, i.e., must be not later than 14 days before the hearing date.

^bA3 – The date of the 1st Notice of public hearing (A2) determines the date of the 2nd Notice of public hearing, i.e., must be within the “next successive week” of A2.

^cA4 – While there is no statutory limit to the duration of the public hearing, unjustified continuances of the hearing for no valid evidentiary purpose have led courts to find the hearing has actually “closed” as of the date of the last evidentiary session, resulting in a constructive approval for failing to make and file the decision within the 90 days prescribed (A6 & A7).

^dA7 – Although the statute requires that the written decision be filed with the municipal clerk within 14 days of making the decision, failure to do so is not fatal unless the filing occurs beyond the 90th day of the close of the public hearing.

3.2 – SPECIAL PERMIT – “FINAL ACTION” – The statute requires the SPGA to “take final action” within 90 days of the close of the public hearing; the courts have held that this means both making and filing the decision within 90 days of the close of the hearing, even though the statute states that the SPGA has 14 days to file the decision. This contrasts with the statute governing administrative appeals and variances, which affords an additional 14 days beyond the date on which its decision was made, provided that the decision was made within 100 days of the original application, and the written decision is filed not later than 114 days of the original application.

3.3 – SPECIAL PERMIT – CONTINUANCE – The dates for opening or continuing the hearing, and making and filing the decision beyond any statutory deadline may be extended upon mutual written agreement between the applicant and the board. A copy of the signed extension agreement must be filed with the city or town clerk.

3.4 – VARIANCE – TIMELINE

A = Action; PGA = permit granting authority

Variance Timeline			
Action		Action Date	Enter Date, or n/a
A1	Application is filed		
A2	1 st Notice of hearing ^e	= > 14 days prior to A4	
A3	2 nd Notice of hearing ^f	Within the next successive week following A2	
A4	Public hearing ^g	< = 65 days of A1	
A5	Public hearing closed	After evidentiary sessions are completed, but not later than 100 days after A1	
A6	Decision is made	After evidentiary sessions are completed, but not later than 100 days after A1	
A7	Written decision is filed ^h	< = 14 days of A6	

^eA2 – The hearing date (A4) determines the date (A2) by which the 1st Notice of public hearing must be published, i.e., must be not later than 14 days before the hearing date.

^fA3 – The date of the 1st Notice of public hearing (A2) determines the date of the 2nd Notice of public hearing, i.e., must be within the “next successive week” of A2.

^gA4 – While there is no statutory limit to the duration of the public hearing, as a practical matter the clock is running on the 100 days from the date of the application (A1) within which to hold the hearing (A4 and A5) and to make a decision (A6).

^hA7 – Although the statute requires that the written decision be filed with the municipal clerk within 14 days of making the decision, failure to do so is not fatal unless the filing occurs beyond the 114th day of the application (A1).

3.5 – VARIANCES – DECISION FILING DATE – The statute affords to the PGA an additional 14 days beyond the date on which its decision must be made, provided that the decision is made within 100 days of the original application, and the written decision is filed not later than 114 days of the original application. This contrasts with the timeline for special permits, which requires the SPGA to “take final action” within 90 days of the closing of the public hearing. The courts have held that this means both making and filing the decision within 90 days of the close of the hearing.

3.6 – VARIANCE – CONTINUANCE – Note that the dates for opening or continuing the hearing, and making and filing the decision beyond any statutory deadline may be extended upon mutual written agreement between the applicant and the board. A copy of the signed extension agreement must be filed with the city or town clerk.

3.7 – ADMINISTRATIVE APPEAL – TIMELINE

A = Action; PGA = permit granting authority

Administrative Appeal Timeline			
Action		Action Date	Enter Date, or n/a
A1	Order or decision is made by board or official		
A2	Notice of Appeal filed with municipal clerk, copy to board or official whose order or decision is appealed	< = 30 days of A1	
A3	1 st Notice of hearing ⁱ	= > 14 days prior to A5	
A4	2 nd Notice of hearing ^j	Within the next successive week following A3	
A5	Public hearing ^k	< = 65 days of A1	
A6	Public hearing closed	After evidentiary sessions are completed, but not later than 100 days after A1	
A7	Decision is made ^l	< = 100 days of A2	
A8	Written decision is filed	< = 14 days of A7	

ⁱA3 – The hearing date (A5) determines the date (A3) by which the 1st Notice of public hearing must have been published, i.e., must be not later than 14 days before the hearing date (A5).

^jA4 – The date of the 1st Notice of public hearing (A3) determines the date of the 2nd Notice of public hearing (A4), which must be within the “next successive week” of A3.

^kA5 – While there is no statutory limit to the duration of the public hearing, as a practical matter the clock is running on the 100 days from the date of the application (A2) within which to hold the hearing (A5 and A6) and to make a decision (A7).

^lA7 – Although the statute requires that the written decision be filed with the municipal clerk within 14 days of making the decision, failure to do so is not fatal unless the filing occurs beyond the 114th day of the application (A21).

3.8 – ADMINISTRATIVE APPEAL – DECISION FILING DATE – The statute affords to the PGA an additional 14 days beyond the date on which its decision was made, provided that the decision was made within 100 days of the original application, and the written decision is filed not later than 114 days of the original application date. This contrasts with the timeline for special permits, which requires the SPGA to “take final action” within 90 days of the closing of the public hearing; and the courts have held that this means both making and filing the decision within 90 days of the close of the hearing.

3.9 – ADMINISTRATIVE APPEAL – CONTINUANCE – Note that the dates for opening or continuing the hearing and making, and filing the decision beyond any statutory deadline may be extended upon mutual written agreement between the applicant and the board. A copy of the signed extension agreement must be filed with the city or town clerk.

3.10 – ZONING ADOPTION & AMENDMENT

A=Action

Zoning Adoption and Amendment Timeline			
Action		Action Date	Enter Date, or n/a
A1	Submission of zoning amendment to city/town council or board of selectmen		
A2	Forwarding of amendment by city/town council or selectmen to planning board	< = 14 days of A1	
A3	1 st Notice of hearing ^m	= > 14 days prior to A5	
A4	2 nd Notice of hearing ^N	Within the next successive week following A3	
A5	Public hearing by planning board in town or city and city council in city (in city, hearing may be held jointly with planning board)	< = 65 days of A1	
A6	Public hearing closed	No statutory requirement	
A7	Planning board report to town meeting or city/town council	No vote taken by town meeting or city council unless PB submits a report or 21 days elapse from A6	
A8	City/town council decision	< = 90 days of A5	
A9	Town meeting decision	< = 6 months of A5	
A10	Effective date	In a city – date passed by council and signed by mayor In a town – date town meeting voted to adopt it (subject to review and approval by Attorney General)	
A11	Attorney General review & action for towns only	< = 90 days of receipt by town clerk	

^mA3 – The hearing date (A5) determines the date (A3) by which the 1st Notice of public hearing must have been published, i.e., must be not later than 14 days before the hearing date (A5).

^NA4 – The date of the 1st Notice of public hearing (A3) determines the date of the 2nd Notice of public hearing (A4), which must be within the “next successive week” of A3.

Section 4-33

Action Date Checklists – Zoning Adoption & Amendment

[G.L. c.40A, § 5, & G. L. c. 40, § 32]

1.0 – Introduction

1.1 – OVERVIEW – The subject of zoning adoption and amendment is covered in-depth in Section 4-05 of this Chapter. This section (4-33) is intended to provide a checklist of action date timelines in one location for easy reference. The tables lay out in a step by step format the “action dates” applicable to the adoption and amendment of zoning ordinances and bylaws in Massachusetts cities and towns.

1.2 – USE OF THE TABLES – The tables separately cover the following:

- zoning adoption & amendment – cities
- zoning adoption & amendment - towns

Note – Upon the initial release (October 2021) of this Guidebook, the APA-MA Chapter has restricted its use to members only and only in an electronic image format that does not allow reproduction or downloading. However the Tables were originally designed for use by cities and towns to track their own zoning amendments. At such time that PDF versions may be made available by the Chapter, the Tables may be used in that manner.

In addition to each action date in the first column there are 3 additional columns for a city or town’s use that will better equip the municipality to comply with applicable state law. A board, council, or official can use the second column to fill in the appropriate dates of a particular amendment as it goes through the adoption process.

In Tables 2.1, and 2.2, the letter designation “A” signifies “Action”.

In both of the tables the “=” directs the user to enter the appropriate date as identified in Column 1, for the subject zoning amendment being considered by the city or town.

2.0 – Zoning Adoption & Amendment – Cities

Zoning Adoption and Amendment in Cities - Action Date Calculator A step by step checklist				
Action	Action Date	Can be as early as	But not later than	Comments
Note: "A" = an Action. Action dates that appear in BOLD are critical; failure to comply can be fatal.				
A1 - Date on which the "proposed amendment" is submitted to the City Council ("Council"). The proposal can be submitted by any entity authorized to do so by Chapter 40A, § 5.	A1 =	n/a	n/a	- Statute does not prescribe the form or format for a "proposed amendment." - It is the "proposed amendment" to which the PB Notices and Hearing relate.
A2 - Date on which the Council sends the "proposed amendment" to the Planning Board (PB).	A2 =	A1	14 days after A1	- Where "proposed amendment" is made by PB, the Attorney General deems A2 = A1. - Failure of Council to submit within the 14 day period is not fatal; deadline is directory not mandatory.
A3 - Date on which the first notice of PB and Council hearings is published in a newspaper of general circulation in the city.	A3 =	A2	At least 14 days before A10	- Need not be same newspaper as A4. - Notice must include: [1] Time and place of hearing. [2] Subject matter sufficient for identification. [3] Place where text and maps may be inspected.
A4 - Date on which the second notice of PB and Council hearings is published in a newspaper of general circulation in the city.	A4 =	any day in the next successive week after A2	the day before the hearing	- Need not be same newspaper as A3. - Notice must include: [1] Time and place of hearing. [2] Subject matter sufficient for identification. [3] Place where text and maps may be inspected.
A5 - Date on which Notice of PB and Council hearings is posted in a conspicuous place in the City Hall.	A5 =	A2	14 days before A10	Must remain posted continuously for 14 days prior to the hearing. 48 hour Open Meeting Law Notice is not sufficient.

Zoning Adoption and Amendment in Cities - Action Date Calculator

A step by step checklist

Action	Action Date	Can be as early as	But not later than	Comments
A6 - Date on which a copy of the Notice of the PB and Council hearings is mailed to DHCD	A6 =	A2	A10	• Notice date is not prescribed, but must be reasonably prior to A10. The notice is open to challenge if mailed so shortly before the hearing as to offer little or no opportunity to attend the hearing. • Waiver of notice or affidavit of actual notice can cure a defect here. The statute states that the waiver or affidavit is to be submitted to the city clerk "<i>prior to city council action</i>" on the proposed amendment.
A7 - Date on which a copy of the Notice of the PB and Council hearings is mailed to Regional Planning Agency ("RPA").	A7 =	A2	A10	• Notice date is not prescribed, but must be reasonably prior to A10. The notice is open to challenge if mailed so shortly before the hearing as to offer little or no opportunity to attend the hearing. • Waiver of notice or affidavit of actual notice can cure a defect here. The statute states that the waiver or affidavit is to be submitted to the city clerk "<i>prior to city council action</i>" on the proposed amendment.
A8 - Date on which a copy of the Notice of PB and Council hearings is mailed to planning boards of abutting cities/towns.	A8 =	A2	A10	• Notice date not prescribed, but must be reasonably prior to A10. The notice is open to challenge if mailed so shortly before the hearing as to offer little or no opportunity to attend the hearing. • Waiver of notice or affidavit of actual notice can cure a defect here. The statute states that the waiver or affidavit is to be submitted to the city clerk "<i>prior to city council action</i>" on the proposed amendment.

Zoning Adoption and Amendment in Cities - Action Date Calculator

A step by step checklist

Action	Action Date	Can be as early as	But not later than	Comments
A9 - In cases involving boundary, density, or use changes within a district, the date on which a copy of the Notice of PB and Council hearings is mailed to any non-resident owner who has filed a request with the city clerk and whose property lies in the district where the zoning change is sought.	A9 =	A2	A10	- Notice date not prescribed, but must be reasonably prior to A10. The notice is open to challenge if mailed so shortly before the hearing as to offer little or no opportunity to attend the hearing. - Waiver of notice or affidavit of actual notice can cure a defect here. The statute states that the waiver or affidavit is to be submitted to the city clerk "<i>prior to city council action</i>" on the proposed amendment.
A10 - Date of PB and Council Hearings.	A10 =	the day after A4	65 days after A2 (or A1 if there is no PB)	- Hearing is by the PB and the council (or a committee designated or appointed for the purpose by the council) together or separately. - It is possible for the hearing(s) to be continued to 1 or more future dates if required to complete the hearing. - The 48-hour OML notice is required for each continued session.
A11 - Planning Board Report with recommendations to the Council.	A11 =	A10	A12	- Can be oral or written: written is recommended. - This condition is satisfied both by favorable and unfavorable recommendations. <u>A simple "no position" by the PB is not considered a report.</u> - If not written, PB must make its report to the council.
A12 - Date on which the Council votes on the proposed amendments.	A12 =	A10	90 days after A10	- In the absence of a PB report with recommendations, 21 days must elapse after A10 (or after the date on which the PB hearing related to the amendment concludes) before the Council can vote. - The vote of the Council must be on a motion that is within the scope of the amendment proposed.
A13 - Date of voter initiative referendum petition	A13 =	A12	20 days A12	<u>G.L.c. 43, § 42.</u> Ordinance is "suspended if at least 12% of the voters file a referendum petition. (See Chapter 4, Section 4-05, and subsection 5.0 on referenda.)

Zoning Adoption and Amendment in Cities - Action Date Calculator A step by step checklist				
Action	Action Date	Can be as early as	But not later than	Comments
A14 - Date on which amendments take effect.	A14 =	A12	Any later date as provided in the amendment	When passed by the Council and signed by the mayor, or as otherwise provided by ordinance or charter. However the ordinance or amendment must then be forwarded by the City Clerk to – but not for approval by – the Attorney General. If the city has accepted the provisions of G.L.c. 40, § 32A , publication is required, and a summary of the ordinance or amendment must be published at least twice in a newspaper of general circulation in the city. The publication of the summary shall include a statement indicating where copies of the ordinance may be examined and obtained and a statement that claims of invalidity by reason of a defect in the procedure of adoption may only be made within 90 days after the posting or the second publication.

3.0 – Zoning Adoption & Amendment – Towns

Zoning Adoption and Amendment in Towns – Action Date Calculator A step by step checklist				
Action	Action Date	Can be as early as	But not later than	Comments
References to Forms are to those found on the Attorney General's Website. TM = Town Meeting; ATM = Annual Town Meeting; STM = Special Town Meeting. Note: “A” = an Action. Action dates that appear in BOLD are critical; failure to comply can be fatal.				
A1 - Date on which the “proposed amendment” is submitted to the Board of Selectmen (BoS). The proposal can be submitted by any entity authorized to do so under Chapter 40A, Section 5.	A1 =	n/a	n/a	Statute does not prescribe the form or format for a “proposal.” It is the “proposed amendment” and not the “warrant article” to which the PB Notices and Hearing relate.

Zoning Adoption and Amendment in Towns – Action Date Calculator

A step by step checklist

Action	Action Date	Can be as early as	But not later than	Comments
A2 - Date on which the BoS sends the “proposed amendment” to the Planning Board (PB).	A2 =	A1	14 days after A1	Where “proposed amendment” is made by PB, the Attorney General (AG) deems A2 = A1. Failure of BoS to submit within the 14 day period not fatal; deadline is directory not mandatory.
A3 - Date on which the first notice of PB Hearing is published in a newspaper of general circulation in the town.	A3 =	A2	At least 14 days before A10	Need not be same newspaper as A4. The Attorney General’s Form 7 is recommended. It covers all the bases. Notice must include: [1] Time and place of hearing. [2] Subject matter sufficient for identification. [3] Place where text and maps may be inspected.
A4 - Date on which the second notice of PB Hearing is published in a newspaper of general circulation in the town.	A4 =	any day in the next successive week after A2	the day before the hearing	Need not be same newspaper as A3. Form 7 is recommended. It covers all the bases. Notice must include: [1] Time and place of hearing. [2] Subject matter sufficient for identification. [3] Place where text and maps may be inspected.
A5 - Date on which Notice of PB Hearing is posted in a conspicuous place in the Town Hall.	A5 =	A2	14 days before A10	Notice must remain posted continuously for 14 days prior to the hearing. 48 hour Open Meeting Law Notice is not sufficient.
A6 - Date on which a copy of PB Notice is mailed to DHCD.	A6 =	A2	A10	- Notice date not prescribed, but must be reasonably prior to A10. The notice is open to challenge if mailed so shortly before the hearing as to offer little or no opportunity to attend the hearing. Form 7 is recommended. It covers all the bases. - Waiver of notice or affidavit of actual notice can cure a defect here. The statute states that the waiver of notice or affidavit is to be submitted to the town clerk “<i>prior to town meeting.</i>”

Zoning Adoption and Amendment in Towns – Action Date Calculator

A step by step checklist

Action	Action Date	Can be as early as	But not later than	Comments
A7 - Date on which a copy of PB Notice is mailed to Regional Planning Agency ("RPA").	A7 =	A2	A10	- Notice date not prescribed, but must be reasonably prior to A10. The notice is open to challenge if mailed so shortly before the hearing as to offer little or no opportunity to attend the hearing. Form 7 is recommended. It covers all the bases. - Waiver of notice or affidavit of actual notice can cure a defect here. The statute states that the waiver of notice or affidavit is to be submitted to the town clerk "<i>prior to town meeting.</i>"
A8 - Date on which a copy of PB Notice is mailed to planning boards of abutting cities/towns.	A8 =	A2	A10	- Notice date not prescribed, but must be reasonably prior to A10. The notice is open to challenge if mailed so shortly before the hearing as to offer little or no opportunity to attend the hearing. Form 7 is recommended. It covers all the bases. - Waiver of notice or affidavit of actual notice can cure a defect here. The statute states that the waiver of notice or affidavit is to be submitted to the town clerk "<i>prior to town meeting.</i>"
A9 - In cases involving boundary, density, or use changes within a district, the date on which a copy of the PB Notice is mailed to any non-resident owner who has filed a request with the town clerk and whose property lies in the district where the zoning change is sought.	A9 =	A2	A10	- Notice date not prescribed, but must be reasonably prior to A10. The notice is open to challenge if mailed so shortly before the hearing as to offer little or no opportunity to attend the hearing. Form 7 is recommended. It covers all the bases. - Waiver of notice or affidavit of actual notice can cure a defect here. The statute states that the waiver of notice or affidavit is to be submitted to the town clerk "<i>prior to town meeting.</i>"
A10 - Date of PB Hearing.	A10 =	the day after A4	65 days after A2 (or A1 if there is no PB)	- It is possible for the hearing to be continued to 1 or more later dates if required to complete the hearing. - The 48-hour Open Meeting Notice is required for each continued hearing.

Zoning Adoption and Amendment in Towns – Action Date Calculator

A step by step checklist

Action	Action Date	Can be as early as	But not later than	Comments
A11 - Date on which the Board of Selectmen (BoS) signs the TM warrant.	A11 =	A1	14 days before A14 for STM - or - 7 days before A14 for ATM	- The warrant can be signed before A1 or after A10. - The BoS may sometimes wait for the outcome of the PB hearing before settling on the final language of the warrant article. - The adequacy of the PB hearing notice is based on the subject of the amendment proposed, not on the language of the warrant article, which may be written after the PB hearing.
A12 - Date on which the TM warrant is published and posted in the manner prescribed by the general bylaws of the town, or, if there are no bylaws, by a vote of the town, or in a manner approved by the Attorney General. [G.L. c. 39, § 10]	A12 =	A1	14 days before A14 for STM - or - 7 days before A14 for ATM	
A13 - Planning Board Report with recommendations to TM.	A13 =	A10	A15	- Can be oral or written. - This condition is satisfied both by favorable and unfavorable recommendations. <u>A simple “no position” by the PB is not considered a report.</u> - If not written, PB must orally make its report to TM.
A14 - Date on which Town Meeting first convenes.	A14 =	14 days after publication for STM - or - 7 days after publication for ATM	the date specified in warrant	

Zoning Adoption and Amendment in Towns – Action Date Calculator

A step by step checklist

Action	Action Date	Can be as early as	But not later than	Comments
A15 - Date on which Town Meeting votes on the proposed amendments.	A15 =	A10	6 months after A10	- In the absence of a PB report with recommendations, 21 days must elapse after A10 (or after the date on which the PB hearing on the amendment concludes) before TM can vote. - The vote of TM must be on a motion that is within the scope of the article, as distinct from the subject matter originally proposed.
A16 - Date on which Town Meeting finally adjourns.	A16 =	A14	n/a	
A17 - Date on which any applicable referendum period ends.	A17 =	determined by state statute or town charter	determined by state statute or town charter	
A18 - Date on which AG receives amendments from Town Clerk for approval.	A18 =	A16	30 days after D16	Submission later than the 30th day is not fatal; but serious confusion – or worse – could result if a subsequent TM were to vote on amendments to bylaw provisions not yet approved by the AG.
A19 - Date on which AG approves (or disapproves) the proposed bylaw or amendment.	D19 =	D18	90 days after D18	- Can be extended by AG for insufficient information or by agreement between AG and Town Counsel. - Can be extended pending waiver of minor defects pursuant to G.L. c. 40, § 32.

Zoning Adoption and Amendment in Towns – Action Date Calculator

A step by step checklist

Action	Action Date	Can be as early as	But not later than	Comments
A20 - Date on which Town Clerk posts/publishes the bylaw or amendments as prescribed by G.L. c. 40, § 32.	A20 =	A19	unspecified	- No exact date is prescribed; but uncertainty results where amendments approved by the AG are not posted or published pursuant to G.L. c. 40, § 32. - The notice must include a statement that claims of invalidity by reason of any defect in the procedure of adoption or amendment may be made only within 90 days of the posting or within 90 days of the second publication. - The notice must also include a statement indicating where copies of the bylaw or amendment may be examined and obtained.
A21 - Date on which amendments take effect.	A21 =	A15	Any later date as prescribed in the amendment	Only after all of the following are done: (1) TM votes the amendments (A15) (2) AG approves the amendments (A 19); and, (3) Town clerk posts and publishes as required by law (A20). Zoning bylaws and amendments thereto are deemed to take effect on the date voted by TM, subject to the above conditions being met.
A22 - Date on which claims of invalidity for defect in procedures of adoption may be made.	A22 =	A20	within 90 days of A20	



THE GUIDEBOOK TO MASSACHUSETTS LAND USE 2021

CHAPTER FIVE SUBDIVISION CONTROL LAW

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American Planning Association
Massachusetts Chapter

Creating Great Communities for All

Chapter Five

Subdivision Control Law G.L. c. 41, §§ 81K-FF

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Section 5-01

Subdivision – Introduction

1.0 – Overview

1.1 – BACKGROUND – Chapter Five covers the topic of subdivision control in Massachusetts. This chapter is substantially correlated with [G.L. c. 41, §§ 81K-81GG](#). These sections of the statute constitute a comprehensive statutory scheme for the regulation of subdivisions, and are designated and collectively known as the “Subdivision Control Law”.

1.2 – HISTORY – While earlier legislation had given powers to cities and towns to regulate the construction of ways, it was not until 1936 that legislation was enacted granting them the power to regulate subdivisions. Any board that after 1936 had subdivision powers was then required to adopt rules and regulations regarding the submission and approval of plans. The legislative intent underlying the Subdivision Control Law (G.L. c. 41, § 81K et seq.) is to establish orderly procedures for definitive action within stated times and for notice of that action to be filed in offices of record within stated times, so that all concerned may rely upon recorded action or absence thereof within those times. [Board of Selectmen of Pembroke v. R. & P. Realty Corp.](#), 348 Mass. 120 (1964).

In 1947, the statute was amended to provide for the submission of a preliminary plan prior to that of a definitive plan. The planning board was also given the power to modify, amend, or rescind its approval of a definitive plan or to require a change in the plan.

1.3 – CURRENT SUBDIVISION CONTROL LAW – In 1953, G.L. c. 41, §§ 81K – 81GG, was enacted as the “Subdivision Control Law”. Among the changes in that legislation was the provision of plans not requiring full subdivision approval – that is, “Approval Not Required (ANR)” plans. There have been several amendments since 1953; but the subdivision control law remains substantially the same as when enacted in 1953.

1.4 – THE SUBDIVISION CONTROL LAW – The Subdivision Control Law, in some respects like the state Zoning Act, was enacted to regulate the use of land to . . . “*ensure the safety, convenience, and welfare of the inhabitants of municipalities*”. [Kitras v. Zoning Adm'r of Aquinnah](#), 453 Mass. 245 (2009). Its principal purposes differ from those of zoning, however, in that it focuses on safe and efficient vehicular access to each lot in a subdivision, [Gates v. Planning Bd. of Dighton](#), 48 Mass. App. Ct. 394 (2000), and by regulating the design and construction of infrastructure, such as roadways, water, sewer, and stormwater systems, to the lots within the proposed subdivision.

1.5 – PURPOSE – For the purpose of the Subdivision Control law, see Section 5-03 below.

2.0 – Organization of Chapter Five

2.1 – SEQUENCE OF SECTIONS – This Chapter is organized in generally the same sequence as its statutory provisions (§ 81K – § 81GG). However, in one instance – § 81P – while the statute itself is relatively short there are many issues regarding ANR plans that have been addressed by the courts. Therefore, to assist in understanding all the different aspects related to ANR plans, there are 4 separate

segments on Section 81P – Overview; Adequate Access; Lots with Inadequate Frontage; and Other Considerations.

In a second instance – § 81U – the statute is relatively long and contains a wide variety of topics related to definitive subdivision plans. To make better sense of the many topics in § 81U, it has been divided into separate sections – Approval, Modification, or Disapproval of Definitive Plan; Performance Guarantee; and Land for Parks.

2.2 – ADDITIONAL SECTIONS – In addition to the chapter sections covering each statutory section from § 81K through § 81GG, there are 2 additional sections of this chapter where the authors consolidate information found throughout the Subdivision Control Law. By consolidating these topics, the reader will have easier access to this information. The 2 topics covered by these additional sections are: Section 5-27, Subdivision Plan Freeze and Section 5-28, Subdivision Plans – Action Dates.

3.0 – Acceptance of Subdivision Control Law

3.1 – SUBDIVISION CONTROL LAW IN EFFECT – The Subdivision Control Law is in effect only in those communities that have accepted the statute, which is all but a few municipalities.

3.2 – CITY OF BOSTON – The City of Boston is not subject to the provisions of the Subdivision Control Law. The City is exempted under [G.L. c. 41, § 81N](#).

4.0 – Preemptive Nature of Subdivision Control

4.1 – BACKGROUND – Many court cases have stated that the Subdivision Control Law is a “comprehensive statutory scheme” and as such is “preemptive”. In other words, both the state (in the General Laws) and cities and towns (by ordinance, bylaw, or regulation) may regulate or control subdivisions, although only that in doing so cities and towns not conflict with or frustrate the purposes of the Subdivision Control Law.

The “preemptive” effect of the Subdivision Control Law, along with local authority under the Home Rule Amendment (Article 89 of the Articles of Amendment to the Massachusetts Constitution), leaves municipalities free to legislate and regulate subdivisions in any way that does not conflict with or frustrate the statutory objectives of the state statute. The authors are unaware of any appellate cases that clarify where that imprecise boundary is located.

Thus, to the extent that both the state Subdivision Control Law and local regulation of subdivisions can be implemented harmoniously, both will be lawfully applicable. Only where there is a conflict must the local regulation yield to the state Subdivision Control Law.

Section 5-02

Designation of the Law [G.L. c, 41 § 81K] and Definitions [G.L. c. 41, § 81L]

1.0 – Designation of the Law

1.1 – OVERVIEW – [G.L. c. 41, § 81K](#), provides that §§ 81K – 81GG, inclusive, of c. 41, is known as, “The Subdivision Control Law”. The designation shall, where appropriate, include corresponding provisions of earlier laws.

2.0 – Definitions

2.1 – OVERVIEW – The definitions for the Subdivision Control Law are found in [G.L. c. 41, § 81L](#).

3.0 – Defined Words

3.1 – LISTING OF DEFINED WORDS & PHRASES – The following words and phrases are defined in [G.L. c. 41, § 81L](#):

• Applicant	• Certified	• Drainage
• Lot	• Municipal Service	• Planning Board
• Preliminary Plan	• Recorded	• Register of Deeds
• Registered Mail	• Registry of Deeds	• Subdivision
• Subdivision Control		

3.2 – HIGHLIGHTED DEFINITIONS – Of these thirteen definitions, the following are particularly important:

3.2.1 – *“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 board, or by its chair 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.*

3.2.2 – *“Lot” shall mean an area of land in a single ownership, with definite boundaries, used, or available for use, as the site of one or more buildings.*

This definition of the term “lot” in the Subdivision Control Law does not refer to a lot meeting zoning requirements. [Smalley v. Planning Bd. of Harwich](#), 10 Mass. App. Ct. 599 (1980).

3.2.3 – *“Municipal Service” shall mean public utilities furnished by the city or town in which the subdivision is located, such as water, sewerage, gas, and electricity.*

3.2.4 – *“Planning Board” shall mean a planning board established under [c. 41, § 81A](#), or a board of selectmen acting as a planning board, or a board of survey in a*

city or town which has accepted the provisions of the Subdivision Control Law as provided for in c. 41, § 81N, or corresponding provisions of earlier laws or has been established by special law with powers of subdivision control.

3.2.5 – *“Preliminary Plan” shall mean a plan of a proposed subdivision or resubdivision of land drawn on tracing paper, or a print thereof, showing:*

- *the subdivision name, boundaries, north point, date, scale, legend and title “Preliminary Plan”;*
- *the names of the owner(s), the applicant and the designer, engineer or surveyor;*
- *the names of all abutters, as determined from the most recent local tax list;*
- *the existing and proposed lines of streets, ways, easements and any public areas within the subdivision in a general manner;*
- *the proposed system of drainage, including adjacent existing natural waterways;*
- *the approximate boundary lines of proposed lots, with approximate areas and dimensions;*
- *the names, approximate location and widths of adjacent streets; and*
- *the topography of the land in a general manner.*

3.2.6 – *“Recorded” shall mean recorded in the registry 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.*

Land Court filings may typically be done at registry of deed offices.

3.2.7 – *“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 divided has frontage on:*

- *a public way or a way which the clerk of the city or town certifies is maintained and used as a public way, or*
- *a way shown on a plan theretofore approved and endorsed in accordance with the Subdivision Control Law, or*
- *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, and for the installation of municipal services to serve such land and the buildings erected or to be erected thereon. (See also: [“ANRs and Ancient Ways”](#) – Citizen Planner Training Collaborative). Such frontage shall be of at least the distance as is then required by a zoning or other ordinance or bylaw, if any, of the city or town, for the erection of a building on such lot, and if no distance is so required the 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.

It is important to know that the “Subdivision” definition is key to understanding what does, and does not, constitute a subdivision that must be acted on under the Subdivision Control Law.

3.3 – DEFINITIVE PLAN – G.L. c. 41, § 81L, does not include a definition of a “Definitive Subdivision Plan”. However, a Definitive Plan is covered by G.L. c. 41, § 81L, which refers to a plan showing a subdivision of a tract of land into 2 or more lots, including resubdivision, submitted to the planning board for its approval and under G.L. c. 41, § 81O, which states that *“no person shall make a subdivision of any land in any city or town in which the subdivision control law is in effect unless he has first submitted it to the planning board . . . for its approval . . .”*. The plan required by § 81O is termed the “definitive plan”.

3.4 – CLERK’S CERTIFICATE FOR A PUBLIC WAY – In the absence of contradictory evidence, the planning board may rely upon the clerk’s certificate attesting that a way is maintained and used as a public way. However, in the face of contradictory evidence, the court may accept the clerk’s certificate as one piece of evidence. But the matter then indicates the need for further evidence. [*Matulewicz v. Planning Bd. of Norfolk*](#), 438 Mass. 37 (2002).

Section 5-03

Purpose of the Subdivision Control Law and Planning Board Powers [G.L. c. 41, § 81M]

1.0 – Introduction

1.1 – STATUTORY REFERENCE – [G.L. c. 41, § 81M](#), is the purpose section of the Subdivision Control Law.

1.2 – PURPOSE OF THE LAW – The purpose of the subdivision Control Law is as follows:

The Subdivision Control Law has been enacted for the purpose of protecting the safety, convenience and welfare of the inhabitants of the cities and towns in which it is, or may hereafter be, put in effect by regulating the laying out and construction of ways in subdivisions providing access to the several lots therein, but which have not become public ways, and ensuring sanitary conditions in subdivisions and in proper cases parks and open areas.

See [Dolan v. Board of Appeals of Chatham](#), 359 Mass. 699 (1971).

1.3 – SUBDIVISION VERSUS ZONING – Failure to distinguish between the purposes of subdivision control (e.g., adequacy of ways in relation to lots and other infrastructure issues such as water and sewer) and the purposes of zoning (lawful use of lots) may introduce errors in a board's analysis and decisions relating to land use permits.

2.0 – Powers of the Planning Board

2.1 – POWERS OF THE PLANNING BOARD – The powers of the planning board under subdivision control shall be exercised to:

- *provide adequate access to all of the lots in a subdivision by ways that will be safe and convenient for travel;*
- *lessen congestion in those ways and in the adjacent public ways;*
- *reduce danger to life and limb in the operation of motor vehicles;*
- *secure safety in the case of fire, flood, panic, and other emergencies;*
- *ensure compliance with the applicable zoning ordinances or bylaws;*
- *secure adequate provisions for water, sewerage, drainage, underground utility services, fire, police, and other similar municipal equipment, and street lights and other requirements where necessary in a subdivision;*
- *coordinate the ways in a subdivision with each other and with the public ways in the city or town in which it is located and with the ways in neighboring subdivisions; and*
- *encourage the use of solar energy and protect access to direct sunlight for solar energy systems.*

2.2 – ADDITIONAL POWERS – SOLAR – The planning board powers under the Subdivision Control Law may also be exercised in ways that recognize the policy of the Commonwealth to encourage the use of solar energy systems and to protect access to direct sunlight of solar energy systems.

3.0 – Approval of Subdivision Plans

3.1 – INTENT OF THE SUBDIVISION CONTROL LAW – APPROVAL OF PLANS – G.L. c. 41, § 81M, states that “[i]t is the intent of the Subdivision Control Law that any subdivision plan filed with the planning board shall receive the approval of such board if the plan conforms to the recommendations of the board of health and to the reasonable rules and regulations of the planning board pertaining to the subdivision of land”.

A planning board may consider factors outside the boundaries of a subdivision, including those pertaining to safety, accessibility, and traffic, where those factors are relevant to the requirements of the Subdivision Control Law or of local regulations. [Rattner v. Planning Bd. of West Tisbury](#), 45 Mass. App. Ct. 8 (1998).

3.2 – BOARD OF HEALTH – The planning board may not approve a subdivision plan which does not comply with the board of health recommendations. [Canter v. Planning Bd. of Westborough](#), 4 Mass. App. Ct. 306 (1976). The planning board may address its concerns only by disapproving the plan or by modifying it in such fashion as to bring it into conformity with the recommendations of the board of health. [Fairbairn v. Planning Board of Barnstable](#), 5 Mass. App. Ct. 171 (1977), and [Independence Park, Inc. v. Board of Health of Barnstable](#), 25 Mass. App. Ct. 133 (1987).

However, the board of health is required to act in a reasonable manner in formulating its recommendation and report to the planning board with respect to a proposed subdivision plan. For more detailed information regarding the board of health, see Section 5-14, subsection 6.0.

3.2 – WAIVER OF RULES & REGULATIONS – The planning board may, where appropriate, waive portions of its own rules and regulations, in accordance with [G.L. c. 41, § 81R](#).

Section 5-04

Acceptance of Subdivision Control

[G.L. c. 41, § 81 N]

1.0 – Introduction

1.1 – OVERVIEW – Acceptance of the Subdivision Control Law is covered by [G.L. c. 41, § 81N](#).

2.0 – Acceptance

2.1 – SUBDIVISION CONTROL LAW IN EFFECT – The Subdivision Control Law shall be in effect in every city and town where the city or town had established a planning board prior to January 1, 1954, or in a city or town which, after that date, establishes a planning board under § 81A, unless at the time of the planning board establishment the city council or town meeting votes not to accept the provisions of the Subdivision Control Law.

In 2012, the Appeals Court held that the Subdivision Control Law became effective in a town when town officials adopted rules and regulations regarding subdivisions, not on an earlier date on which the town created a planning board. The court stated that an effective municipal Subdivision Control Law required regulations for substance and standards, and that detailed codification of subdivision control was required so that property owners would know in advance what was or may be required of them. [Ridgeley Management Corp. v. Planning Bd. of Gosnold](#), 82 Mass. App. Ct. 793 (2012).

2.2 – LATER SUBDIVISION CONTROL ACCEPTANCE – If a city or town voted not to accept subdivision control as provided for in Section 2.1 above, it may subsequently vote to accept the Subdivision Control Law in accordance with [G.L. c. 4, § 4](#). In addition, any city or town having a board of survey may vote to accept the Subdivision Control Law in the same manner.

2.3 – CITY OF BOSTON – The City of Boston is not subject to the Subdivision Control Law.

3.0 – Board of Survey

3.1 – SUBDIVISION CONTROL BY BOARD OF SURVEY – In any city or town that has not established a planning board under § 81A but that has a board of survey and has accepted the provisions of the Subdivision Control Law prior to January 1, 1954, the board of survey shall have the all the powers and be subject to all of the duties of a planning board relating to subdivision control.

4.0 – Application of the Subdivision Control Law

4.1. – SECTIONS 81K-GG – In every city or town in which the Subdivision Control Law is in effect, the provisions of §§ 81E-GG apply in that city or town regardless of whether the planning board was established under § 81A or by any other general or special law. This is the case notwithstanding any contrary or inconsistent provision of any general or special law.

5.0 – Subdivision Control Law Acceptance – Effective Date

5.1 – EFFECTIVE DATE; NOTICE TO LAND COURT & REGISTER OF DEEDS – The Subdivision Control Law shall not become effective in any city or town in which it was not in effect on January 1, 1954, until the planning board of that city or town shall have notified the register of deeds and the recorder of the Land Court that the provisions of the Subdivision Control Law have been accepted and that the planning board has adopted subdivision control rules and regulations as required by § 81Q.

5.2 – CERTIFIED COPIES OF VOTE OF ACCEPTANCE OF SUBDIVISION CONTROL LAW; RULES & REGULATIONS – The planning board shall furnish the register of deeds and the recorder of the Land Court with a copy, certified by the municipal clerk, of the vote of the city council or town meeting under which the provisions of the Subdivision Control Law were accepted.

In addition – but sometimes overlooked – the planning board shall furnish the register of deeds and the recorder of the Land Court a copy of the board's subdivision control rules and regulations, certified by the city or town clerk.

Section 5-05

Regulation of New Subdivisions and Submission of Plans [G.L. c. 41, § 81O]

1.0 – Introduction

1.1 – OVERVIEW – [G.L. c. 41, § 81O](#), covers the topic of the regulation of new subdivisions. It also includes language related to the submission of subdivision plans.

2.0 – Subdivision Plan Required

2.1 – SUBDIVISION OF LAND & SUBDIVISION PLAN – Landowners may not subdivide their land in any city or town where the Subdivision Control Law is in effect unless and until they have submitted a subdivision plan to the planning board for approval. The plan shall show the proposed lots and the existing or proposed ways. The planning board must approve the subdivision plan before it can take effect.

2.2 – CHANGING THE WAYS – After approval of the subdivision plan, the location and width of the ways on the plan shall not be changed by private parties (developers, landowners) unless the plan is amended under [G.L. c. 41, § 81W](#).

2.3 – LOT CHANGES – The number, shape, and size of lots on an approved definitive plan may be changed without action by the board, provided every lot so changed still has frontage on a public way or a way shown on an approved subdivision plan, and the lot or lots have at least the frontage distance required by the zoning ordinance or bylaw, or, if not so required, then at least 20 feet.

2.4 – LOT NUMBER LIMITS – If a planning board intends to limit the number of lots in a subdivision, it must include the limitation in its decision and must note the limitation on the approved plan, which becomes a matter of record; otherwise, the number, shape, and size of lots on the plan may be changed as matter of right, provided every lot still has frontage that meets the minimum requirements of the city or town in which the land is located. [Hamilton v. Planning Bd. of Beverly](#), 35 Mass. App. Ct. 386 (1993).

3.0 – Plan Deemed Submitted

3.1 – SUBMISSION OF SUBDIVISION PLAN – A subdivision plan may be submitted by either:

- a) delivery to the planning board at a meeting of the board, or
- b) sending it by registered mail to the planning board care of the municipal clerk. If mailed, the date of receipt of the plan shall be the date of submission of the plan.

In [Cullen v. Planning Board of Hadley](#), 4 Mass. App. Ct. 482 (1976), the court determined that hand delivery to the municipal clerk was also an acceptable means of submittal.

3.2 – ADDITIONAL INFORMATION ON PLAN SUBMISSION – Refer to the following Sections of this Subdivision Chapter for additional information regarding the submission of plans.

Section 5-06 Approval Not Required Plans – § 81P, Part 1; Overview

Section 5-12	Preliminary Subdivision Plan – § 81S
Section 5-13	Submission of Plans & Public Hearing – § 81T
Section 5-14	Approval, Modification, or Disapproval of Definitive Plan – § 81U, Part 1

Section 5-06

Approval Not Required Plans (ANR Plans)

Part 1 – Overview [G.L. c. 41, § 81P]

1.0 – Introduction

1.1 – OVERVIEW – Information on ANR plans (“Form A” or “81P” plans) is in [G.L. c. 41, § 81P](#). To understand of the purpose of ANR plans is to recognize that the board’s endorsement is merely “a simple method to inform the register of deeds that the [planning] board was not concerned with the plan” ([Smalley v. Planning Board of Harwich](#), 10 Mass. App. Ct. 599 (1980)).

2.0 – Definition of Subdivision

2.1 – SUBDIVISION – The definition of “subdivision” in [c. 41, § 81L](#), is key to understanding what does and does not constitute a subdivision under the Subdivision Control Law. The language states:

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 of land so divided has frontage on: (Emphasis added.)

- o a public way or a way which the clerk of the city or town certifies is maintained and used as a public way; or*
- o a way shown on a plan theretofore approved and endorsed in accordance with the Subdivision Control Law; or*
- o 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.*

2.2 – WAY SHOWN ON A SUBDIVISION PLAN – For the type of way defined as “a way shown on a plan theretofore approved and endorsed in accordance with the subdivision law” the way must either be constructed or that it is certain to be constructed because adequate security has been provided under [c. 41, §81U](#), to guarantee performance. [Richard v. Planning Bd. of Acushnet](#), 10 Mass. App. Ct. 216, 219 (1980).

2.3 – FRONTAGE REQUIREMENT – The definition also includes the condition that lot frontage must either be the distance required by the zoning ordinance or bylaw, or if none is required, then a minimum of 20 feet.

2.4 – 81L SUBDIVISION EXEMPTIONS – There are 2 situations in the definition found in § 81L where an ANR plan is exempt from the Subdivision Control Law and is therefore entitled to an endorsement. These 2 exemptions are:

- 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 required frontage; and
- the division of a tract of land into 2 or more lots on which 2 or more buildings were standing when the Subdivision Control Law went into effect in the city or town where the land is located and where the parcel is in separate lots on each of which one of the buildings remains standing.

2.5 – DIVISION OF A TRACT OF LAND INTO TWO OR MORE LOTS WITH BUILDINGS – A question relating to the second of these 2 exemptions is “what is a building”. In [*CITGO Petroleum Corporation v. Planning Board of Braintree*](#), 24 Mass. App. Ct. 425 (1987), the Court found that the buildings located on the parcel created by the ANR plan, which had been denied by the board, were substantial in nature and used for business operations. Therefore, the ANR plan was entitled to endorsement.

In a Land Court case referred to in [*“The ANR Handbook”*](#) (DHCD, Rev. September 2010), *Taylor v. Pembroke Planning Board*, Plymouth Misc. Case No. 126703, (1990), the judge ruled that an 88.6 foot by 30.8 foot auto storage building with its own cesspool and electricity was a substantial building and the ANR plan was entitled to endorsement by the board. The judge also determined that the use of a building was not controlling on whether a § 81L exemption applies or not.

3.0 – Procedures

3.1 – SUBMISSION OF PLAN TO PLANNING BOARD – A person seeking an endorsement of an ANR plan for land located in a city or town where the Subdivision Control Law is in effect and wishing to record it, and who believes also that the plan does not require approval under the Subdivision Control Law, may submit the plan to the board in accordance with the procedures in [G.L. c. 41, § 81T](#).

3.2 – NOTICE TO CITY OR TOWN CLERK – Written notice shall be given to the city or town clerk by delivery or registered mail, postage prepaid, that the plan has been submitted. The clerk shall, if requested, give a written receipt for that notice. The written notice must be given to the city or town clerk in a prompt manner.

3.3 – TIMELINE & DECISION – The planning board has 21 days from the time of the submission to act and to notify the city or town clerk of such action in one of 2 ways. They are:

- if the board finds the plan does not require subdivision approval, it shall, without a public hearing, by majority vote, endorse on the plan, or cause to be endorsed on it by a person authorized by the board, the words “*approval under the Subdivision Control Law not required*” with the appropriate names of those authorized to endorse or sign the plan; or
- if the board determines that the plan requires approval under the Subdivision Control Law, it shall give written notice of its determination to the clerk of the city or town and to the person submitting the plan.

3.4 – STANDARDS FOR ENDORSEMENT – In order for the Board to endorse an ANR plan, it must determine that the approval is not required under the Subdivision Control Law, 3 standards must

be met. They are:

- the lots shown on the plan must front on one of the 3 ways specified in § 81L;

- the lots shown must meet the minimum frontage requirements of § 81L; and
- the planning board must determine that vital access to such lots as contemplated by § 81M otherwise exists.

3.5 – VOTE OF THE PLANNING BOARD – The vote of the planning board to endorse an ANR plan shall be by a majority of the full board, not merely a majority of the quorum.

3.6 – ACTIONS OF THE APPLICANT – If the board finds that the plan requires approval under the Subdivision Control Law, the applicant may submit the plan for approval as provided for in [G.L. c. 41, § 81T](#), or may appeal the determination of the board as provided for in [G.L. c. 41, § 81BB](#).

3.7 – CONSTRUCTIVE APPROVAL – If the board fails within 21 days after the submission of an ANR plan to either act on the plan or to notify the clerk of the city or town and the person submitting the plan of its action on the plan, approval of the plan under the Subdivision Control Law shall be deemed not to be required (constructive approval). The board shall without delay endorse on the plan that it has been constructively approved; but if it fails to do so, the city or town clerk shall issue a certificate to the same effect.

3.8 – ENDORSEMENT MUST BE MADE “FORTHWITH” – While the board has 21 days to decide, it cannot, however, use the 21-day period to frustrate the purposes of the ANR plan submission. For example, in [Bisson v. Planning Board of Dover](#), 43 Mass. App. Ct. 504 (1997), the board received an ANR plan 7 days before town meeting. Although the board met before town meeting and considered the plan, it did not act. Subsequently town meeting passed a zoning amendment that adversely affected the land on the ANR plan. The planning board then acted within the 21-day time period and denied the plan based on the adopted zoning amendment. The court ruled that a board must endorse a valid ANR plan “forthwith” even when the 21-day period had not expired.

3.9 – RETURN OF PLAN OR CERTIFICATE TO APPLICANT – The plan bearing the endorsement shall be delivered by the board to the person who submitted the plan, or in the case of constructive grant, the town clerk shall deliver to the person who submitted the plan a certificate of constructive grant.

4.0 – Planning Board Signature

4.1 – INDIVIDUAL SIGNATORY & NOTICE TO REGISTER OF DEEDS OR RECORDER OF LAND COURT – The action of the board is exclusively a board function that requires a majority vote of the board. The endorsement of the plan may be either by the signatures of a majority of the board or by a single member of the board who has been authorized by a majority vote of the board to endorse the board’s approval on a plan. If the board has voted to allow a single member’s signature then it shall send a written statement to the register of deeds and to the recorder of the Land Court, signed by a majority of the board, setting forth the name of the person so authorized.

5.0 – Plan “Freezes”

5.1 – ZONING FREEZE – The use of the land shown on the ANR plan shall be governed by applicable provisions of the zoning ordinance or bylaw in effect at the time of the submission of the plan while the plan is being processed under § 81P, including the time required to pursue or await the determination of an appeal. This freeze protection is for 3 years from date of the ANR endorsement.

5.2 – STATE ENVIRONMENTAL CODE & BOARD OF HEALTH REGULATIONS FREEZE – The state environmental

code and board of health regulations in effect at time of submission of plan govern the plan. The plan is protected for 3 years from date of the endorsement from any changes to those regulations.

5.3 – FREEZE DATE – It is date of plan endorsement by the board that triggers the 3-year use protection for zoning, as well as the applicability of the environmental code and board of health regulations.

6.0 – § 81L Exemption & Nonconforming Status

6.1 – NONCONFORMITIES AND THE § 81L EXEMPTION (See Section 2.4 above.) – The question of whether a single-family home can obtain legal nonconforming status when the nonconformity is created through § 81L was addressed in an unpublished opinion by the Appeals Court in *Branagan v. Zoning Board of Appeals of Falmouth*, 75 Mass. App. Ct. 1107 (2009).

The Court determined that there was nothing to support the plaintiff’s argument that a house on a remaining lot created by an ANR plan under the § 81L exemption acquires protected status as a preexisting non-conforming structure under G.L. c. 40A, § 6. Section 81L states that “*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 Court in the *Branagan* case referenced the determination made in *Gattozzi v. Director of Inspection Servs. of Melrose*, 6 Mass. App. Ct. 889, 890 (1978), that “[t]he planning board’s endorsement, ‘approval not required,’ on the plan dividing the land in question into three lots gives the lots no standing under the zoning ordinance.” This would appear to include the protections accorded by G.L. c. 40A, § 6, to lawful nonconforming uses.

In *Palitz v. Zoning Board of Appeals of Tisbury*, 470 Mass. 795 (2015), the SJC restated a long standing precedent that an ANR endorsement under G.L. c. 41, § 81L, does not render a lot compliant with zoning, and that any new noncompliance that results from the conveyance of a noncompliant lot can be cured only by a variance. A § 81L endorsement carries with it no determination of zoning compliance and provides no grandfather protections.

Section 5-07

Approval Not Required Plans (ANR Plans)

Part 2 - Adequate Access [G.L. c. 41, § 81P]

1.0 – Introduction

1.1 – OVERVIEW – One issue addressed in the ANR plan process is that of determining “adequate access” when a plan is submitted to the planning board for endorsement. There have been several court decisions over the years addressing many of the different issues on this topic. This section reviews the issues with citations to several of the court cases.

1.2 – BACKGROUND – In 1955, in [*Rettig v. Planning Board of Rowley*](#), 332 Mass. 476 (1955), the Supreme Judicial Court considered a plan submitted for ANR endorsement showing a parcel on a road that was 10 feet wide, in poor repair, and impassible in bad weather. The Court stated that:

. . . irrespective of the meaning of ‘way’ in § 81L . . . [the street] could not in any practical sense have been in existence as a way”. The plan was therefore subject to the Subdivision Control Law to “assure adequate access to all of the lots in a subdivision by ways that will be safe and convenient for travel.

See the *Sturdy* and *Ball* cases in Section 3.4 below.

1.3 – The “ADEQUACY OF ACCESS” STANDARD – The requirement that a board determine that adequate access exists to the lots shown on an ANR plan before endorsing it is not expressly stated in [§ 81P](#); however, the courts have determined that inadequacy of access may be a basis for withholding endorsement. This standard has evolved from court decisions as to whether lots have practical physical access to ways. In particular, adequacy of access may be determined by whether or not the access is suitable for public safety purposes.

These decisions have focused on 2 issues:

- adequacy of the way on which the proposed lots front; and
- adequacy of the access from the way to the buildable portion of the lots.

2.0 – Frontage

2.1 – FRONTAGE ISSUES – By definition, lots on an ANR plan must have adequate frontage on one of 3 types of ways. Failure to comply with the frontage requirements of local zoning means the planning board must withhold endorsement for the simple reason that such a plan shows land requiring subdivision approval. [*Gifford v. Planning Bd. of Nantucket*](#), 376 Mass. 801, 807-808 (1978).

2.2 – ASPECTS OF FRONTAGE – In [*Gifford v. Planning Board of Nantucket*](#), 376 Mass. 801 (1978), the SJC discerns a linkage between the definition of frontage and the need for the provision of public safety access. The court stated:

Frontage is meant 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.

As a result, frontage is considered to have 2 aspects:

- quantitative frontage measures the linear distance of the lot along a way; and
- qualitative frontage requires practical access to the building site for fire, police, and emergency vehicles.

In [*Perry v. Planning Board of Nantucket*](#), 15 Mass. App. Ct. 144 (1983), the Appeals Court determined that there was a “dual requirement” for an ANR endorsement regarding access. There must be:

- frontage on one of the 3 types of ways as defined in § 81L; and
- a planning board’s determination that adequate access, as intended by 81M, exists.

3.0 – Adequate Access Issues

3.1 – INTRODUCTION – There are numerous additional issues related to the adequacy of access to a lot shown on an ANR plan. Those issues and relevant court cases are in the sections that follow.

3.2 – WAYS – A proposed lot must front on one of the following 3 ways to be eligible for a § 81P endorsement as defined by § 81L. They are:

- a public way or a way which the clerk of the city or town certifies is maintained and used as a public way; or
- a way shown on a plan theretofore approved and endorsed in accordance with the Subdivision Control Law; or
- 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.

3.3 – ACCESS TO A PUBLIC WAY – The first instance in which a division of a tract of land into 2 or more lots shall not be deemed to constitute a subdivision is with respect to . . . “a public way or a way which the city or town clerk certifies to be maintained and used as a public way ‘

In [*Hutchinson v. Planning Board of Hingham*](#), 23 Mass. App. Ct. 416 (1987), the planning board withheld endorsement of an ANR plan even though it was on a paved public way similar in width and in other respects to other local roads. The planning board’s determination that the way was “inadequate” was overturned by the Court. The Court stated:

. . . 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 a § 81P endorsement is required.

Inadequacy of a public way is a sufficient basis to withhold endorsement only in extraordinary circumstances.

Refer to the discussion of *Gifford* below in Section 3.7 where technical compliance with frontage requirement on a public way was accompanied by plan constrictions that made access illusory. Also, in Section 3.8 below the *Hrenchuk* case and decision included a situation where state-installed barriers foreclosed physical access from the public way to the lot.

In [*Perry v. Planning Board of Nantucket*](#), 15 Mass. App. Ct. 144 (1983), the issue addressed was whether adequate access on the public ways leading to the development could be considered. The planning board argued that public ways are not exempted by § 81L unless they in fact existed. Because the ways did not exist upon the ground, the court found that the planning board was correct in denying the ANR plan. The court stated:

... ways will not satisfy the requirements of the "public way" exemption of § 81L... of the Subdivision Control Law, unless they in fact exist on the ground in a form which satisfies the... goals of § 81M.

A public way that in fact does not exist on the ground (or "paper street") is a valid reason to withhold endorsement of an 81P plan.

3.4 – DEFICIENCY OF THE PUBLIC WAY – There are 2 later cases that examine deficiencies in the public way and whether those deficiencies justify the withholding of an ANR endorsement. In [*Sturdy v. Planning Board of Hingham*](#), 32 Mass. App. Ct. 72 (1992), the Court looked at whether a public way with certain deficiencies nevertheless provided suitable access. The road was a public way, dirt and gravel, 11 to 12 feet wide, muddy in spots, and impassable at certain times of the year. The planning board denied the endorsement; but the Appeals Court overturned the denial ruling that "[d]eficiencies in a public way are insufficient ground for denying the endorsement."

However, in 2003, the Appeals Court returned to this issue in [*Ball v. Planning Board of Leverett*](#), 58 Mass. App. Ct. 513 (2003). The landowners relied on the *Sturdy* case to support their argument that if the access was not illusory the ANR plan must be endorsed, even with deficiencies of the way. In this case the way was public and unpaved with a raised bed of gravel along the centerline. Approximately 1000 feet of the way needed improvements for an automobile to be able to traverse it. A Superior Court judge ruled that, although it needed improvements, it was a public way and emergency vehicles could use it; therefore, ANR endorsement was required.

The Appeals Court proceeded to clarify the holdings in previous cases, including *Sturdy*, drawing a distinction between "deficient" access ("it could be better, but manageable") and access that fails to provide acceptable physical access ("illusory"). Testimony at the trial in *Ball* indicated that emergency vehicles could not traverse portions of the way. Although the way was more than a paper street, it nevertheless provided no practical means for emergency vehicles to access the lots. Therefore, the denial of the ANR plan by the planning board was upheld.

The Appeals Court in *Ball* cited to its earlier decision in [*Gates v. Planning Bd. of Dighton*](#), 48 Mass. App. Ct. 394, 399 (2000), in which it stated that the perceived tension between the cases concerning ANR endorsements and questions of physical access, including *Perry* and *Sturdy*, create 2 categories of access on public ways.

There is the 'could be better but manageable' category and the 'illusory' category. The first category warrants a § 81P endorsement; the second does not.

3.5 – ACCESS TO A WAY SHOWN ON A DEFINITIVE PLAN – The second instance in which a division of a tract of land into 2 or more lots shall not be deemed to constitute a subdivision is stated as:

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... a way shown on a plan theretofore approved and endorsed in accordance with the Subdivision Control Law

In [*Richard v. Planning Board of Acushnet*](#), 10 Mass. App. Ct. 216 (1980), the Appeals Court determined that this exception requires either that the approved ways have been built or that there exists the assurance (a performance guarantee) required by § 81U that they will be built. A planning board cannot endorse a § 81P plan showing access to a way shown on an approved and endorsed definitive subdivision plan unless the way either exists or a performance guarantee for its construction has been submitted.

3.6 – ACCESS TO A WAY IN EXISTENCE WHEN THE SUBDIVISION LAW TOOK EFFECT – The third instance in which a division of a tract of land into 2 or more lots shall not be deemed to constitute a subdivision is stated as:

... 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.

This allows the planning leeway to determine the adequacy of this third qualifying way.

A planning board has the authority to withhold endorsement of an ANR plan if the “way in existence,” in the opinion of the board, does not have sufficient width, suitable grades, and adequate construction to provide for the needs of vehicular traffic in relation to the proposed use of the land.

There are numerous Land Court cases that have consistently determined that a way does not qualify as a “way in existence” if it did not exist on the ground at the time the Subdivision Control Law took effect in the municipality. In *Gould v. Planning Board of Pembroke* 7 LCR 78 (1999) (Misc. Case No. 238169, unavailable on-line), the Court stated:

A fair reading of . . . the Subdivision Control Law . . . suggests that the Legislature intended merely to recognize ways already in use at the time the Subdivision Control Law became effective, provided such ways offer adequate access, and not to create a mechanism to circumvent the subdivision review process for ways newly constructed within the layout of previously delineated “paper streets”

3.7 – ADEQUACY OF THE ACCESS BETWEEN THE WAY AND THE BUILDABLE PORTION OF THE LOT – Regardless of which of the 3 instances in which a division of a tract of land into 2 or more lots shall not be deemed to constitute a subdivision, inadequacy of access between the way and the buildable portion of the lot can sometimes be a basis for withholding endorsement.

In [*Gifford v. Planning Board of Nantucket*](#), 376 Mass. 801 (1978), the Supreme Judicial Court dealt with the issue of adequate access between the buildable portions of the lots and the public ways on which they fronted. Several of the lots were inaccessible as a practical matter (extremely long, narrow, angular “necks” with multiple changes of directions between the frontage and the buildable portion of the lots) and could not be used by fire or other emergency vehicles. The court stated that the circumstances of this plan made it a very “exceptional” case. The Court overturned the planning board’s endorsement of the ANR plan. The Court determined that:

A proposed lot must have accessibility from the way to the buildable portion of the lot for a § 81P plan to be endorsed.

3.8 – NO PRACTICAL ACCESS TO LOTS – In [Hrenchuk v. Planning Bd. of Walpole](#), 8 Mass. App. Ct. at 949, the ANR lots fronted on a limited access highway (I-95) and for that reason there was no practical access from the lots to the way. Consequently, the plan was not entitled to ANR endorsement. If there is no real, physical access from the way to the lot then an ANR plan is not entitled to endorsement.

3.9 – STATUTORY PRIVATE WAYS – ANR plans have been filed showing access onto a “statutory private way.” In [Casagrande v. Town Clerk of Harvard](#), 377 Mass. 703 (1979), the plaintiff argued that a private way laid out in accordance with G.L. c. 82 constituted a public way for the purposes of ANR plan endorsement. The Court determined that such a way was not a public way and the planning board could require subdivision approval unless the way was both maintained and used as a public way. The Legislature did not intend the words “public way” to include statutory private ways.

An ANR plan showing a lot with access to a private way is not entitled to endorsement unless the private way is maintained and used as a public way.

3.10 – ANR LOTS & WETLANDS – There are 2 court cases of interest, listed below, regarding the issue of wetlands on a property and ANR endorsement.

In [Corcoran v. Planning Board of Sudbury](#), 406 Mass. 248 (1989), an ANR plan with a common driveway was submitted showing some wetlands between the buildable portion of the lots and the public way. The planning board withheld endorsement of the plan and the Appeals Court upheld the action of the board; but later the Supreme Judicial Court reversed the Appeals Court, finding that the board erred in withholding endorsement for the reasons cited.

In this case the Court stated that the wetlands did not raise a question of access from the public way, but rather the extent to which the wetlands would limit – but not prohibit – the buildability of the lots. The Court concluded that the presence of interior wetlands that does not render access illusory is not the same as distinct physical impediments that would render access illusory.

In [Gates v. Planning Board of Dighton](#), 48 Mass. App. Ct. 394 (2000), the Court again looked at the wetlands issue and in this case upheld a planning board’s refusal to endorse an ANR plan. The existence of wetlands in the *Gates* plan prevented practical, safe, and efficient access to the buildable portions of the proposed lots.

A planning board can cite wetland issues in withholding endorsement of an ANR plan only where the wetlands either prohibit the practical and safe access from the way to the lot or to the buildable portions of the lot.

3.11 – EXISTING VERSUS POTENTIAL ACCESS – In [Poulos v. Planning Board of Braintree](#), 413 Mass. 359 (1992), the issue was whether an ANR plan could be endorsed even though, while there was no existing access, adequate access could be provided in the future. The lots were on a public way with a guardrail across the frontage as the land sloped steeply downward from the street. The applicant argued that the Conservation Commission had granted a permit to fill in the property such that the guardrail would not be needed. The Supreme Judicial Court ruled that the planning board properly denied the plan. The existing access was illusory. The fact that this situation might be rectified in the

future did not permit endorsement based on §§ 81L and 81M. There can be no endorsement in the absence of existing adequate access.

Even if access could be provided at some time in the future, if it does not exist on the ground at the time of the filing of the ANR plan, then it is illusory and the plan is not entitled to endorsement.

4.0 – Planning Board Determination of Adequacy

4.1 – ZONING DEFINITION OF STREET OR WAY – Many cities and towns have adopted a zoning bylaw or ordinance definition of “street” or “way”. Thus, it could be that a lot abuts a way as defined in § 81L, but it does not conform to the definition of “street” or “way” in the zoning ordinance or bylaw.

If the zoning ordinance or bylaw also includes the 3 definitions from § 81L, and the board is asked to endorse a § 81P (ANR) plan because it meets the third definition where the board must determine the adequacy of the way, then the board should make a specific determination that the way satisfies the specified criteria as to adequacy.

In [*Corrigan v. Board of Appeals of Brewster*](#), 35 Mass. App. Ct. 514 (1993), the Court determined that a planning board had not made a specific determination as to how the lot met the third section of the § 81L definition. The point here is that a lot shown on an endorsed ANR plan might still be denied a building permit based upon a later determination that the “way” shown on the ANR plan does not in fact conform to the definition of “street” in the zoning ordinance or bylaw.

5.0 – Summary

5.1 – REVIEW – A review of the many court cases on this topic leads to a few observations.

- A “way” meeting one of the 3 types referred to in § 81L must either physically exists on the ground, or a performance guarantee for such way shall have been provided.
- Access must be available at the time of the ANR plan and not be able to be provided at some time in the future.
- Access must be illusory, and not simply deficient, for a board to deny ANR endorsement.
- If the way provides adequate access for emergency vehicles, then the planning board is unlikely to be able to refuse ANR endorsement.
- If the way is similar in width, grades, and construction to nearby public ways, then the plan is entitled to an ANR endorsement.
- The fact that there may be alternative means of access or the proposed access could be more suitable is not justification for denying an ANR plan.
- Access from the way to the buildable portion of the lot must be adequate and not illusory.

Section 5-08

Approval Not Required Plans (ANR Plans)

Part 3 - Building Lots and Inadequate Frontage [G.L. c. 41, § 81L; G.L. c. 41, § 81M; & G.L. c. 41,

§ 81P]

1.0 – Introduction

1.1 – OVERVIEW – A landowner may wish to create, or use, a lot that does not meet the minimum frontage requirement of the municipality. This situation creates an intersection between the zoning ordinance or bylaw and the Subdivision Control Law. Based on the circumstances, either an ANR plan ([§ 81P](#)) or a definitive subdivision plan ([§ 81U](#)) may be needed by an applicant in addition to seeking zoning relief through either a special permit or a variance.

2.0 – Options to Create a Buildable Lot with Inadequate Frontage

2.1 – OPTIONS – Other than the frontage protections accorded under the so-called “single lot exception” and “common lot exception” as described in [c. 40A, § 6](#), there are 2 possible options, each requiring 2 separate actions, for a lot with inadequate frontage to become buildable.

Variance/Definitive Subdivision Plan Frontage Waiver

- Action One – Frontage reduction granted by a variance approved by the ZBA; and
- Action Two – A definitive subdivision plan with a waiver request for subdivision frontage is approved by the planning board.

Special Permit/ANR Endorsement

- Action One – Frontage reduction granted by special permit approval (if specifically allowed by local zoning bylaw or ordinance); and
- Action Two – Endorsement of an ANR plan by the planning board.

3.0 – Process to Create a Buildable Lot

3.1 – § 81L FRONTAGE REQUIREMENT – The key issue with regard to how to create a buildable lot that does not meet the zoning frontage requirement is the requirement in [§ 81L](#) that a subdivision is:

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

3.2 – FRONTAGE REDUCTION BY VARIANCE & SUBDIVISION WAIVER – In [Sequin v. Planning Board of Upton](#), 33 Mass. App. Ct. 374 (1992), the Court defined the process required for approving building lots that do not meet frontage requirements. A variance for a lot with inadequate frontage was approved, and then an ANR plan was filed. The ANR plan was denied and the Appeals Court upheld the denial.

The petitioner argued that a variance granted by the ZBA resulted in a reduced frontage requirement that met the definition in § 81L. The Appeals Court rejected that argument. The Court held that the statutory requirement that every lot in the subdivision have “*frontage . . . of at least such distance as is then required by zoning or other ordinance or by-law*” refers to frontage required by the bylaw, and does not extend to frontage lawful only under a variance granted by the ZBA.

The planning board's approval under the Subdivision Control Law must be independently determined and based either on a specific bylaw frontage requirement or on frontage allowed by a special permit.

This determination was based in part on the [Arrigo v. Planning Board of Franklin](#), 12 Mass. App. Ct. 802 (1981) case. In this case the applicant received a variance from the ZBA for reduced lot frontage and then submitted a definitive plan subdivision application under § 81U to the planning board requesting a waiver from the frontage requirements. The board approved the waiver under § 81R that authorizes the planning board to waive strict compliance with frontage requirements. The Court upheld the planning board's approval of the frontage waiver.

The Court determined that the proper procedure to make the lot buildable was to obtain both a variance from the ZBA and a waiver from the frontage requirements of the Subdivision Control Law from the planning board. However, refer to Section 3.3 below for a second process that may be used for a frontage reduction under certain circumstances.

Therefore in the case where a variance request under G.L. c. 40A, § 10, (and not a special permit request under G.L. c. 40A, § 9) for reduced frontage is approved by the ZBA, the lot is subject to the Subdivision Control Law and is not entitled to an ANR endorsement.

There is nothing in the statute regarding the order for making an application. The decision of one board does not bind the other board and

3.3 – FRONTAGE REDUCTION BY SPECIAL PERMIT & ANR PLAN – Communities can allow for the reduction of frontage requirement through a special permit process. In [Haynes v. Grasso](#), 353 Mass. 731 (1968), the SJC determined that the requirement that each lot have frontage “*. . . of at least such distance as is then required by [the] zoning ordinance or bylaw if any . . .*” was met if frontage requirements were reduced by the granting of a special permit. The Court determined that where frontage requirements on a public way are met by action under an exception to the zoning bylaw, a division into 2 lots is not a “subdivision” subject to Subdivision Control Act and is entitled to an § 81P plan endorsement. Thus, meeting the frontage requirements by express provisions of the zoning bylaw (i.e., by special permit) is not a “variance” but a “special application” of the bylaw itself.

In [Adams v. Board of Appeals of Concord](#), 356 Mass. 709 (1970), the SJC again determined that frontage reduced through a special permit process is entitled to an ANR endorsement by the planning board.

Section 5-09

Approval Not Required Plans (ANR Plans)

Part 4 -Additional Considerations

[G.L. c. 41, § 81P]

1.0 – Introduction

1.1 – OVERVIEW – Part 1 of the 4-part sections on ANR covered the procedures, requirements, and timelines for a planning board to review and act on an approval not required (ANR) plan ([G.L. c. 41, § 81P](#)); Part 2 covered the adequate access issue of ANR plans; and Part 3 covered the issue of building lots with inadequate frontage.

In addition to the language in § 81P and the topics covered in ANR Parts 1-3, there are several additional topics relating to ANR plans that are discussed below.

2.0 – Relation to Zoning

2.1 – ANR PLANS AND ZONING COMPLIANCE – The definition of the term “lot” in the Subdivision Control Law does not refer to a lot that satisfies zoning requirements. It makes no inference that the “lots” shown on a plan are buildable.

The courts have clearly stated that the board may not withhold endorsement because the “lots” do not comply with zoning requirements (other than frontage), board of health regulations, or adequate provision of municipal services. [Gattozzi v. Dir. of Inspection Services of Melrose](#), 6 Mass. App. Ct. 889 (1978). [This link will bring you to a page that lists 2 separate Appeals Court decisions. The first is a contempt of court case – ignore that one – and the second is the Gattozzi decision.]

A lot on an endorsed ANR plan is not “entitled” to a building permit unless it meets all zoning requirements.

The following cases provide examples where the courts discussed the relationship of ANR plans and compliance with zoning requirements.

- In [Smalley v. Planning Board of Harwich](#), 10 Mass. App. Ct. 599, 603 (1980), the Court rejected the argument of the plaintiff that a § 81P endorsement would constitute a decision that the unrelated requirements of the local zoning code had been met.
- In [Corrigan v. Board of Appeals of Brewster](#), 35 Mass. App. Ct. 514 (1993), the Court said that a § 81P endorsement makes no determination of compliance with the local zoning requirements.

2.2 – ANR PLANS AND ZONING VIOLATIONS – While an ANR plan must show lots with frontage that meet local zoning regulations, questions have been raised as to the planning board’s ability to address ANR plans that show lots with zoning violations other than frontage deficiencies, for example an ANR plan that does not meet the zoning requirement for lot area. Courts have consistently held that an ANR plan showing adequate frontage and adequate access, but showing zoning violations other than frontage, is nevertheless entitled to an ANR endorsement.

In [Smalley v. Planning Board of Harwich](#), 10 Mass. App. Ct. 599 (1980), the Court stated that a plan showing a zoning violation other than frontage may have a variety of valid reasons for being

submitted. Zoning violations are not sanctioned or cured by the ANR endorsement.

2.3 – PLANNING BOARD STATEMENT ON A PLAN – The board may be concerned that endorsing a plan showing zoning violations may mislead current or future owners as to the zoning status of the lots. The board should consider – and it is recommended – adding a statement on the plan such as: “*No determination as to zoning compliance, other than frontage, has been made by the board’s endorsement,*” or its equivalent.

3.0 – Using an ANR Plan to Amend an Approved Subdivision Plan

3.1 – AMENDING A PREVIOUSLY APPROVED DEFINITIVE SUBDIVISION PLAN – The Subdivision Control Law allows for 2 methods of amending a previously approved definitive subdivision plan.

- Under [§ 81W](#), a planning board has the power to amend its prior approval of a subdivision plan. All of the provisions of the Subdivision Control Law relating to the submission and approval of a plan shall be applicable to the amendment.
- Under [§ 81O](#), the number, shape, and size of the lots can be changed without approval by the planning board, provided every lot still has frontage on a public way or way shown on an approved subdivision plan with frontage meeting the zoning requirements of the city or town, or if no such distance is required, then at least 20 feet.

3.2 – § 81P Plan Considerations – If an applicant submits a § 81P plan to amend a definitive subdivision plan in accordance with § 81O, the planning board must determine whether:

- the approved ways have either not been constructed or no performance guarantee has been submitted to the planning board to assure they will be built;
- there is a condition or restriction placed on the approved definitive plan that either has not been met, or that would prevent further subdivision of the land; or
- a condition on the approved plan imposed an expiration date, and the subdivider failed to meet the conditions of approval by the expiration date.

If the planning board finds any of the above to be true, then the § 81P plan would not be entitled to an “approval not required” endorsement.

3.3 – EXAMPLES OF COURT DETERMINATIONS – The following court decisions concern the use of § 81P plans as a means of amending an approved subdivision plan.

[*Richard v. Planning Board of Acushnet*](#), 10 Mass. App. Ct. 216 (1980). The ways were not built and no performance guarantee was submitted to the board; therefore, § 81P endorsement was denied.

[*Costanza & Bertolino v. Planning Board of North Reading*](#), 360 Mass. 677 (1971). The developer was required to complete all of the roads and infrastructure within a given time or the definitive subdivision plan would be automatically rescinded. A § 81P plan was submitted subsequent to the rescission date and was denied.

[*Hamilton v. Planning Board of Beverly*](#), 35 Mass. App. Ct. 386 (1993). The planning board’s approval of a definitive subdivision plan included a condition limiting the number of lots to 5. The owner of one of the lots submitted a § 81P plan to subdivide his lot into 2, thereby creating a 6th lot. The

planning board approved the § 81P plan; but the building inspector refused to issue a building permit under § 81U. The Court upheld denial of building permit.

3.4 – DEFINITIVE PLAN RESTRICTIONS & CONDITIONS AND § 81P – There may be instances where a § 81P plan may be filed by the owner of a definitive subdivision, or a lot therein, approved by the planning board under § 81U (Definitive Plan) in order to modify the definitive subdivision plan.; but this does not relieve the land shown on the § 81P plan from any restrictions or conditions imposed upon the land under the definitive plan approval.

4.0 – Rescission or Modification of an ANR Plan

4.1 – ENDORSED ANR PLAN – Once endorsed, an ANR plan may not be subsequently rescinded or amended. G.L. 41, § 81W, *Modification, Amendment or Rescission of Plans*, applies only to definitive subdivision plans, not ANR plans. [*Cassani v. Planning Board of Hull*](#), 1 Mass. App. Ct. 451, 454 (1973).

5.0 – Perimeter Plans & ANR Plans

5.1 – PERIMETER PLANS – A perimeter plan shows only existing property lines and not a division of land. Perimeter plans can be created and recorded at the registry of deeds or Land Court under [§ 81X](#).

5.2 – ZONING PROTECTION – Perimeter plans under [§ 81X](#), standing alone and without a § 81P plan, are not entitled to the 3 year zoning use protection of c. 40A, § 6.

5.3 – PERIMETER PLANS AND ANR PLANS – Prior to 2005, numerous court decisions by both Superior Courts and the Land Court made varying determinations as to whether a perimeter plan was entitled to an ANR endorsement or not. In 2005, the Appeals Court settled that question by deciding that perimeter plans are entitled to an ANR endorsement. [*Cumberland Farms Inc. v. Planning Board of West Bridgewater*](#), 64 Mass. App. Ct. 902 (2005). The Court stated that the plaintiffs admitted motive of obtaining the 3-year zoning protection is irrelevant to the decision regarding endorsement of the plan.

6.0 – Appeals

6.1 – APPEAL OF BOARD DETERMINATION THAT PLAN REQUIRES SUBDIVISION CONTROL APPROVAL – Section 81P provides for one appeal procedure under [§ 81BB](#). This appeal procedure may be used where the board determines that an ANR plan requires approval under the Subdivision Control Law. The applicant may appeal this determination and the appeal must be filed within 20 days after the board notifies the city or town clerk of its decision.

6.2 – OTHER § 81P APPEALS – On the other hand, the statute does not include any language regarding the rights of persons claiming to be aggrieved by the endorsement of an ANR plan by a planning

board. In [Stefanik v. Planning Board of Uxbridge](#), 39 Mass. App. Ct. 418 (1995), the Court determined that such an appeal would be in the nature of *certiorari* pursuant to [G.L. c. 249, § 4](#).¹ The appeal must be filed within 60 days from the date of endorsement.

The issues on appeal are only for correcting legal errors in the proceedings; they are not otherwise reviewable by any other appeal mechanism. The appeals are not “*de novo*,” meaning that the appeal proceeds on the record and not based on new evidence or testimony.

Also, the Supreme Judicial Court determined that the use of [§ 81Y](#) is not appropriate to contest the action of a board on an ANR plan. [Carey v. Planning Board of Revere](#), 335 Mass. 740 742-743 (1957).

¹ G.L. c. 249, § 4, defines “a civil action” in the nature of “*certiorari*” to be a “civil action . . . to correct errors in proceedings” and “that are not otherwise reviewable by motion or by appeal.” Actions “in the nature of certiorari – or “cert actions,” they are often called – arising under or involving the Zoning Act and local zoning bylaws and ordinances, as well as the Subdivision Control Law and local subdivision regulations, are brought in the Land Court. Rather than a trial – such as a “*de novo*” zoning appeal in which evidence is presented to the court – a cert action is essentially a review of the record only, and must be commenced within 60 days after the proceedings complained of. Cert is available only where there is no local law or state statute that prescribes the nature of the appeal, (in contrast to a G.L. c. 40A, § 17, appeal for example). The elements of cert appeal may vary depending on the nature of the action. After cert review, the court may enter judgment quashing or affirming the proceedings or such other judgment as justice may require appealed from. It is important to discuss all cert actions with the municipal attorney.

Briefly stated, it means that an appellate court has ordered a lower court to provide the full record of a case for the appellate court to review or to retry.

Section 5-10

Planning Board Rules and Regulations for Subdivisions [G.L. c. 41, § 81Q]

1.0 – Introduction

1.1 – OVERVIEW – The statutory authority for adopting subdivision rules and regulations and the details regarding them can be found in [G.L. c. 41, § 81Q](#). The intent of the Subdivision Control Law is that any definitive plan submitted to the planning board is entitled to approval if the plan conforms to the reasonable rules and regulations adopted by the board. The rules and regulations must not only be reasonable, but must also be not inconsistent with any state statutes nor any local ordinance or bylaw.

1.2 – SUBDIVISION CONTROL LAW – The rules and regulations are intended to carry out the purposes of the Subdivision Control Law as set forth in [G.L. c. 41, § 81M](#), and may not be inconsistent with those purposes; nor may the rules and regulations extend beyond those areas of regulation authorized under the Subdivision Control Law.

1.3 – WAIVER – The planning board may waive strict compliance with its rules and regulations, although the board is not required to do so. A large measure of judgment and discretion is accorded to the board. As a matter of best practice, an explanation with findings and reasons should accompany the waiver, including language to the effect that the waiver is not inconsistent with either the public interest or the Subdivision Control Law itself. (See Section 5-11 of this Chapter – *Waiver of Strict Compliance with the Subdivision Rules & Regulations* – for a more detailed discussion of waiver of subdivision regulations under [G.L. c. 41, § 81R](#).)

1.4 – REFERRALS OF PLANS – Except with respect to the board of health which is required by statute to receive a copy of the definitive subdivision plan submission, the planning board rules and regulations shall not require referral of the subdivision plan to any other board or person prior to the submission of the plan to the planning board. However, there could well be information reasonably necessary for the board in its evaluation of certain aspects of the subdivision that are primarily the focus of other boards or officials.

Thus, following the submission of the plans the board is not barred from seeking information from other municipal boards and officials relating to the contents of the plan. This may serve to provide the board with information upon which the proper application of the board's rules and regulations depend as well any discretion it may lawfully exercise.

2.0 – Adoption Process

2.1 – PUBLIC HEARING NOTICE – In adopting or amending subdivision rules and regulations, a notice of the public hearing, including the time, place, and subject matter of the hearing, shall be published in a newspaper of general circulation in each of 2 successive weeks, the 1st publication to be not less

than 14 days before the day of the hearing.

If there is no newspaper of general circulation, the public hearing notice shall be posted in a conspicuous place in city or town hall not less than 14 days before the day of the hearing and posted on the municipality's website.

2.2 – VOTE – A simple majority of a quorum of the planning board may vote to adopt or amend the subdivision rules and regulations.

3.0 – Contents

3.1 – APPLICATION – The rules and regulations may specify the size, form, contents, style, and number of plan copies, and the submission procedure. The rules and regulations shall be written to enable the applicant to comply with the registry of deeds' requirements for recording the plan.

3.2 – PROPOSED WAYS & MUNICIPAL SERVICES – The rules and regulations shall set forth the requirements of the board with respect to the location, construction, width, and grades of the proposed ways shown on the plans, and the installation of municipal services.

3.3 – STREET AND R.O.W. STANDARDS – In establishing requirements for the ways (for example, street and right-of-way widths), due regard shall be paid to the prospective character of different subdivisions, whether residential, business, or industrial, as well as the anticipated amount of travel.

3.4 – COMMON COMMUNITY STANDARDS – In no case shall the rules and regulations regarding the laying out, construction, alteration, or maintenance of ways within a subdivision exceed the standards and criteria commonly applied by that city or town to the laying out, construction, alteration, or maintenance of its publicly financed ways located within similarly zoned districts. [*Miles v. Planning Bd. of Millbury*](#), 404 Mass. 489 (1989).

3.5 – TURNAROUND – The rules and regulations may require that a turnaround be provided at the end of an approved portion of a way (cul-de-sac, hammerhead or similar) that does not connect with another way.

Any easement in a turnaround shown on a plan approved under subdivision control that was established after January 1, 1960, other than an easement appurtenant to a lot abutting the turnaround, shall terminate upon the approval and recording of a plan showing an extension of the way, except for the portion of the easement located within the extension. In addition, the planning board shall record a certificate that the extension has been constructed.

3.6 – UNDERGROUND AND OVERHEAD UTILITIES – The rules and regulations may require the construction of underground distribution systems for utility services, including electrical and telephone services. In addition, the rules and regulations may specify that the design of poles and overhead structures, including street lighting, be approved by the planning board.

3.7 – SOLAR – The rules and regulations may encourage the use of solar energy systems and may protect, to the extent feasible, access to direct sunlight of solar energy systems. They may include:

- standards for the orientation of new streets;
- lots and buildings;

- building setback requirements;
- limitations on the type, height, and placement of vegetation; and
- restrictive covenants protecting solar access that are not inconsistent with existing local ordinances or bylaws.

See Chapter Four – Zoning, Section 4-11, for more information on solar access under [c. 40A, § 9B](#).

3.8 – OFF-SITE PUBLIC WAY IMPROVEMENTS – In [*North Landers v. Planning Board of Falmouth*](#), 382 Mass. 432 (1981), the Supreme Judicial Court determined that the adequacy of a public way to provide access to a proposed subdivision was properly considered by the town’s planning board in determining whether to approve a subdivision plan and by a judge on review of the board’s decision under G.L. c. 41, § 81BB. The board’s subdivision rules and regulations had specific language to this effect that was not impermissibly vague or inconsistent with G.L. c 41, §§ 81L, 81M, and 81P.

Section 5-11

Waiver of Compliance with Subdivision Rules and Regulations [G.L. c. 41, § 81R]

1.0 – Introduction

1.1 – OVERVIEW – In accordance with the provisions of [G.L. c. 41, § 81R](#), planning boards have the power to waive strict compliance with their subdivision rules and regulations. Waivers may be granted at the discretion of the board, subject to the considerations in Section 2.0 below.

1.2 – VOTE – A majority vote of the board members in attendance is required to waive subdivision rules and regulations.

2.0 – Waiver Requests and Board Decisions

2.1 – INITIATION OF REQUEST – A waiver may be requested by the applicant, or initiated by the board itself.

2.2 – RULES & REGULATIONS & WAIVER REQUESTS – Regarding definitive subdivision plan applications, it is advisable to require applicants to list the waivers they seek, as well as the relevant rules and regulations from which the waivers are sought. Such a list then becomes part of the record.

2.3 – PLANNING BOARD WAIVER DECISIONS – While the board is not required in its written decision to enumerate each waiver it has granted, it is advisable that the board do so for the benefit of those attending the meeting and of those who read the decision later. However, if the board does not list each waiver, it then must be clear in the record which waiver requests the board made a conscious decision to grant. See [Meyer v. Planning Bd. of Westport](#), 29 Mass. App. Ct. 167 (1990); and [Curtin v. Board of Survey & Planning of Waltham](#), 15 Mass. App. Ct. 978 (1983).

In [Wheatley v. Planning Bd. of Hingham](#), 7 Mass. App. Ct. 435 (1979), the planning board failed, in a letter accompanying its certificate of approval of the subdivision plan, to explicitly require the installation of water pipes, fire hydrants, telephone lines or ducts, fire alarm cables and boxes, and street lights, purportedly waiving its regulation requiring that subdivision plans show all existing and proposed municipal services. The board's purported waiver was inconsistent with the intent and purpose of Subdivision Control Law and board's approval of plan was annulled.

The board should always weigh the merits of any waiver request, granting or disposing of it only after reasonable consideration. In [Lakeside Builders, Inc. v. Planning Bd. of Franklin](#), 56 Mass. App. Ct. 842 (2002), the Appeals Court said that in certain instances a planning board's refusal to grant a waiver of strict compliance with subdivision rules and regulations could be found to be an abuse of discretion.

3.0 – Statutory Test for Waivers

3.1 – TWO-PRONGED TEST – For a planning board to grant a waiver from the subdivision rules and regulations, a 2-pronged test must be met.

- The action is in the public interest.
- The action is not inconsistent with the intent and purpose of the Subdivision Control Law.

3.2 – SCOPE OF REVIEW FOR WAIVERS – Based on the above 2-pronged test, courts have established the scope of review for planning board action related to the granting of waivers. A review of each test prong is provided below.

3.2.1 – The Public Interest – The test that such action is “in the public interest” has been found to involve much subjectivity. If the waiver is reasonable, the planning board’s waiver decision under this test is likely to withstand any court challenge. In [*Arrigo v. Planning Bd. of Franklin*](#), 12 Mass. App. Ct. 802 (1981), the Court stated that the burden of showing that the planning board erred in granting such a waiver is nearly “unsupportable.” *Arrigo* also stands for the proposition that the board’s approval of a subdivision plan does not preclude a building inspector or board of appeals from performing their statutory duties of requiring adherence to town’s zoning bylaw, including any provisions specifying minimum frontage, as condition of making the lot buildable.

3.2.2 – Not Inconsistent with the Subdivision Control Law – For this test, the standard of review is more rigorous because the standard is more clear-cut than the “in the public interest” standard. The inconsistency promoted by a waiver must be substantial before the court will nullify a planning board’s waiver decision. See *Arrigo* above.

3.2.3 – Scope of the Planning Board’s Discretion – In [*Krafchuk v. Planning Bd. of Ipswich*](#), 453 Mass. 517 (2009), the planning board waived a requirement that 2 feet of soil separate the bottom of infiltration basins from the seasonal high water table. This was found not to be contrary to the public interest or to public safety. The board stated that the purpose of the waived requirement was to protect the aquifer; and the board, while waiving the separation requirement, went on to require the installation of pretreatment filters inside the 2 infiltration basins in lieu of the soil requirement. The board found that this would provide substantially the same level of safety and convenience to the public as the soil requirement, and would not constitute a substantial derogation from the intent and purpose of the statute.

4.0 – Types of Waivers & Conditions and Endorsement

4.1 – WAIVER EXAMPLES – Section 81R provides a few examples as to the type of waivers that the planning board could consider. These include waivers of the frontage requirements and access requirements. However, the board has the authority to consider waiver requests from all aspects of its subdivision rules and regulations with the one exception in § 4.3 below.

4.2 – SUBDIVISION WAIVERS & ZONING – It is important to understand that approval under the Subdivision Control Law gives the lots shown on the plan no protection under the zoning ordinance or bylaw. Thus, while the board may grant a waiver of frontage requirements, a property owner would then need to pursue a zoning remedy (for example, a variance) to make the lot buildable.

4.3 – PROHIBITION ON WAIVER OF OWNER’S NAME ON APPLICATION – The planning board has no authority to waive a requirement in the board’s Subdivision Rules and Regulations that all the owners of a property be named or identified as an applicant for subdivision approval. [*Silva v. Planning Bd. of*](#)

[*Somerset*](#), 34 Mass. App. Ct. 339 (1993); [*Batchelder v. Planning Bd. of Yarmouth*](#), 31 Mass. App. Ct. 104 (1991).

4.4 – PROHIBITION ON WAIVERS OF A ZBA VARIANCE CONDITION – The *Silva* case, in addition to reiterating that a board has no authority to waive the requirement for all owners' names to appear on the subdivision application, also addressed the issue of whether a planning board may “waive” a variance condition imposed by the ZBA. The Court concluded it could not do so.

4.5 – CONDITIONS – Section 81R also provides examples of conditions that the board might impose on its approval of a definitive subdivision plan. These include conditions where, for instance, the board determines the way or ways are not adequate. Examples given are:

- limit the lots upon which buildings may be erected;
- limit the number of buildings that may be erected on particular lots;
- limit the length of time for which particular buildings may be maintained without further consent by the planning board to the access provided.

4.6 – ENDORSEMENT OF CONDITIONS – In order to be effective as restraints upon the use of the land by reason of the Subdivision Control Law, agreements affecting plans made with planning boards, or conditions on approval of plans imposed by planning boards, must be either inscribed on the plan itself or contained in a separate document referred to on the plan. [*Green v. Board of Appeal of Norwood*](#), 358 Mass. 253 (1970).

5.0 – Review and Appeal

5.1 – WAIVER DECISION AND APPEAL – In [*Krafchuk v. Planning Bd. of Ipswich*](#), 453 Mass. 517 (2009), the Court determined that a planning board's decision to grant or deny a waiver will be upheld unless premised upon a legally untenable ground, or that it is unreasonable, whimsical, capricious, or arbitrary. A board's determination whether a waiver of compliance with rules and regulations is in the public interest involves a large measure of discretion; and if reasonable minds might in good faith differ, without doubting the reasonableness of the opposing view, the conclusion reached by the planning board should be sustained on judicial review.

The Court stated that it is the board, not the Court, to whom the statute delegates the discretion, and the role of a court is merely to ascertain whether the board exceeded its authority.

5.2 – BURDEN OF PROOF – The applicant has the burden of showing that the board's denial of the waiver was based upon considerations other than those stated in G.L. c. 41, § 81R (i.e., ensuring that a grant of a waiver would be based on the public interest and would not be inconsistent with the intent and purpose of the board's own rules and regulations). [*Douglas A. Wine & another v. Planning Board of Newburyport*](#), 74 Mass. App. Ct. 521 (2009).

Section 5-12

Preliminary Subdivision Plan [G.L. c. 41, § 81S]

1.0 – Introduction

1.1 – OVERVIEW – Requirements for a Preliminary Subdivision Plan are covered by [G.L. c. 41, § 81S](#).

1.2 – PURPOSE – The purpose of a preliminary plan is to provide an introduction of the proposed subdivision plan to the planning board. Preliminary plans are not required to be as detailed or as technical as definitive subdivision plans; rather, they serve as the beginning of the review process to examine the plans, scale, and potential impacts of the subdivision. It is an opportunity for the planning board to raise issues that must be addressed in the definitive plan and for the applicant to discuss any potential waivers or other requests that would be needed for definitive plan approval.

Another important purpose for the submission of a preliminary subdivision plan and for the definitive plan that evolves therefrom relates to the freeze protections afforded subdivision plans. (See Section 5.0 below.)

2.0 – Residential and Non-residential Subdivision Plans

2.1 – RESIDENTIAL SUBDIVISION – Although it may be beneficial to do so, the submission of a preliminary plan to the planning board is not required for a plan “*showing lots in a residential zone*,” often referred to as a “residential subdivision.” However, if no preliminary plan is submitted, the planning board will then have 135 days to act on the submission of a definitive plan, instead of the 90 days prescribed for a definitive residential plan where a preliminary plan had been submitted.

2.2 – NON-RESIDENTIAL SUBDIVISION – Submission of a preliminary plan for a non-residential subdivision is required prior to the submission of a definitive plan. If a proposed subdivision does not show “*lots in a residential zone*,” then it is a “non-residential subdivision” and a preliminary plan filing is required prior to submission of a definitive subdivision plan.

2.3 – RESIDENTIAL V. NON-RESIDENTIAL SUBDIVISION – DEFINITIONAL ISSUES – “Residential Subdivision” is defined in § 81S in terms of a plan “*showing lots in a residential zone*,” but the statute does not - except by inference - define “non-residential subdivision”. It simply states that a non-residential subdivision must first be shown on preliminary plan, but exempts a plan showing “lots in a residential zone” from this requirement.

One might be tempted to conclude simply that a plan showing lots in a non-residential zone is a non-residential subdivision; but yielding to that temptation goes beyond what § 81S actually states. Cities and towns are left to their own devices in determining what is a “non-residential subdivision”. Intuitively, any plan showing lots “for non-residential use” should be seen as needing to be filed as a preliminary plan in order to give the planning board adequate time to review and discuss the plan with the applicant.

However, it could be that a board might need to rely on how the zoning ordinance or bylaw defines “residential zone” if it does so at all. Possible questions regarding these ambiguities include:

- Are lots for residential use in a mixed-use zone “residential”?

- Does it matter if the lots are “for residential use” or rather for other uses permitted in the mixed-use zone?
- What about a plan with lots for “residential use” in a non-residential zone? Is a preliminary plan required?
- Are non-residential uses on lots in a residential zone a “residential” or “non-residential” subdivision?

The ambiguities in the language of the statute give rise to many questions without clues to answer them. As of the date of this Guidebook, the authors are unaware of any court cases that deal with these ambiguities; but it could be considered reasonable, and not inconsistent with § 81S, to interpret “non-residential subdivision” as any division of land for non-residential use, regardless of the zoning district.

If it is accepted that exempting the requirement for filing a preliminary plan is limited only to residential uses in a residential zone, then it cannot have been the intent of the Legislature to exempt plans showing non-residential uses in a residential zone from such requirement.

2.4 – OPTIONS – Based upon the reasoning above, the table below outlines 4 potential types of subdivisions and whether a preliminary plan would be required or not.

SUBDIVISION TYPES & PRELIMINARY PLANS		
Type of Plan	Type of Subdivision	Preliminary Plan – Y/N
All lots are in a residential zone for residential use only	It is a residential subdivision	Preliminary plan is optional
All lots are in a residential zone, but one or more lots are for a non-residential use	It is a non-residential subdivision	Preliminary plan is required
All lots are in a non-residential zone for any permitted use	It is a non-residential subdivision	Preliminary plan is required
One or more lots are in a residential zone and one or more lots are in a non-residential zone for any uses permitted in the 2 districts	It is a non-residential subdivision	Preliminary plan is required

3.0 – Submission Procedure

3.1 – SUBMISSION TO PLANNING & HEALTH BOARDS – A preliminary plan shall be submitted to both the planning board and the board of health.

3.2 – APPLICANT IDENTIFICATION – All owners of the site shall be named and identified on the application form. The planning board may not waive this requirement of G.L. c.41, § 81R.

3.3 – NOTICE TO THE MUNICIPAL CLERK – In addition to the submission of the plans, the applicant shall, by delivery or by registered mail, give written notice to the municipal clerk that the plans have been submitted to the planning board and to the board of health. If the notice is mailed, the date of receipt by the clerk becomes the date of submission. If requested, the clerk shall provide a written receipt of the plan submission to the applicant.

3.4 – SUBMISSION REQUIREMENTS – The form and content for preliminary plan applications are as determined by the subdivision rules and regulations adopted by the planning board for each municipality where the Subdivision Control Law is in effect.

4.0 – Planning Board Timeline and Decision

4.1 – TIMELINE – Both the planning board and the board of health have 45 days total from the date of plan submission within which to make a decision unless an extension is agreed to in writing by either or both boards and applicant and that agreement is filed with the city or town clerk.

4.2 – DECISION OPTIONS – The planning board and the board of health may each, by majority vote:

- approve the plan;
- approve the plan with modifications recommended by the board; or
- disapprove the plan, in which case the board shall state in detail its reasons for disapproval.

4.3 – DISAPPROVAL OF A PRELIMINARY PLAN – The planning board's “disapproval” of a preliminary subdivision plan does not authorize the board to refuse to receive a definitive plan. There is no right to refuse to receive a definitive plan submitted properly under [G.L. c. 41, § 81U](#), merely because a preliminary plan filed under [G.L. c. 41, § 81S](#), a permissive procedure, is disapproved.

Thus, if an applicant has filed an adequate preliminary plan, but is later denied the right to file a definitive plan, failure by the board to act within the time required for action on the definitive plan can be treated as an approval of it (e.g. constructive approval). [Paul Livoli, Inc. v. Planning Bd. of Marlborough](#), 347 Mass. 330 (1964).

4.4 – NOTIFICATION OF DECISION – The planning board and board of health shall each notify the applicant and municipal clerk of its decision by certified mail.

4.5 – APPLICABILITY OF THE SUBDIVISION CONTROL LAW – Except as otherwise provided, many provisions of the Subdivision Control Law are not applicable to a preliminary plan. A preliminary plan shall not be registered at the registry of deeds.

4.6 – CONSTRUCTIVE APPROVAL – Because the approval or disapproval of preliminary plan has no legally binding effect, the failure of a planning board to act within 45 days does not result in a constructive approval of the plan.

4.7 – APPEAL – The applicant for a preliminary plan does not have a right to appeal the action taken by a planning board on a preliminary subdivision plan. [Paul Livoli, Inc. v. Planning Bd. of Marlborough](#), 347 Mass. 330 (1964).

5.0 – Freeze Protections

5.1 – PURPOSE – Another important purpose of the submission of a preliminary plan followed within 7 months by the submission of a definitive plan is to give the applicant the benefit of a number of freeze protections from ordinances, bylaws, rules and regulations, and codes.

5.2 – TYPES OF FREEZE PROTECTIONS – There are 3 separate freeze protections triggered by the submission of a preliminary plan followed by the filing within 7 months of a definitive plan. They are:

- Zoning Freeze – Submission of a preliminary plan followed within 7 months by submission of a definitive plan that is then approved by the planning board provides protection (“freeze”) to the land shown on the plan as to the zoning in effect at the time of submission of the preliminary plan. It is the land shown on the plan, not the plan itself, which enjoys this statutory protection. This zoning freeze is for a period of 8 years, commencing on the date of endorsement of the definitive plan. ([G.L. c. 40A, § 6.](#))
- Subdivision Rules & Regulations Freeze – [G.L. c. 41, § 81Q](#), provides that when a preliminary plan of subdivision has been submitted to the planning board and written notice of the submission has been given to the city or town clerk, the preliminary plan and the definitive plan, filed within 7 months, derived from it, shall be governed by the subdivision rules and regulations in effect at the time of the submission of the preliminary plan and until final action has been taken by the planning board
- State Environmental Code Freeze/Board of Health Regulation Freeze – The provisions of [G.L. c. 111, § 127P](#), state that the same filing of the preliminary plan followed within 7 months by the filing of the definitive plan and subsequent definitive plan approval also freezes the state environmental code provisions, or of the regulations of the local board of health that differ from the state code, in effect at the time of the preliminary plan submission. The freeze is for a period of 3 years from the date of approval of the definitive plan.

5.3 – FURTHER INFORMATION – For more detailed information regarding these protections, see Section 5-27 – Plan Freeze Protections – of this Chapter.

Section 5-13

Submission of Plans and Public Hearing

1.0 – Introduction

1.1 – OVERVIEW – [G.L. c. 41, § 81T](#), provides instructions on the submission of plans, the content and timing of the public hearing notice, and distribution of that notice. [G.L. c. 41, § 81O](#), the Regulation of New Subdivisions, also includes language related to the submission of subdivision plans. (See Section 5-05, Regulations of New Subdivision & Submission of Plans.). Also note that c. 41, § 81S, provides for the submission of preliminary subdivision plans. (See Section 5-12, subsection 3.0.)

2.0 – Submission of Definitive Plan and Approval Not Required (ANR) Plan

2.1 – SUBMISSION OF PLAN – In accordance with c. 41, § 81O, a definitive subdivision plan or an ANR plan may be submitted in one of 2 ways.

- delivered to the planning board at a meeting of the board; or
- sent by registered mail to the planning board and, if so mailed, the date of receipt of the plan shall be the date of submission of the plan.

2.2 – NOTICE TO CITY OR TOWN CLERK – Anyone submitting a definitive subdivision plan or an ANR plan to the planning board shall also give written notice to the city or town clerk that the plan has been submitted. Notice may be either by delivery to the clerk or by registered mail, postage prepaid.

The notice to town clerk that a plan has been submitted requires that notice be filed with town clerk concurrently with, or at least very promptly after, submission to board.

An applicant for an ANR plan not following these requirements is not entitled to endorsement. [Korkuch v. Planning Bd. of Eastham](#), 26 Mass. App. Ct. 307 (1988). In *Korkuch*, 20 days had elapsed between the submission of the plan to the planning board and the notice to the clerk.

2.3 – RECEIPT – If the notice is given to the city or town clerk by delivery, the clerk shall provide a written receipt if requested by the person delivering the notice.

2.4 – NOTICE CONTENTS – The notice provided to the city or town clerk shall contain all of the following information:

- description of the land on the plan sufficient to identify that land;
- the date on which the plan was submitted to the planning board; and
- the name and address of the owner(s) of the land.

3.0 – Public Hearing and Notice

3.1 – PUBLIC HEARING REQUIREMENT – For a definitive plan submission, but not for an ANR plan, the planning board is required to hold a public hearing prior to taking any action to approve, approve with modification, or disapprove the plan.

3.2 – PUBLIC HEARING NOTICE – Before holding a public hearing, the planning board shall provide public notice of the time and place of the hearing including adequate identification of the subject matter (the definitive plan). Notice of the hearing is adequate where the notice describes the land sufficiently for identification and of the purpose of the hearing.

3.3 – COST OF THE PUBLIC HEARING NOTICE – The applicant shall be responsible for bearing the cost of the public hearing notice advertisement.

3.4 – ADVERTISING & POSTING REQUIREMENTS – The public notice shall be placed in a newspaper of general circulation in the city or town once in each of 2 successive weeks. The 1st publication of the notice shall not be less than 14 days before the day of the hearing.

If there is no newspaper of general circulation, the hearing notice shall be posted in a conspicuous place in the city or town hall for a period of not less than 14 days prior to the hearing.

3.5 – NOTICE REQUIREMENTS – [G.L. c. 4, § 13](#) – In addition to the notice requirements in G.L. c. 41, § 81T above, G.L. c. 4, § 13, requires electronic publication of legal notices, which include public hearing notices. Notice requirements are summarized in §§ 3.5.1, 2.5.2, and 3.5.3 below.

3.5.1 – Website Posting – In addition to the publication of the legal notice in the print edition of the local newspaper, notice shall also be posted on the newspaper’s website as well as the statewide website established and maintained as a repository of legal notices. If a newspaper does not maintain a website then the legal notice printed in the newspaper shall reference the statewide website at <https://www.masspublicnotices.org/>

3.5.2 – Website Requirements – When a legal notice is posted on the website of a newspaper and the statewide website, the operator of the website shall:

- ensure access by the public to the website at all times;
- make the full text of the legal notice available in a searchable format for the time period that the notice is required to be posted;
- ensure that the website substantially complies with the accessibility standards of Section 508 of the federal Rehabilitation Act of 1972, as amended and codified at 29 U.S.C. Section 794d and to perform searches for notices on the website;
- provide access to view legal notices on the website for free, provided that operators of newspaper websites may charge a fee for enhanced search and customized content delivery features;
- maintain an archive of legal notices for at least 90 days for notices that are no longer displayed on the website; and
- charge no additional fee for publication on a website in addition to the fee for publishing the notice in the print newspaper.

3.5.3 – Website Posting Errors – It shall not constitute a defect in the publication of the legal notice where an error occurs in posting the legal notice on a newspaper or statewide website that is either attributable to the website operator or is because a temporary website outage or service interruption has occurred that prevents the publication or display of a legal notice on the website, provided that the legal notice appears correctly in the newspaper’s print publication and satisfies all other legal requirements.

3.6 – NOTICE TO APPLICANT & ABUTTERS – In addition to the above, a copy of the hearing notice shall be mailed to the applicant and all owners of land abutting the land shown on the definitive subdivision plan as their names respectively appear on the most recent tax list. This notice requirement is distinct from, and more limited than, the notice requirement for zoning under G.L. 40A, § 11.

3.7 – FURTHER INFORMATION – This topic is covered in more detail in Guidebook Chapter 4 – Zoning. Refer to the Section 4-18, Public Hearing Notice Requirements.

Section 5-14

Section 81 U – Part 1

Approval, Approval with Conditions, or Disapproval – Definitive Subdivision Plan

[G.L. c. 41, § 81U]

1.0 – Introduction

1.1 – OVERVIEW – The procedures, requirements, and timelines for a planning board to review and act on a definitive subdivision plan are covered by [G.L. c. 41, § 81U](#).

2.0 – Definitive Plan Submission Following Preliminary Plan

2.1 – SUBMISSION TIMING ISSUE – There are practical issues to consider when a definitive plan is submitted later than 7 months from an earlier preliminary plan submission. Is a definitive plan always required to be filed within 7 months of a preliminary plan? Or is it the case that a definitive plan filed beyond the 7-month time limit only results in the loss of the freeze protections for zoning, subdivision rules and regulations, environmental code, and board of health regulations?

2.2 – SEVEN-MONTH TIME PERIOD – The only statutory references to the 7-month time limit for filing the definitive plan are associated with freeze protections. There is no statutory reference that would require the definitive plan always to be filed within the 7-month period. The normal 90-day review period for a definitive residential plan where a preliminary plan had been filed still applies. As a caution, the longer the time lapse between the 2 submissions, the more problematic the matter may become for both the applicant and the board.

2.3 – AMENDED PLAN FILING AND 7-MONTH DEADLINE FOR FREEZE PROTECTION – In [Arenstam v. Planning Board of Tyngsborough](#), 29 Mass. App. Ct. 314 (1990), the Court held that the statute that affords “grandfather” protection from zoning changes to subdivision plans where a preliminary plan followed within 7 months by definitive plan is submitted to planning board for approval under the Subdivision Control Law, does not apply to an amended definitive plan that had not been filed with the planning board within the 7-month period after submission of the preliminary plan.

3.0 – Timeline – Nonresidential Subdivisions

For more detailed information, organized in a table form, regarding timelines and action dates required for all subdivision review, see Section 5-28, Action Dates, of this Chapter.

3.1 – NINETY-DAY TIME PERIOD – In the case of a nonresidential subdivision, if a preliminary plan had been submitted to, and acted upon by, the planning board, or where 45 days have elapsed since the submission of the preliminary plan, a definitive plan may then be submitted. The planning board has 90 days from the submission of the definitive plan to hold the public hearing, make its decision, and file its written decision with the municipal clerk.

If the planning board fails to take final action within 90 days from the submission of the plan or of any agreed upon extension of time, or if the board fails to file a certificate of its final action, with the

city or town clerk within that 90-day time period or any agreed upon extension, the plan shall then be deemed approved (i.e., constructive grant approval).

3.2 – EXTENSION OF 90-DAY TIME PERIOD/FILING WITH CLERK – The 90-day time period may be extended upon the written request of the applicant and with the agreement of the planning board. The written extension shall be filed forthwith by the planning board with the city or town clerk. The approval of board should be included in the written document filed with the clerk.

4.0 – Timeline – Residential Subdivisions - Preliminary Plan Submitted

4.1 – NINETY-DAY TIME PERIOD – In the case of a subdivision showing lots in a residential zone, where a preliminary plan has been acted upon by the planning board, or where 45 days have elapsed since the filing of the preliminary plan, a definitive subdivision plan may then be submitted. The planning board then has 90 days from the submission of the plan to hold the public hearing, make its decision, and file its written decision with the municipal clerk.

If the planning board fails to take final action within 90 days from the submission of the plan or of such agreed upon extension of time, or fails to file a certificate of its final action with the city or town clerk within that 90-day period or any agreed upon extension, the plan shall then be deemed approved (i.e., constructive approval).

4.2 – EXTENSION OF 90-DAY TIME PERIOD/FILING WITH CLERK – The 90-day time period may be extended upon the written request of the applicant and agreement of the planning board. The written extension shall be filed forthwith by the planning board with the city or town clerk. The approval of the board should be included in the written document filed with the clerk.

5.0 – Timeline – Residential Subdivision – No Preliminary Plan Submitted

5.1 – ONE HUNDRED THIRTY-FIVE DAY TIME PERIOD – In the case of a subdivision showing lots in a residential zone, where no preliminary plan has been submitted and acted upon by the planning board, a definitive subdivision plan may be submitted. The planning board has 135 days from the submission of the plan to hold the public hearing, make its decision and file that decision with the municipal clerk.

If the planning board fails to take final action within 135 days from the submission of the plan or of such agreed upon extension of time, or fails to file a certificate of its final action with the city or town clerk within that 135-day period, the plan shall then be deemed approved (i.e., constructive grant approval).

5.2 – EXTENSION OF 135-DAY TIME PERIOD/FILING WITH CLERK – The 135-day time period may be extended upon the written request of the applicant and agreement of the planning board. The written extension shall be filed forthwith by the planning board with the city or town clerk. The approval of board should be included in the written document filed with the clerk.

6.0 – Board of Health

6.1 – FILING OF PLAN WITH THE BOARD OF HEALTH – When a definitive subdivision plan is submitted to the planning board, a copy of the plan shall also be filed with the board of health or board or officer having the same duties.

6.2 – REPORT OF THE BOARD OF HEALTH – The board of health or health officer shall, within 45 days after the plan is filed with the board, report to the planning board in writing stating its approval or disapproval of the plan. If the board or officer disapproves the plan, then it shall make specific findings as to which areas shown on the plan cannot be used for building sites without injury to the public health. It shall include findings and reasons for the findings in its report. Where possible, the health board or officer shall make recommendations on what adjustments can be made to the plan to address the stated concerns. A copy of the report shall be sent to the applicant by the board of health or health officer.

The board of health is required to act in a reasonable manner in formulating its recommendation and report to the planning board with respect to a proposed subdivision plan. The board of health's recommendation should focus on matters within the statutory jurisdiction of the planning board's review of the subdivision plan.

6.3 – PLANNING BOARD LIMITATIONS BASED ON BOARD OF HEALTH REPORT – A planning board may not approve a definitive plan that does not conform to the board of health recommendations. The planning board may either deny the plan or modify it so that it conforms to the board of health recommendations. [*Fairbairn v. Planning Bd. of Barnstable*](#), 5 Mass. App. Ct. 171, 173-174 (1977).

6.4 – FAILURE TO REPORT DEEMED APPROVAL – PLAN NOTATION – Failure of the board of health or officer to submit a report to the planning board shall be deemed approval by the board of health or officer. The planning board shall note on the subdivision plan that board of health approval is by its failure to report.

6.5 – BOARD OF HEALTH – CONDITIONAL APPROVAL – If the report of the board of health or officer so states, then the planning board approval shall be on the condition that no building or structure be built or placed on areas designated without the consent of the board of health or officer.

6.6 – BOARD OF HEALTH CONDITION – INSCRIBED ON PLAN OR ON SEPARATE DOCUMENT– Any condition required by the board of health or officer shall be either inscribed on the plan or contained in a separate document and referred to on the plan.

6.7 – PLAN WITHOUT PUBLIC SEWER – When a definitive plan does not include the provision of public sewer for any of the lots, then the approval by a board of health or officer shall not be deemed to be an approval for the construction and use on any lot of an individual sewage disposal system; and approval by the board of health or officer shall not be deemed to be an application for a permit to construct or use an individual sewage disposal system on any individual lot.

7.0 – Planning Board Action

7.1 – APPROVAL, APPROVAL WITH CONDITIONS, AND APPROVAL, OR DISAPPROVAL – After the public hearing required by [§ 81T](#) and the submission of the report of the board of health or officer, or upon lapse of the 45-day period for that report, the planning board's choices are indicated in Sections 7.1.1 through 7.1.3 below.

7.1.1 – REQUIRED SUBDIVISION PLAN APPROVAL – If the subdivision plan conforms to the board's rules and regulations and with the recommendations of the board of health, the planning board has no choice but to approve the plan.

7.1.2 – APPROVAL WITH CONDITIONS – If the planning board approves the subdivision plan with conditions, those conditions must be founded on a specific rule or regulation of the board or on a valid recommendation of the board of health. A planning board exceeds its authority if requirements or conditions are imposed beyond those established by the rules and regulations. [*Beale v. Planning Board of Rockland*](#), 423 Mass. 690 (1996).

7.1.3 – DISAPPROVAL AND FINDINGS – If the board disapproves the plan, it shall state in detail where the plan does not conform to the rules and regulations of the board or to the board of health recommendations. In almost every situation, the planning board's rules and regulations are central to its review of subdivision plans and as the basis for disapproval. [*Sealund Sisters v. Planning Board of Weymouth*](#), 50 Mass. App. Ct. 346 (2000).

In [*Massachusetts Broken Stone v. Planning Board of Weston*](#), 45 Mass. App. Ct. 738 (1998), the Appeals Court held that the planning board's disapproval of a definitive subdivision plan based on the potential of the proposed drainage design to adversely affect water quality was beyond the scope of the board's authority under its rules and regulations. Had the rules and regulations expressly provided for the determination of water quality impact as a basis for board action, disapproval might have withstood judicial scrutiny.

In [*Canter v. Planning Board of Westborough*](#), 4 Mass. App. Ct. 306 (1976), the Court summarized these points as follows:

The rules and regulations of the planning board were admitted in evidence and are before us. We find nothing in them which appears to be directed to those aspects of the plan which were made the grounds for disapproval. The planning board does not contend otherwise. It follows that the board's decision cannot be sustained.

However, in [*Beale v. Planning Board of Rockland*](#), 423 Mass. 690 (1996), Beale argued that the language of G.L. c. 41, § 81U allows a planning board to disapprove a subdivision plan only when that plan fails to comply with the board's own subdivision rules and regulations or with the recommendations for the board of health. The Supreme Judicial Court disagreed and stated:

*Section 81U, however, must be read in conjunction with other provisions of the subdivision control law, most notably s. 81M, which states the purposes of the law. Section 81M provides in part that, "the powers of a planning board . . . shall be exercised with due regard for . . . insuring compliance with the applicable zoning ordinances or by-laws." This statement of purpose provides a basis for disapproval of a subdivision plan separate from any noncompliance with a planning board's subdivision rules and regulations or a board of health's recommendations. See *Doliner v. Planning Bd. of Millis*, 343 Mass. 1, 6 (1961) ("The subdivision control law contemplates that the planning board shall ensure compliance of subdivision plans not only with the zoning by-law, but also with the [subdivision] rules and regulations. . . ." *Baker v. Planning Bd. of Framingham*, 353 Mass. 141, 144-145 (1967) (planning board should consider the language of s. 81M concerning zoning compliance and approve a plan that complies with the board of health's recommendations and the planning board's reasonable rules and regulations)).*

Also see *Arrigo v. Planning Bd. of Franklin*, [12 Mass. App. Ct. 802](#), 807-808 (1981) The Arrigo court, while upholding the planning board's authority to grant a waiver of the zoning frontage requirements, adhered to the position that a plan can be disapproved not just for noncompliance with subdivision rules and regulations or board of health recommendations, but also for violating the zoning frontage requirements incorporated in provisions for excluding certain land divisions from the subdivision approval process.

Thus, the courts have noted a few very specific circumstances when the planning board might disapprove a subdivision plan for reasons beyond noncompliance with the rules and regulations. Nevertheless, beyond those limited circumstances, it is insufficient that a planning board has a valid concern that would justify disapproval; it ought first to have adopted rules and regulations that addressed the particular concern.

7.1.4 – SUBDIVISION DISAPPROVAL AND ZONING – [G.L. c. 41, § 81M](#), allows the planning board to review subdivisions with regard for ensuring compliance with the zoning bylaw or ordinance. The board may deny a subdivision based on a violation of the zoning bylaw or ordinance. It may do so even in the absence of language to that effect in the subdivision rules and regulations. [Beale v. Planning Board of Rockland](#) 423 Mass. 690 (1996).

Also, § 81Q precludes a planning board from imposing frontage requirements independent of and more stringent than those of the zoning bylaw. Therefore, a board may not deny a subdivision plan for violating frontage requirements where the board attempts to impose requirements greater than those required by the zoning bylaw or by the Subdivision Control Law. [Arrigo v. Planning Bd. of Franklin](#), 12 Mass. App. Ct. 802, 807-808 (1981).

7.2 – BOARD ACTION & VOTE – A planning board public hearing held on a definitive subdivision plan is quasi-judicial in nature; thus, the action of the board in approving a definitive plan requires the affirmative vote of a majority of the members of the full board, not merely of a majority of the quorum present and voting. [McElderry v. Planning Board of Nantucket](#), 431 Mass. 722 (2000).

7.3 – REVOCATION OF DISAPPROVAL – The planning board shall revoke its disapproval and approve any plan which, as amended, conforms to the rules and regulations of the board or with the board of health or officer recommendations.

7.4 – NOTICE OF ACTION – The planning board shall file a certificate of its action with the city or town clerk, a copy of which shall be recorded by the clerk in the book kept for such purpose. The board shall also send, by registered mail, postage prepaid, notice of its action to the applicant at the address stated on the application.

8.0 – Planning Board Conditions

8.1 – CONDITIONS AND RESTRICTIONS RELATIVE TO REAL PROPERTY – TIME LIMITS – [G.L. c. 184, § 23](#), provides for a time limitation on conditions or restrictions on the use of land for a period of 30

years. Thus, where the statute applies, the condition or restriction automatically expires – or “sunset” – after 30 years, whether that limit appears in the document or not. The question as to whether this statute applies to conditions on definitive subdivision plans had long been a question that was addressed by the Appeals Court in 2014.

8.2 – TIME LIMITATIONS ON CONDITIONS OF APPROVAL – In [Killorin v. Zoning Board of Andover](#), 80 Mass. App. Ct. 655, 657 (2011), the Court held that G.L. c. 184, § 23, which limits conditions or restrictions on the title or use of real property to a term of 30 years after the date of deed or other instrument or date of probate of will creating the restrictions, did not apply to a condition imposed by a zoning board of appeals on a special permit under G.L. c. 40A, § 9. The condition had been imposed on the special permit over 60 years earlier.

In a subsequent unpublished decision, [Martha Samuelson v. Planning Board of Orleans](#)², [Appeals Court Docket #13 P 1418] (2014), the court affirmed an earlier Land Court decision, extending *Killorin* to similarly preserve conditions that were imposed by a planning board in approving a subdivision plan. The court explained that:

... the holding of Killorin does not turn on the identity of the local board or on the particular nature of the regulatory decision at issue. Rather, the key distinction we drew there was between land use restrictions ‘created by deed, other instrument, or a will,’ and land use restrictions imposed as a condition to the discretionary grant of regulatory approval under the police power.

It is clear that subdivision conditions – as distinct from restrictions arising under a “written agreement or contract” with the town – are not subject to the 30-year limit in G.L. c. 184, § 23.

9.0 – Appeals

9.1 – CONFORMITY WITH RULES & REGULATIONS – In [Strand v. Planning Bd. of Sudbury](#), 5 Mass. App. Ct. 18 (1977), the Appeals Court determined that when a subdivision approval is the basis for an appeal by a party aggrieved, the court’s proper role is to determine whether, on facts independently found by the judge, the board had exceeded its authority in approving the plan aired at public hearing. During that process, the judge should have determined whether the plan conformed to the rules and regulations of the planning board and to the recommendations of the board of health. If there was such compliance and conformity, the judge should conclude that the board did not exceed its authority in approving plan.

Section 5-15

Section 81 U – Part 2

² In *Samuelson*, the owner of lots in an old approved subdivision received approval from the planning board to subdivide one of the old lots, even though conditions of the earlier plan prohibited further subdivision unless certain road improvements were undertaken and water service provided. Those conditions had not been met. The court observed that the planning board could have modified these conditions in accordance with G.L. c. 41, § 81W, but had not been asked to do so by the landowner. The planning board agreed with the applicants that G.L. c. 184, § 23, applied in this case. The Land Court disagreed and reversed the planning board approval and subsequently the Appeals Court affirmed the Land Court ruling. For the full text of this decision, [Martha Samuelson v. Planning Board of Orleans](#), 21 LCR 378 (2013).

Performance Guarantee [G.L. c. 41, § 81U]

1.0 – Introduction

1.1 – OVERVIEW – Under [G.L. c. 41, § 81U](#), prior to endorsing a definitive subdivision plan, a planning board shall require that the construction of ways and the installation of municipal services be secured by a performance guarantee.

1.2 – G.L. c. 44, § 53G½ – G.L. c. 44, § 53G½, does not apply to a financial guarantee received by a city or town under G.L. c. 41, § 81U.

[Chapter 218, Acts of 2016 § 9](#), which added a new section, [G.L. c. 44, § 53G½](#), was adopted by the Legislature on August 9, 2016. This amendment provided that cities and towns may, “. . . by bylaw, ordinance, rule, regulation or contract, provide for the deposit of cash, bonds, negotiable securities, sureties or other financial guarantees to secure the performance of any obligation by an applicant as a condition of a license, permit or other approval or authorization”. . . [T]he [m]onies or other security received may be deposited in a special account. This Legislature Act took effect on November 7, 2016.

For more information regarding G.L. c. 44, § 53G½, see Chapter 8, Administration and Meetings, Section 8-06, of this Guidebook.

2.0 – Performance Guarantee

2.1 – OPTIONS – There are 4 performance guarantee options available to the planning board laid out in G.L. c. 41, § 81U; a bond, a deposit, a covenant, or a lender agreement.

The applicant determines which method – or which combination of methods – will be used. The method selected may be varied from time to time.

2.1.1 – Bond or Deposit of Money or Securities – A bond or a deposit of ether money or securities, may be used for a performance guarantee if, in the opinion of the planning board, they are sufficient to secure the construction of ways and the installation of municipal services required for the lots in the subdivision shown on the subdivision plan. The planning board may require that the applicant specify the time within which such construction shall be completed.

2.1.2 – Covenant – A covenant may be used if it is executed and recorded by the owner(s) of record and runs with the land. In this instance, the ways and services shall be provided to serve any lot before that lot may be built upon or conveyed, other than by a mortgage deed. A mortgagee that acquires title to the mortgaged premises by foreclosure or otherwise, and any succeeding owner of the premises or part thereof may sell the lot, subject to that portion of the covenant which provides that no lot shall be built upon until the ways and services have been provided to serve that lot.

Nothing in § 81U, shall be deemed to prohibit a conveyance by a single deed, subject to a covenant, of either the entire parcel of land shown on the subdivision plan or of all lots not previously released by the planning board.

A deed to any part of the subdivision in violation of § 81U, shall be voidable by the grantee prior to the release of the covenant but not later than 3 years from the date of the deed. Any covenant given to the city or town and any condition required by the health board or officer shall either be inscribed on the plan or contained in a separate document referred to on the plan.

2.1.3 – Lender Agreement (Tri-partite Agreement) – An agreement, executed after the recording of a first mortgage covering the land shown on the subdivision plan or a portion thereof, may be given as security for advances to be made to the applicant by the lender. This agreement shall be executed by the applicant and the lender and shall provide for the retention of funds sufficient, in the opinion of the planning board and otherwise due the applicant, to secure the construction of ways and the installation of municipal services.

This agreement shall also include a schedule of disbursements, similar to construction loan disbursements. This may be made to the applicant upon completion of various stages of the work. It shall further provide that if the work is not completed within the time set forth by the applicant, any remaining funds shall be available for completion of the ways and municipal services.

2.2 – TIME LIMIT ON COMPLETION OF SUBDIVISION – Unlike a bond and deposit of money or securities, where § 81U includes express language authorizing the planning board to require that the applicant specify the time within which construction shall be completed, there is no equivalent language for a covenant.

However, one court has suggested that the failure to include this same authority under the covenant section was an inadvertent oversight on the part of the Legislature. [*Costanza & Bertolino v. Planning Board of North Reading*](#), 360 Mass. 677 (1971)

A requirement in a covenant fixing the time within which the work must be completed is, in our view, consonant with the purposes of the law. We believe that the authority for imposing such a time limit contained in the section of the statute concerned with securing performance by bond or deposit is equally applicable to the covenant portion of the statute. A contrary result would impose a potentially greater burden on applicants who secure performance by bond or deposit than on those who execute covenants. The Legislature could not have had this difference in result in mind when it enacted Section 81U.

In [*Campanelli v. Planning Board of Ipswich*](#) 358 Mass. 798 (1970), the Court held that time limitations were acceptable because the applicant had agreed to their inclusion in the original approval of the plan obtained by a prior owner of the property. “A provision for automatic rescission where the initial approval was not final but rather conditional is within the board's authority.”

2.3 – IMPLEMENTATION RULES & REGULATIONS – While the statute addresses the types of performance guarantees that can be used, the implementation details and other requirements related to the performance guarantee should be included in the board’s subdivision rules and regulations.

3.0 – Funds

3.1 – REQUIRED AMOUNT OF FUNDS – The required amount of funds covered by a bond, or funds deposited, or funds retained by a lender, shall bear a direct and reasonable relationship to the anticipated cost necessary to complete the work, including the effects of inflation.

3.2 – REDUCTION OF FUNDS – The fund amount may be reduced so that the amount bonded, deposited, or retained continues to reflect the actual anticipated cost of work remaining to be completed.

4.0 – Completion of Ways and Municipal Services

4.1 – NOTICE TO PLANNING BOARD AND MUNICIPAL CLERK – Upon completion of the construction of ways and the installation of municipal services in accordance with the rules and regulations of the planning board and in accordance with the security submitted regarding this completion or installation, the applicant shall send by registered mail to the planning board and city or town clerk a written statement that the construction or installation has been completed accordingly. This written statement shall include the address of the applicant.

4.2 – RELEASE OF SECURITY BY PLANNING BOARD – If the planning board determines that the construction of public ways and installation of municipal services has been satisfactorily completed, it shall release the interest of the town in a bond, shall return the bond or deposit to the person who furnished it, or shall release the covenant by an appropriate instrument, duly acknowledged, which may then be recorded.

4.3 – CONSTRUCTION NOT COMPLETED – NOTICE REQUIRED – If the planning board determines that the construction or installation has not been satisfactorily completed, it shall provide details in a notice sent, within 45 days of receipt of the applicant's notice of completion, by registered mail to the applicant and to the city or town clerk. The notice shall include how the construction or installation fails to comply with the board's rules and regulations and any conditions of approval.

4.4 – FAILURE OF BOARD TO RESPOND – If the planning board fails to respond within 45 days of the date of receipt of the applicant's notice to the board and municipal clerk of completion of construction and installation of municipal services, then:

- all obligations under the bond shall cease and terminate by operation of law;
- any deposit shall be returned; and
- any covenant shall become void.

If the board does not act within 45 days, the city or town clerk shall issue a certificate to the effect that that all obligations under the bond shall cease, any deposit shall be returned, and any covenant shall be void. The certificate shall be duly acknowledged by a notary public and may be recorded.

5.0 – Failure to Perform; Expenditure of Funds

5.1 – ENFORCEMENT – If the applicant fails to construct municipal ways or install municipal services that are covered by a bond or deposit as a performance guarantee, then the planning board may either enforce the bond or apply the deposit for the benefit of the city or town, as provided in [§ 81Y](#). Enforcement is available only to the extent of the reasonable cost to the city or town for the costs and expenses of completing the construction and installation.

5.2 – EXPENDITURE OF FUNDS – A city or town must use its normal appropriation process to use the proceeds of any bond or deposit that is in the possession of the city or town upon the applicant's

default for meeting its costs and expenses of completing the public improvements in a subdivision, with the possible exception mentioned in the next paragraph. This contemplates costs and expenses incurred or to be incurred by the city or town, and provides a mechanism designed to offset those costs by funds of the applicant. The Department of Revenue considers money received and in the possession of the city or town under this section, either as bond proceeds or cash deposit, to be “*receipts reserved for appropriation*” to enable the municipality to have a funding source for appropriations necessary to complete the work. [See Dept. of Revenue Property Tax Bureau [IGR No. 89-209](#), (January, 1989). superseding IGR No. 88-212.]

However, in a town which votes to accept the provisions of the penultimate paragraph of [§ 81U](#), the proceeds of a bond or deposit shall be made available to the town for expenditures to meet the cost and expenses of the town in completing the work as specified in the approved plan. If the proceeds do not exceed \$100,000, then the expenditures may be made without specific appropriation under [G.L. c. 44, § 53](#), provided that they be approved by the board of selectmen.

No town can use the proceeds of a bond or deposit that it possesses without prior appropriation unless it has specifically voted to accept the provisions of the paragraph of § 81U mentioned above. The town can vote to accept this provision at an annual or special town meeting. The provisions noted in this paragraph shall not apply to cities, or towns with town councils.

The statute does not appear to contemplate circumstances in which the deposit is contractually placed in escrow with a third party and not with the municipality, or where completion of the work is undertaken by third parties who are compensated out of escrow funds upon the planning board’s determination that the applicant has failed to fulfill its conditions of approval.

Section 5-16

Section 81 U – Part 3

Land Reserved for Parks [G.L. c. 41, § 81U]

1.0 – Introduction

1.1 – OVERVIEW – The last paragraph of [G.L. c. 41, § 81U](#), contains language regarding the reservation of land for parks as part of the definitive subdivision plan approval process.

2.0 – Limitation

2.1 – THREE-YEAR BUILDING RESTRICTION – The planning board may require a definitive subdivision plan to show a park or parks suitably located for playground or recreation purposes or for providing light and air. The area shown shall not be unreasonable in relation to the land being subdivided and the prospective uses of the land.

If the planning board requires this designation for parkland, then the board shall, by appropriate endorsement on the plan, require that no building may be erected on the park or parks for a period of not more than 3 years without its approval.

At the end of the 3-year time period, if either the municipality has not purchased the land designated for a park or parks, or if the land has not otherwise been legally protected from development, then the owner of the land may develop the land.

Section 5-17

Endorsement of Definitive Plans; Constructive Grant Certificate [G.L. c. 41, § 81V]

1.0 – Introduction

1.1 – OVERVIEW – [G.L. c. 41, § 81V](#) requires a planning board endorsement of a final approved plan or the requirement for a city or town clerk certificate if the plan was approved by a constructive grant. The endorsement must be signed by either a majority of the board members or a person (e.g., the chair, or clerk) authorized in writing by a majority of the board to endorse, with certification thereof provided to the register of deeds and the recorder of the Land Court.

2.0 – Waiting Period for Endorsement

2.1 – APPEAL OR NO APPEAL – A planning board shall provide a written endorsement on the approved definitive plan after either of the following 2 events and after the submission of a performance guarantee as cited in Section 2.2 below:

- no appeal of the planning board's approval of the definitive plan to the Superior or Land Court is taken within 20 days of the board's approval of the plan; or
- if there has been an appeal, after the entry of a final decree of a court sustaining the approval of the plan by the board.

2.2 – ENDORSEMENT SUBSEQUENT TO PERFORMANCE GUARANTEE SUBMISSION – In accordance with [G.L. c. 41, § 81U](#), a planning board may not endorse an approved subdivision plan until one of the forms of security for completion of the subdivision improvements has been provided.

3.0 – Constructive Grant Certificate

3.1 – CONSTRUCTIVE GRANT ACTIONS – In the case of an approval of a definitive plan by the failure of the planning board to act within the time prescribed (constructive grant), the city or town clerk must either wait for the 20-day appeal period to expire without appeal to the Superior or Land Court or, if appealed, wait until after receipt of certified records from the court indicating that the court decision sustaining the approval of the plan has become final.

After either of the 2 events cited in Section 2.1 above, the clerk shall issue a certificate stating:

- the date of plan submission;
- the fact that the planning board failed to take final action within the time prescribed;
- that approval resulting from such failed action has become final.

3.2 – CONSTRUCTIVE GRANT CERTIFICATE OF FINAL APPROVAL – The court cases listed below provide further specific information regarding the constructive grant certificate.

[Dennis v. Planning Bd. of Winchester](#), 71 Mass. App. Ct. 179 (2008). The recording of both the clerk's certificate of constructive approval of a subdivision and the subdivision plan are prerequisites for securing final approval.

[*Krafchuk v. Planning Bd. of Ipswich*](#), 70 Mass. App. Ct. 484, review granted 451 Mass. 1108, remanded [453 Mass. 517](#) (2007). The town clerk's affidavit stating that there were no filings by landowners or the planning board during the 90 days after submission of the definitive subdivision plan and that no appeal was filed subsequently was not sufficient to substitute for a timely issued certificate of final approval.

[*Kitras v. Zoning Adm'r of Aquinnah*](#), 453 Mass 245, 254 (2009). Constructive approval is not actually achieved until and unless the clerk has issued the certificate of constructive approval.

[*Board of Selectmen of Pembroke v. R. & P. Realty Corp.*](#), 348 Mass. 120 (1964). [Chapter 41, Section 81U](#), which provides that failure of the planning board to take final action regarding a plan within the timeline required should be deemed approval thereof, must be construed with reference to this section governing a certificate of approval.

4.0 – Notice to Applicant

4.1 – ENDORSED PLAN OR CLERK CERTIFICATE – In the case of a plan approved and endorsed by the planning board, the board shall deliver the endorsed plan to the person submitting the plan. In the case where the clerk issues a certificate of constructive grant, the clerk shall deliver that certificate.

Section 5-18

Modification, Amendment, or Rescission of Plans [G.L. c. 41, § 81W]

1.0 – Introduction

1.1 – OVERVIEW – A planning board has the power to modify, amend, or rescind its approval of a subdivision plan, or to require a change in a plan as a condition of that plan retaining the status of an approved plan. It may do so under the provisions of [G.L. c. 41, § 81W](#).

1.2 – INITIATION OF PROCESS – The board may take this action either on the petition of any interested person or on its own motion.

1.3 – PROVISIONS OF THE SUBDIVISION CONTROL LAW – All of the provisions of the Subdivision Control Law relating to the submission and approval of the subdivision plan shall also be applicable to the approval of the modification, amendment, or rescission of a plan, under § 81W.

2.0 – Lots Affected

2.1 – SOLD OR MORTGAGED LOTS – No modification, amendment, or rescission of the approval of a subdivision plan or changes to such a plan shall affect the lots in the subdivision that have been sold or mortgaged in good faith and for valuable consideration after the approval of the plan without the consent of:

- the owner(s) of such lots, and
- the holder of the mortgage or mortgages on the lots.

2.2 – SALE TO A SINGLE GRANTEE – A modification, amendment, rescission of an approval, or a change in a plan, shall not be prohibited if there has been a sale to a single grantee of either the entire parcel of land shown on the subdivision or of all the lots not previously released by the planning board.

2.3 – LIMITATION OF THE NUMBER OF LOTS & SUBSEQUENT RE-DIVISION – The planning board has the power to impose a condition of approval that limits the number of lots on a subdivision plan. If it does so, the board must note that limitation on the plan itself. To further divide any lot in that subdivision there must be a modification of the original subdivision plan pursuant to § 81W.

2.4 – EXTENT OF MODIFICATIONS – In [Patelle vs. Planning Board of Woburn](#), 20 Mass. App. Ct. 279 (1985), the Appeals Court determined that under § 81W the planning board has the authority to approve modifications to a recorded subdivision plan proposed by the developer without the consent of owners of lots in the subdivision where the alterations approved by the board affecting traffic pattern, view, and over-all neighborhood density, did not have a direct and tangible impact on the property rights of the lot owners. The court made clear that the word "affect", as it appears in § 81W, does not have the broad meaning that many plaintiffs may wish to ascribe to it; rather, the verb "affect" was meant by the Legislature to address matters relating to the marketability of titles acquired by bona fide purchasers from subdividers.

3.0 – Planning Board Process

3.1 – 81W PROCEDURE – The courts have outlined the process a planning board must use in acting under § 81W. This process includes the following:

- The board must hold a public hearing with notice required as provided for in [§ 81T](#).
- The board may rely on the entire record made of the subdivision plan's previous approval.
- The board may ask itself whether there is a reason for the board to deviate from the result it sought to achieve in its approval, or approval with conditions, of the subdivision plan that would warrant an amendment, modification, rescission, or change to the plan.

4.0 – Actions Required

4.1 – UNREGISTERED LAND – For unregistered land, no modification, amendment, or rescission of the approval of the plan or change to the plan under this section shall take effect until the following actions are taken:

- the plan as originally approved, or a copy thereof, and a certified copy of the vote of the planning board to modify, amend, rescind, or change a previously approved subdivision plan, and any additional plan referred to in the vote, shall have been recorded;
- an endorsement has been made on the plan originally approved as recorded referring to the vote and where it is recorded; and
- the vote is indexed in the grantor index under the names of the owners of record of the land affected.

4.2 – REGISTERED LAND – For registered land, no modification, amendment, or rescission of the approval of the plan or change in a plan under this section shall take effect until the action has been verified by the Land Court pursuant to [G.L. c. 185](#). In the case of rescission, amendment, modification, or change, not so verified, the action shall not take effect until ordered by the court pursuant to [G.L. c. 185, § 114](#).

5.0 – Approval Not Required (ANR) Plans and § 81W

5.1 – APPLICABILITY OF § 81W TO ANR PLANS – ANR plans endorsed under § 81P are not subject to amendment, modification, or rescission under § 81W. In [Cassani v. Planning Bd. of Hull](#), 1 Mass. App. Ct. 454 (1973), the Court determined that § 81W applies only to a definitive subdivision plan approval and not to an endorsement under [§ 81P](#).

6.0 – Constructively Approved Subdivisions and § 81W

6.1 – AUTHORITY TO MODIFY, AMEND, RESCIND, OR CHANGE A CONSTRUCTIVELY APPROVED PLAN – If a subdivision has been constructively approved but does not conform to the subdivision rules and regulations or to the recommendations of the board of health, the planning board has the authority to subsequently act under § 81W to modify, amend, rescind, or change the constructively approved plan. [Board of Selectmen of Pembroke v. R. & P. Realty Corp.](#), 348 Mass. 120 (1964), [Pierce v. Town Clerk of Rochester](#), 3 Mass. App. Ct. 728 (1975).

6.2 – CONSENT OF MORTGAGE HOLDER – That the entire parcel of the proposed subdivision – as distinct from the “lots” of the proposed subdivision – was mortgaged did not relieve the town’s planning

board from the requirement that it obtain the consent of the mortgage holder before rescinding a constructive approval of subdivision. [Terrill v. Planning Bd. of Upton](#), 71 Mass. App. Ct. 171 (2008).

6.3 – JUSTIFICATION FOR RESCISSION OF PLAN – While a planning board's ability to rescind constructive approvals provides a safety valve that helps protect against legitimate police power concerns being dissipated by sloppy practice, a planning board may not rescind its approval of a definitive plan, constructive or otherwise, unless there is good reason to do so. [Czyoski v. Planning Bd. of Truro](#), 77 Mass. App. Ct. 151 (2010). In that case, the Appeals Court stated that:

. . . [it does] not mean to suggest that a planning board has authority to rescind a constructive approval only when it has already developed an airtight case for denying an application. Our point is simply that when a planning board rescinds a subdivision approval (constructive or otherwise) and disposes of the application in a particular manner, that disposition needs to be defended on its own merits.

7.0 – Amended Plans and Damages

7.1 – DAMAGES – Under certain circumstances, an amendment to an approved definitive subdivision plan may result in the possibility of damages being claimed by the property owner. Damages may be awarded in accordance with § 81DD. For more details regarding the circumstances under which damages may be a possibility, see Section 5-24 – Damages, subsection 3.0.

Section 5-19

Requirements for Recording of Plans

[G.L. c. 41, § 81X]

1.0 – Introduction

1.1 – OVERVIEW – [G.L. c. 41, § 81X](#), covers the requirements for recording plans with the registry of deeds or recorder of the Land Court Registration Office. This section covers approval not required (ANR) plans, definitive subdivision plans, and definitive subdivision plans that are constructively approved.

2.0 – Plan Recording Process

2.1 – PLAN RECORDING – The register of deeds shall record only the following plans that show a division of land into lots in a city or town in which the Subdivision Control Law is in effect and the ways - whether existing or proposed - providing access thereto:

- Definitive Subdivision Plan Approved and Endorsed by the Planning Board – a plan that:
a) bears the endorsement of the planning board of the city or town where that plan has been approved by the board and, b) has a certificate by the city or town clerk endorsed on the plan or is separately recorded and referred to on the plan stating that no notice of appeal was received during the 20-day appeal period, or if an appeal was taken, that a final decree has been entered by the court sustaining the approval of the plan;
- Approval Not Required Plan Endorsed by Planning Board – a plan that bears the endorsement of the planning board that approval of that plan (ANR plan) is not required under § 81P;
- Definitive Plan Approved by Constructive Grant – a definitive subdivision plan that is accompanied by a certificate from the city or town clerk that the plan has been approved by reason of the failure of the planning board to act therein within the time prescribed as provided in §§ 81U and 81V;
- ANR Plan Approved by Constructive Grant – an Approval Not Required Plan under § 81P which is accompanied by a certificate from the city or town that it has been determined that approval is not required by failure of the planning board to act within the prescribed time.

2.2 – CERTIFICATE REFERENCE REQUIREMENT – A reference to the book and page where the certificate of no appeal by the city or town clerk is recorded shall be made on said plan.

2.3 – TIME LIMITS FOR RECORDING DEFINITIVE PLANS – [G.L. c. 41, § 81X](#) requires that an “approved” plan be recorded with the registry of deeds within 6 months of the date of endorsement. However this requirement does not apply to plans constructively approved, as the board does not endorse constructively approved plans.

The contents of the endorsement of the board or certificate by the city or town clerk shall be final and conclusive on all parties, subject to the provisions of § 81W.

Readers should refer to the Tables in Section 5-28 of this Chapter which lay out the action dates and timelines that govern the submission of a definitive plan for recording at the registry of deeds or Land Court. The tables separately track the timely recording of the plan and the late recording of the plan.

2.4 – TIME LIMITS – CAUTION FOR PLANNING BOARDS – There is no time limit in § 81U for an applicant to submit a performance guarantee after the date of plan approval. The planning board cannot endorse a plan, nor record the plan, until a performance guarantee satisfactory to the board is submitted. If a board wishes to avoid the situation of approving a subdivision plan and seeing that plan languish

without endorsement for a long period of time, it should consider crafting time limits as a condition of approval that would require the submission of the performance guarantee and construction of the public improvements within a set period of time.

2.5 – CERTIFICATE OF NO CHANGE – Upon an application request a certificate stating that approval has not been modified, amended, rescinded, or changed, shall be made by the board or by the city or town clerk, unless the records show that the approval has been modified, amended, rescinded, or changed.

3.0 – Planning Board Authorization for Endorsement

3.1 – NOTICE OF PLANNING BOARD ENDORSEMENT AUTHORIZATION – The planning board of a city or town that has authorized any person (e.g., the board chair or board clerk) other than the 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 recorder of the Land Court, signed by a majority of the planning board, giving the name of the person so authorized.

4.0 – Register of Deeds and Recorder of Land Court

4.1 – PUBLIC RECORD – The register of deeds and the recorder of the Land Court shall each keep in a place open for public inspection a book that shall be a public record in which the name of each city and town where the Subdivision Control Law is in effect is listed and separately indexed. In addition, this book shall also include all notices from a city or town related to subdivision control, including copies of the subdivision rules and regulations of the local boards.

4.2 – ACCEPTANCE OF PLANS WITH NO NOTICE OF SUBDIVISION CONTROL IN EFFECT – The register of deeds and the recorder of the Land Court may accept for the recording of any plan of land, otherwise appropriate for recording, where the board having the powers of subdivision control has not sent the register of deeds or recorder of the Land Court notice that the Subdivision Control Law is in effect, without requiring the approval of the planning board of the city or town or a certificate that no approval is necessary.

4.3 – PERIMETER PLAN – ACCEPTANCE OF PLANS WITH NO NEW LOTS OR WAYS SHOWN – Notwithstanding the provisions of § 81X, 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 of a registered land surveyor that:

- the property lines shown are the lines dividing existing ownerships;
- the lines of streets and ways shown are those of public or private streets or ways already established; and
- no new lines for division of existing ownership or for new ways are shown.

This type of plan is commonly referred to as a “perimeter plan”. 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 provisions of law.

4.4 – ACCEPTANCE OF NOTICE OF MODIFICATION, AMENDMENT, OR RESCISSION – No register of deeds or recorder of the Land Court shall accept for recording a notice of a modification, amendment, or rescission of the approval of a definitive subdivision plan unless that notice contains a statement by the planning

board that the modification, amendment, or rescission does not affect any lots or rights appurtenant thereto in the subdivision where a lot was conveyed and mortgaged in good faith and for valuable consideration subsequent to the approval of the subdivision plan.

Section 5-20

Restrictions on Construction of Public Ways, Improvements, and Buildings; Liability of Grantors; Court Jurisdiction

1.0 – Introduction

1.1 – OVERVIEW – [G.L. c. 41, § 81Y](#), includes the following Subdivision Control Law topics:

- the circumstances whereby public ways and public improvements can be constructed;
- the circumstances whereby building permits may be issued or denied;
- the officer or board who may have authority to issue building permits;
- court jurisdiction; and
- enforcement of the provisions of 81Y.

2.0 – Public Improvements

2.1 – PUBLIC WAYS & MUNICIPAL SERVICES AND IMPROVEMENTS – In any city or town in which the Subdivision Control Law is in effect, no public way shall be laid out, accepted, or constructed, and no municipal service or improvement shall be constructed, in a way within a subdivision to serve the land therein, unless the way is shown on an approved subdivision plan, except by the affirmative vote of 2/3 of the local legislative body (city/town council or town meeting).

3.0 – Building Permits

3.1 – ISSUANCE OR DENIAL OF BUILDING PERMIT – Where the Subdivision Control Law is in effect, no building permit shall be issued for the erection of a building unless the authority issuing the permit is satisfied that:

- the lot on which the building is to be erected is not within a subdivision; or
- a way furnishing the access to that lot is shown on a plan recorded or entitled to be recorded under § 81X, and any condition endorsed thereon limiting the right to erect or maintain buildings on the lot has been satisfied, or waived by the board; or
- in the event the planning board has by rule or regulation required that not more than one building for dwelling purposes be erected or placed or converted to use on any lot without its consent, that such consent has been obtained.

Where a building permit is issued that ought not to have been issued because it had not been preceded by satisfaction of the Subdivision Control Law, the building permit is invalid, notwithstanding the planning board's "approval not required" endorsement after issuance of the permit. [Hogan v. Hayes](#), 19 Mass. App. Ct. 399 (1985).

The building inspector cannot issue a building permit so long as a subdivision plan notation remained prohibiting construction. An applicant's remedy is by appeal from planning board's action, rather than an action to review denial of the permit, even if the restriction had been imposed without compliance with hearing requirements or was invalid for any other reason. [Marino v. Board of Appeal of Beverly](#), 2 Mass. App. Ct. 859 (1974).

In [Hamilton v. Planning Board of Beverly](#), 35 Mass. App. Ct. 386 (1993), the Court stated:

The provisions built into Sections 81T and 81W, which are designed to protect purchasers of lots in a subdivision and the larger public, would be altogether . . . and easily . . . subverted if an approved plan could be altered by the simple expedient of procuring a Section 81P "approval not required" endorsement. The endorsement of such a plan is a routine act, ministerial in character, and constitutes an attestation of compliance neither with zoning requirements nor subdivision conditions. . . . Restrictions in an approved subdivision plan are binding on a building inspector.

3.2 – PLANNING BOARD AUTHORITY TO ISSUE BUILDING PERMITS – In any city or town in which the Subdivision Control Law is in effect and which there is no board or officer having the power to issue building permits, no building shall be erected within a subdivision without written permission from the planning board. This permission shall be given when it appears that there is compliance with the Subdivision Control Law.

3.3 – SUBDIVISION BOARD OF APPEALS AUTHORITY TO ISSUE BUILDING PERMITS – If enforcement of the provisions listed in 3.1 and 3.2 above would entail practical difficulty or unnecessary hardship, and if the circumstances of the case do not require that the building be related to a way shown on a plan, then the subdivision board of appeals provided for in § 81Z shall have the power, by vote of a majority of its members, to issue a permit for the erection of the building, subject to the provisions of §§ 81Z and, 81AA and 81BB.

While the foregoing faithfully tracks the language of the statute, what it apparently means is that the “subdivision board of appeals” referred to in § 81Z has “standby authority” to carry out the building permit functions ordinarily handled by the building official, requiring only that the record identify some “practical difficulty or unnecessary hardship” that would result by following the default provisions of this section.

4.0 – Unapproved Subdivision Plan

4.1 – SUBDIVISION WITHOUT AN APPROVED PLAN – If a subdivision of land has been made in a city or town while the Subdivision Control Law is in effect without the plan being recorded or entitled to be recorded under § 81K, the person or persons executing and delivering the deed, mortgage, or other instrument by which the subdivision was made shall be liable to each owner of the land or any part thereof who acquired title without notice or knowledge of the division having been made, for all damages sustained by the owner by reason of the failure to comply, in an action brought within one year after such delivery. In effect, this is a one-year statute of limitations on any action brought by any party to whom an interest in the subdivided property had been conveyed.

4.2 – SUBMISSION OF SINGLE LOT PLAN – Any person owning a lot in a subdivision, approval of which was required by the Subdivision Control Law but was not obtained, and who did not make the subdivision and acquired title without notice or knowledge of the lack of such approval, may submit a plan of the lot and of the ways giving access thereto, to the planning board. This plan shall be acted upon in the same manner and with the same effect, so far as it affects the lot and rights of access, as a plan of a subdivision.

5.0 – Court Jurisdiction & Enforcement

5.1 – ENFORCEMENT OF SECTION 81Y – The Superior Court for the county in which the land affected by any provision of the Subdivision Control Law lies, and the Land Court, shall have jurisdiction in equity on a petition of the planning board, or of 10 taxable inhabitants thereof, to :

- review any action of any municipal board or officer of the city or town in disregard of this section;
- annul and enjoin such action;
- enjoin the erection of a building in violation of this section;
- otherwise enforce the provisions of the Subdivision Control Law;
- otherwise enforce the rules and regulations lawfully adopted and conditions on the approval of a plan lawfully imposed thereunder;
- restrain by injunction violations thereof; and
- make such decrees as justice and equity may require.

5.2 – APPEALS PURSUANT TO SECTION 81Y – What can be appealed using the provisions of § 81Y? The Appeals Court has provided some direction regarding this question. In [*Nantucket Land Council v. Planning Bd. of Nantucket*](#), 5 Mass. App. Ct. 206 (1977), the Court noted that no case decided with reference to § 81Y had held that it could be used to overturn a decision of a planning board to approve a definitive plan, with or without conditions. Thus, appeals using § 81Y are limited to violations of conditions in an approved plan and to actions taken by other boards of officers that are in violation of specific provisions of § 81Y.

5.3 – TIME LIMITATION FOR ENFORCEMENT – No proceeding under 5.2 above shall be instituted more than 1 year after the act or the failure to act on which the petition is based. One of the purposes for the 1-year statute of limitations on proceedings in equity for enforcement of the Subdivision Control Law (§ 81K et seq.) is to lessen the chance that defects in title will arise as a result of conveyances which do not comply with this law. [*Murphy v. Donovan*](#), 4 Mass. App. Ct. 519 (1976).

5.4 – ENFORCEMENT OF SUBDIVISION CONDITIONS BY PLANNING BOARD – Upon the planning board’s approval of a definitive plan with conditions, enforcement of those conditions becomes the responsibility of other appropriate municipal officials.

5.5 – SECTION 81Y AND APPROVAL NOT REQUIRED PLANS (ANR) – The Supreme Judicial Court has held that § 81Y cannot be used to appeal a planning board action on an ANR Plan. [*Carey v. Planning Bd. of Revere*](#), 335 Mass. 740, 742-743 (1957).

Section 5-21

Subdivision Board of Appeals - Establishment [G.L. c. 41, § 81Z] and

- Powers and Duties [G.L. c. 41, § 81AA]

1.0 – Introduction

1.1 – OVERVIEW – A city or town in which the Subdivision Control Law is in effect shall provide a subdivision board of appeals by ordinance or bylaw. Establishment of the board is governed by [G.L. c. 41, § 81Z](#) (Sections 2.0 and 3.0 below.) Powers and duties of the board are governed by [G.L. c. 41, § 81AA](#) (Section 4.0 below.)

2.0 – Background

2.1 – SECTION 81Y BUILDING PERMITS – The subdivision board of appeals shall have jurisdiction to issue building permits for the erection of buildings under [G.L. c. 41, § 81Y](#). This should not be interpreted as equipping this board with the same authority as that of a local building commissioner, but appears only to be a standby provision applicable in cities and towns “*in which the Subdivision Control Law is in effect and in which there is no board or officer having the power and duty to issue [building] permits,*” and then only under certain statutory limitations stated in § 81Y.

2.2 – EXISTING BOARD OF APPEALS – A § 81Z board of appeals may be the existing zoning board of appeals created in accordance with G.L. c. 40A, § 12. However, if the existing ZBA is also the planning board, then it may not act as the board of appeals under the Subdivision Control Law.

If a G.L. c. 40A, § 12, ZBA also serves as the § 81Z board of appeals, it must doff its “zoning ZBA hat” when functioning as the § 81Z subdivision board of appeals, and its authority is strictly limited to the functions established in § 81Z.

2.3 – SUBDIVISION COVENANT & BUILDING PERMIT – Only the planning board and, in certain situations, the subdivision board of appeals, is authorized to determine whether a subdivision covenant has been satisfied so that a building permit may be issued. ([G.L. c. 41, § 81Y](#)). The zoning board of appeals, as such, is not authorized to make such decisions. [Planning Bd. of Easton v. Koenig](#), 12 Mass. App. Ct. 1009 (1981).

3.0 – Membership

3.1 – APPOINTMENT – The mayor or the board of selectmen, (or other equivalent body such as a town council, or selectboard) shall appoint the subdivision board of appeals within 3 months of the board establishment by ordinance or bylaw. Subsequently, members shall be appointed by a mayor with council confirmation or by a board of selectmen.

3.2 – MEMBERSHIP NUMBER & TERMS OF OFFICE – There shall be at least 3 members of the subdivision board of appeals. Members shall be appointed for terms of such length and so arranged that the term of one member shall expire each year.

3.3 – ELECTION OF OFFICERS – The board shall annually elect both a chair and a clerk.

3.4 – REMOVAL & VACANCIES – Any member of the board may be removed for cause by the appointing authority upon written charges and after a public hearing is held. Vacancies shall be filled for unexpired terms in the same manner as in the original appointment.

3.5 – ASSOCIATE MEMBERS – Ordinances or bylaws may provide for the appointment of associate members in the same way as regular members. The chair may designate an associate member to sit in the case of a member's absence, inability to act, or conflict of interest. In addition, in the event of a vacancy the chair may designate an associate member to sit until the vacancy is filled.

4.0 – Powers & Duties

4.1 – RULES & REGULATIONS – A subdivision board of appeals established under § 81Z shall adopt rules for conducting its business and for otherwise carrying out the purposes of this section. These rules shall not be inconsistent with § 81AA and with § 81Y and § 81Z.

4.2 – MEETINGS – Meetings of the board shall be called by the chair and also when called in any other manner as determined by its rules and regulations. All meetings shall be open to the public.

4.3 – OATHS & WITNESSES – The chair, or in the chair's absence the acting chair, may administer oaths, summon witnesses, and call for the production of papers.

4.4 – DETAILED RECORDS – The board shall make a detailed record of its proceedings. The record shall be a public record and a copy of the record shall immediately be filed with the city or town clerk. This record shall include:

- the absence of any member;
- the vote of each member on each question;
- the failure to vote by any member;
- the reason or reasons for each of the board's decisions; and
- the reason or reasons for any of its official acts.

4.5 – HEARINGS – Before taking any action under § 81Y, the board shall hold a public hearing where the parties of interest shall have the opportunity to be heard, in person or by agent or attorney.

4.6 – NOTICE REQUIREMENTS – Notice of the time and place of the hearing and the subject matter, sufficient for identification, shall be published in a newspaper of general circulation in the city or town once in each of 2 successive weeks. The first publication shall not be less than 14 days before the day of the hearing. If there is no such newspaper, then notice shall be posted in a conspicuous place in the city or town hall for a period of not less than 14 days before the day of the hearing. The board may require the applicant to pay the expense of such notice.

4.7 – CONDITIONS OF APPROVAL – In granting a permit under § 81Y, the board may impose reasonable conditions designed to benefit the city or town and promote its health, safety, and welfare.

Section 5-22

Court Appeal [G.L. c. 41, § 81BB & G.L. c. 41, § 81Y]

1.0 – Introduction

1.1 – OVERVIEW – [G.L. c. 41, § 81BB](#), covers the topic of subdivision appeals and [G.L. c. 41, § 81Y](#), covers appeals to the courts. Any person, whether or not previously a party to the proceedings, or any municipal officer or board, who is aggrieved by the following, may appeal:

- a decision by the subdivision board of appeals under § 81Y;
- any decision of a planning board concerning a subdivision plan;
- the failure of a planning board to take final action concerning a subdivision plan within the required time;
- the determination of a planning board that a plan requires subdivision plan approval rather than an Approval Not Required endorsement; or
- the validity of a planning board's subdivision rules & regulations, in connection with an actual case or controversy arising under a § 81BB appeal. *Ranieri v. Town of Heath*, Misc. Case No. 173041 (Land Court 1994)

1.2 – PRELIMINARY SUBDIVISION PLAN – There are no provisions for appealing a planning board's decision on a preliminary subdivision plan. Therefore, the provisions of § 81BB do not apply to those plans, and neither an applicant nor "party of interest" has a right to appeal from action taken on a preliminary subdivision plan. [Mac-Rich Realty Const., Inc. v. Planning Bd. of Southborough](#), 4 Mass. App. Ct. 79 (1976), and [Paul Livoli, Inc. v. Planning Bd. of Marlborough](#), 347 Mass. 330 (1964).

1.3 – APPROVAL NOT REQUIRED PLAN – The only situation where § 81BB may be used for the appeal of a decision regarding an ANR plan is where the board determines that a subdivision plan must be filed.

2.0 – Appeal

2.1 – COURT APPEAL AND "PARTY AGGRIEVED" – Appeals from the board's decision on a definitive plan may be taken by any party aggrieved to the Superior Court for the county in which the land is situated or to Land Court. To be a "party aggrieved" the injury claimed on an appeal must be more than speculative, but should not be read narrowly. [Krafchuk v. Planning Bd. of Ipswich](#), 453 Mass. 517 (2009).

Abutters entitled to notice of planning board hearings enjoy a rebuttable presumption that they are persons aggrieved and entitled to appeal, but must still assert a plausible claim of a definite violation of a private right, a private property interest, or a private legal interest. A party challenging a planning board's decision need not prove by a preponderance of the evidence that his or her claim of particularized injury is true in order to have standing to appeal as a person aggrieved, but rather must put forth credible evidence to substantiate his or her allegations; in this context, appellant's status as a "party aggrieved" becomes a question of fact for the trial judge.

2.2 – APPEAL TIME LIMIT – An appeal shall be taken within 20 days after the decision has been recorded in the city or town clerk's office or within 20 days after the expiration of the time required by G.L. c. 41, § 81U. Thus, the time for an appeal from the approval of a subdivision plan begins to run after the last day given by this section – i.e., the 20 days – for filing the certificate of board's action, rather than from the date of the actual belated filing of such certificate. [Board of Selectmen of Pembroke v. R. & P. Realty Corp.](#), 348 Mass. 120 (1964).

2.3 – NOTICE OF APPEAL – Notice of the appeal shall be given to the city or town clerk within the same 20-day time period. Compliance with the statutory requirement of providing notice of appeal to the

city or town clerk within the 20-day period for appealing from a decision of a planning board regarding a subdivision plan is a jurisdictional prerequisite to the prosecution of an appeal. If no notice is given to the city or town clerk within the 20 days, then the appeal cannot be prosecuted. [Calnan v Planning Board of Lynn](#), 63 Mass. App. Ct. 384 (2005).

2.4 – COURT HEARING & DETERMINATION – The court shall hear all pertinent evidence and determine the facts. Based on those facts, the court shall annul the decision if it is found to exceed the authority of the board, or make other decrees as justice and equity may require. The foregoing remedy shall be exclusive, but the parties shall have all rights of appeal and exceptions as in other equity cases.

2.4.1 – De Novo Hearing – In an appeal of a local planning board disapproving a subdivision, a trial court is required to conduct a hearing *de novo*, find the relevant facts, and determine the validity of the board's decision. [Wine v. Planning Bd. of Newburyport](#), 74 Mass. App. Ct. 521 (2009). “*De novo*” is lawyer-speak for “from scratch.”

Although certain subdivisions have protections under [G.L. c. 111, § 127P](#), from provisions of the environmental code, including board of health regulations promulgated under [G.L. c. 111, § 31](#), they are not exempt from conditions recommended by the board of health under [G.L. c. 41, § 81U](#). G.L. c. 111, § 127P does not limit a board of health to review of subdivision plans only on the basis of promulgated regulations, either by its express terms or by implication. Thus, in imposing conditions on a development, the power of a board of health is not limited to what is already set forth in the state environmental code or in local regulations. A full *de novo* review is available in an appeal under § 81BB from conditions recommended by the board of health under G.L. c. 41, § 81U. [Independence Park, Inc. v. Board of Health of Barnstable](#), 403 Mass. 477 (1988).

2.4.2 – Determination of Board Exceeding its Authority – On appeal from a decision of the planning board approving a proposed subdivision, the judge's role is to determine whether, on facts independently found by the judge, the board had exceeded its authority in approving a plan reviewed at a public hearing. The judge should determine whether the plan conforms to the rules and regulations of the planning board and to the recommendations of board of health. If there is compliance and conformance, the judge should determine that the board has not exceeded its authority in approving the plan. [Strand v. Planning Bd. of Sudbury](#), 5 Mass. App. Ct. 18 (1977).

2.4.3 – Burden of Proof – On appeal from a decision of the town planning board disapproving a subdivision plan, the developer has the burden of proving that the planning board has exceeded its authority in disapproving the plan. [Fairbairn v. Planning Bd. of Barnstable](#), 5 Mass. App. Ct. 171 (1977), and [Mac-Rich Realty Const., Inc. v. Planning Bd. of Southborough](#), 4 Mass. App. Ct. 79 (1976). When it is claimed that a subdivision plan was improperly approved, the burden falls on the one making that claim. [Selectmen of Ayer v. Planning Bd. of Ayer](#), 3 Mass. App. Ct. 545 (1975).

2.5 – LEGAL COUNSEL – A city or town may provide any municipal officer or board with legal counsel for appealing a decision of the planning board or the subdivision board of appeals.

2.6 – COSTS – Costs shall not be allowed against the planning board or the subdivision board of appeals unless it appears that the board acted with gross negligence or in bad faith.

2.7 – POSTING OF SURETY OR BOND – Both [G.L. c. 41, § 81BB](#) and [Chapter 40A, § 17](#), the Zoning Act, provide that the court require non-municipal appellants to post a surety or cash bond in the sum of

not less than \$2000 nor more than \$15,000 to secure payment of any costs incurred by the appellee as a result of the appeal of a decision approving a subdivision plan.

2.8 – SPEEDY TRIAL – All issues in any proceeding under this section may be advanced for speedy trial over other civil actions or proceedings.

Section 5-23

Powers of Planning Board

- Entry onto Private Land [G.L. c. 41, § 81CC] and
 - Transitional Powers [G.L. c. 41, § 81GG]
-

1.0 – Introduction

1.1 – OVERVIEW – [G.L. c. 41, § 81CC](#), is a very short section providing for entry onto private land by the planning board. [G. L. c. 41, § 81GG](#), is a transitional provision adopted in 1953 as part of the adoption by the state legislature of the new Subdivision Control Law found in §§ 81K – GG.

2.0 – Entry onto Private Land

2.1 – ENTRY ONTO LAND & MARKS AND MONUMENTS – Section 81CC provides that planning boards and their officers and agents may, as far as they deem it necessary in carrying out the Subdivision Control Law, enter upon any lands, make examinations and surveys, and place and maintain marks and monuments.

2.2 – ENTRY ONTO LAND – [G.L. c. 41, § 81DD](#), states that any person injured by reason of entry onto land under § 81CC that is not within the limits of a subdivision as shown on a preliminary or definitive plan submitted by that person for approval, may seek to recover the damages so caused under [G.L. c. 79](#). (See this Chapter - Section 5-24 – Application of Law & Damages.)

2.3 – CAUTION TO PLANNING BOARDS – Prior to entry onto private land under this authority, however, planning boards would be well advised to give reasonable notice to and obtain consent from the private property owner, who may otherwise seek to recover any damages resulting from entry under the state’s eminent domain laws ([G.L. c. 79](#)). In the absence of consent, boards should consult with the municipal attorney regarding obtaining an administrative search warrant.

3.0 – Transition of Powers and Severability

3.1 – TRANSITION OF POWERS – Under [§ 81GG](#), any planning board having the power of subdivision control under earlier laws (laws prior to the 1953 enactment of the current Subdivision Control Law) shall have all of the powers and be subject to all of the duties with respect to subdivision control under §§ 81K – GG, without any further action by the city or town.

3.2 – SEVERABILITY – If any provision of §§ 81K – GG shall be held to be unconstitutional, it shall not affect any other provision of those sections or the administration thereof.

Section 5-24

Application of Law; Damages

[G.L. c. 41, § 81DD]

1.0 – Introduction

1.1 – OVERVIEW – [G.L. c. 41, § 81DD](#), covers a variety of topics related to the following:

- the powers of the city council, board of selectmen, or other municipal officers regarding public ways;
- the taking of land;
- the laying out and construction of a public way;

- damages based on the modification, amendment, rescission, or change to the subdivision plan;
- damages based on entry onto land by the planning board or its agent.

2.0 – Powers of Other Municipal Officials Not Abridged

2.1 – POWERS REGARDING PUBLIC WAYS – The Subdivision Control Law does not alter the powers of the city council, board of selectmen, or other municipal officers in regard to public ways in any manner except as provided under the subdivision control statute.

2.2 – POWERS REGARDING THE TAKING OF LAND – The Subdivision Control Law does not authorize the taking of land.

2.3 – POWERS REGARDING THE LAYING OUT & CONSTRUCTING OF WAYS – The layout and acceptance of public ways is governed by statutes beyond the scope of this Guidebook. However, for the purpose of this Guidebook, it should be noted that the Subdivision Control Law itself does not authorize a city or town to lay out or construct any way, nor does an approved subdivision plan imply that the ways shown on the plan may serve as “frontage” for parcels outside the subdivision perimeter. In [*Dolan v. Board of Appeals of Chatham*](#), 359 Mass. 699 (1971), the SJC observed:

The principal purpose of the Subdivision Control Law is to protect the health and welfare of the community "by regulating the laying out and construction of ways in subdivisions providing access to the several lots therein, but which have not become public ways, and ensuring sanitary conditions in subdivisions and in proper cases parks and open areas." . . . Section 81M. The Subdivision Control Law may thus be exercised only when new ways required to serve the subdivided lots themselves are required. The suggestion that the planning board's approval of the way under the statute vests some rights to use it in the plaintiffs whose lot was not within the subdivision finds no support in the statute, whose principal object is to ensure sufficient access to the lots within the subdivision and to provide them with municipal services.

3.0 – Damages

3.1 – DAMAGES – MODIFICATION, AMENDMENT, OR RESCISSION TO PLAN – Any persons whose property is adversely affected by reason of the modification, amendment, or rescission of the approval of a plan under § 81W without their consent in writing may recover damages as a taking under [G.L. c. 79](#).

3.2 – DAMAGES – ENTITLEMENT – The modification, amendment, or rescission of the approval of a plan shall not entitle any person to damages, unless and to the extent that the person shall have changed position or made expenditures in reliance upon approval.

3.3 – DAMAGES – MISREPRESENTATION OF FACTS – No damages shall be awarded for the modification, amendment, or rescission of the approval of a subdivision plan obtained as a result of material misrepresentation of facts, whether willful or otherwise, by the person(s) submitting the plan.

3.4 – DAMAGES – ENTRY ONTO LAND – Any person whose property is adversely affected by reason of entry onto their land that is not within the limits of a subdivision as shown on a preliminary or definitive plan submitted by that person for approval may seek to recover the damages as a taking under [G.L. c. 79](#).

3.5 – MODIFICATION, AMENDMENT OR RESCISSION OF PLAN – As stated in this Chapter Section 5-18, under § 81W, a definitive subdivision plan may be modified, amended, or rescinded. In certain circumstances that action may result in the possibility of damages. The table below provides details on different aspects of a subdivision plan modification, amendment, or rescission and whether damages might result.

Subdivision Damages		
Topic	Modification, Amendment, or Rescission is applicable under § 81W	\$\$ damages may be claimed under § 81DD
Party submitting an approved plan had made material misrepresentation of fact, willful or otherwise.	Yes	No
Any lot that is “not affected” by amendment.	No	No
Any unsold lot that is “affected” by the amendment, but where owner/mortgage consents to the amendment.	Yes	No
Any lot that is “affected” by the amendment sold or mortgaged for valuable consideration, but where the owner/mortgagee consents to the amendment.	Yes	No
Any unsold lot that is “affected” by the amendment, but where the owner/mortgagee has not consented to the amendment.	Yes	Yes
The entire subdivided parcel is sold to a single grantee, but where the owner/mortgage has not consented to the amendment.	Yes	Yes
Any lot sold but not previously released by the planning board.	Yes	Yes
Note: Where \$\$ damages are “possible” under § 81DD, the owner is not entitled to \$\$ damages until and unless the owner <i>“has changed his position”</i> or <i>“has made expenditures”</i> in reliance on the approval to which the amendment relates. This essentially means that the claimant, relying on the approval, has taken some irreversible action which, but for the approval, the claimant would not have taken. In such a case, the claimant has earned only the right to assert a claim for \$\$ damages, but must now document and prove actual \$\$ damages. In the absence of this documentation and proof of actual \$\$ damagers, no damages will be awarded.		

Section 5-25

Subdivision Control Law in Effect - Register of Deeds and Recorder of Land Court [G.L. c. 41, § 81EE]

1.0 – Introduction

1.1 – OVERVIEW – [G.L. c. 41, § 81EE](#), covers notification requirements upon adopting both the Subdivision Control Law and subdivision rules and regulations. Adopted in 1953, it relates to certifying that the Subdivision Control Law was in effect in cities and towns as of January 1, 1954.

2.0 – Notification Requirements

2.1 – SUBDIVISION CONTROL LAW IN EFFECT AS OF 1954 – Every planning board that had the powers of subdivision control as of January 1, 1954, was required, within 60 days of that date, to transmit to the register of deeds and the recorder of the Land Court a statement indicating that the Subdivision Control Law was in effect in that city or town. This submission shall have included a copy, certified by the city or town clerk, of the city council or town meeting vote with the date of the vote as well as a reference to any special statute under which subdivision control was established.

2.2 – REGISTER OF DEEDS AND RECORDER OF LAND COURT – The register of deeds and the recorder of the Land Court were required to enter the statement from the city or town clerk into the book they are required to keep under [§ 81X](#).

Unless the city or town clerk failed to transmit this statement within 60 days from January 1, 1954, and unless the city or town clerk had previously notified the register of deeds and recorder of the Land Court of the establishment of a planning board under provisions of the law prior to January 1, 1954, including the date of establishment of the planning board, the Subdivision Control Law was to be suspended until the city or town clerk notified the register of deeds and recorder of the Land Court that the Subdivision Control Law was in effect in the manner provided for in [§ 81N](#).

2.3 – RULES & REGULATIONS – Any planning board having the powers of subdivision control as of January 1, 1954, was required, within 60 days from that date, to submit to the register of deeds and the recorder of the Land Court a certified copy of the rules and regulations relating to subdivision control. Unless a copy was transmitted, the operation of the Subdivision Control Law in that city or town was suspended.

The register of deeds and the recorder of the Land Court were required to keep that copy in the same manner as copies of the Subdivision Control Law as were thereafter adopted.

Section 5-26

Application of the Subdivision Control Law - Unregistered and Registered Land - Pre-1952 Subdivisions

[G.L. c. 41, § 81FF]

1.0 – Introduction

1.1 – OVERVIEW – This section of the Subdivision Control Law, [G.L. c. 41, § 81FF](#), was adopted in 1953 and pertains to the application of the Subdivision Control Law to registered and unregistered land and whether the Subdivision Control Law was in effect in a municipality as of February 1, 1952. It also concerns Land Court jurisdiction regarding approved subdivision plans on registered land.

2.0 – Unregistered Land

2.1 – RECORDING OF A PLAN PRIOR TO SUBDIVISION CONTROL LAW TOOK EFFECT & LOT EXEMPTION – The first paragraph of § 81FF provides an exemption for unregistered land, for lots in separate ownership, as shown on a plan which was recorded in the registry of deeds prior to the adoption of the Subdivision Control Law in a city or town. For land that was not registered in the Land Court, the recording of a subdivision plan with the register of deeds before the Subdivision Control Law was in

effect in the city or town shall not exempt the land within the subdivision from the subsequent operation of the law except for the following exceptions:

- lots which had been sold and were held in separate ownership from that of the remainder of the subdivision when the Subdivision Control Law went into effect; and
- rights of way and other easements appurtenant to the lots.

In [*Clows v. Planning Bd. of Middleton*](#), 12 Mass. App. Ct. 129 (1981), the decision describes § 81FF as providing relief to good faith purchasers of individual building lots while subjecting owners of large platted tracts to the Subdivision Control Law and changes in it. Unregistered land in an uncontrolled subdivision may not be further divided without either obtaining subdivision approval or obtaining an ANR endorsement.

Plans of subdivision of unregistered land in a city or town recorded prior to the effective date of the Subdivision Control Law are valid only with respect to lots held in separate ownership when the law went into effect and to rights of way appurtenant to such lots. Owners of lots not held in ownership separate from that of the remainder of a subdivision when the Subdivision Control Law (§ 81K et seq. of this chapter) went into effect are not exempt from compliance with the law. The Subdivision Control Law does not fix the location or extent of the rights of way appurtenant to lots sold before the law became applicable. [*Toothaker v. Planning Bd. of Billerica*](#), 346 Mass. 436 (1963).

2.2 – VALIDITY AND EFFECT OF PLANS – Subdivision plans that were recorded in the registry of deeds and subdivisions made without the recording of a plan prior to February 1, 1952, and which had not received the approval of the planning board, shall have the same validity and effect as if the Subdivision Control Law became effective in that city or town on February 1, 1952.

3.0 – Registered Land

3.1 – REGISTRATION OF A PLAN PRIOR TO FEBRUARY 1, 1952 – The second paragraph of § 81FF provides an exemption for registered land regarding subdivisions registered or confirmed by the Land Court before February 1, 1952. For any subdivision plan that has been registered or confirmed by the Land Court prior to February 1, 1952, whether the Subdivision Control Law was in effect or whether the planning board approved the subdivision plan, the plan shall have the same validity as if the plan had been so approved. This exemption is for the entire subdivision, not just for lots in separate ownership as for unregistered land.

3.2 – REGISTRATION OF A PLAN AFTER FEBRUARY 1, 1952 – The Land Court shall not register or confirm a plan of subdivision in a city or town in which the Subdivision Control Law is in effect and where such subdivision plan has been filed on or after February 1, 1952, unless it has first verified that the plan was approved by the planning board or would otherwise be entitled to be recorded in the register of deeds if the plan related to unregistered land.

3.3 – LAND COURT JURISDICTION – The Land Court shall have jurisdiction in so far as it affects land registered or to be registered under [G.L. c. 185](#), to determine whether the Subdivision Control Law has been complied with, and shall verify, prior to registering or confirming any plan of land, that the plan filed with it is entitled to be recorded in accordance with the Subdivision Control Law.

In addition, every plan registered or confirmed by the Land Court in accordance with G.L. c. 185, shall be invested with all of the rights and privileges of a plan approved pursuant to the Subdivision Control Law. In the case of conditions imposed pursuant to § 81R or § 81U of the Subdivision

Control Law and endorsed on the plan filed, the Land Court will ensure that the conditions are either set forth or referred to on the plan. This will then be the basis for registration or confirmation, and reflected in the decree of registration or confirmation or certificate of title.

Section 5-27

Plan Freeze Protections

[G.L. c. 40A, § 6; c. 41, § 81Q; & c. 111, § 127P]

1.0 – Introduction

1.1 – TYPES OF FREEZES & PROTECTIONS – There are 3 “freeze” (or “vested right”) protections for subdivision plans. They are:

- The Zoning Act – The most notable protection is the “freeze” protection for definitive subdivision plans and ANR plans. Paragraphs 5-9 of [G.L. c. 40A, § 6](#), establish separate protections for land on subdivision plans and ANR plans. (See Sections 3.0 – 6.0 below.)
- The Subdivision Control Law – [G.L. c. 41, § 81Q](#), includes language as to the applicability of the planning board subdivision rules and regulations based on the date of submission of a preliminary or definitive subdivision plan. (See Section 7.0 below.)
- State Environmental Code & Board of Health Regulations – [G. L. c. 111, § 127P](#), provides freeze protections to subdivisions against changes in the state environmental code and board of health regulations. (See Section 8.0 below.)

2.0 – Time Period for Freeze Protections

2.1 – TIME PERIOD AND SCOPE OF FREEZE PROTECTION – The time period and scope for protection are:

- Zoning Protection –

- a) Preliminary & Definitive Subdivision plans – The land shown on the plan is protected. The freeze protection is for 8 years from date of endorsement.
- b) Approval Not Required (ANR) plan – The use of the land shown on the plan is protected. The freeze protection is for 3 years from date of endorsement.
- Subdivision Rules and Regulations Protection – Preliminary and Definitive Plans – They are subject to board rules and regulations in effect at the time of submission of the plan.
- Environmental Code & Board of Health Regulations – Preliminary, Definitive, and Approval Not Required plans – They are subject to regulations in effect the date the plan is submitted. The freeze protection is for 3 years from the date of endorsement of the plan.

3.0 – Definitive Plan Protection – (G.L. c. 40A, § 6)

3.1 – DEFINITIVE PLAN – Language in paragraph 5 of [G.L. c. 40A, § 6](#), provides for the following protection for definitive subdivision plans and the actions that apply in order for the plan to receive this protection:

- if a definitive plan, or a preliminary plan followed within 7 months by a definitive plan, is submitted to a planning board for approval under the Subdivision Control Law; and
- written notice of the submission has been given to the city or town clerk before the effective date of a zoning ordinance or bylaw; then
- the land shown on the plan shall be governed by the applicable provisions of the zoning ordinance or bylaw, if any, in effect at the time of the first submission while the plan or plans are being processed under the Subdivision Control Law; and
- if the definitive plan or amendment thereof is finally approved, then the plan shall be governed by the ordinance or bylaw in effect on the first submission of the plan and for a period of 8 years from the date of endorsement of the plan's approval.

3.2 – MORATORIUM & EXTENSION OF PROTECTION – The 8-year protection shall be extended by a period equal to the time in which a city or town imposes or has imposed upon it by a state or federal agency or a court, a moratorium on construction, the issuance of permits, or utility connections.

3.3 – SUBDIVISION PLANS – THE PROTECTION – For residential subdivisions, the filing of a preliminary plan is optional; but if filed the preliminary plan secures zoning freeze status of the land shown on the plan for a period of 8 years from the date on which a definitive plan – if submitted within 7 months of the preliminary – is endorsed by the planning board. No 8-year zoning freeze for a final approved subdivision can commence absent an endorsement or certificate from the town clerk. [Kitras v. Zoning Adm'r of Aquinnah](#), 70 Mass. App. Ct. 561, affirmed by the SJC at [453 Mass. 245](#) (2007).

It is important to understand that the critical date that triggers the freeze is the date of submission of the definitive plan, not its subsequent approval and later endorsement, both of which might well occur later than the 7-month statutory period.

Also important to know is that the 8-year protection is for the land shown on the plan endorsed and not for the specific subdivision plan that was endorsed by the planning board. There is no required consistency between the preliminary plan and the definitive plan, and the later-filed definitive plan can wildly differ from the proposals depicted in the preliminary.

The Court declared that the language of the statute is unambiguous: “The Legislature did not say subdivision shown or lot shown; it said ‘land shown.’” [Massachusetts Broken Stone Co. v. Town of Weston](#), 430 Mass. 637 (2000).

3.4 – A DENIED SUBDIVISION PLAN AND ZONING FREEZE PROTECTION – The freeze protection remains in effect during an appeal of a denied definitive subdivision plan. [*KinderCare Learning Centers, Inc. & another vs. Town of Westford & another*](#), 62 Mass, App. Ct. 924.

3.5 – AMENDED SUBDIVISION PLAN – Although the statute refers to “amended” subdivision plans, in [*Arenstam v. Planning Board of Tyngsborough*](#), 29 Mass. App. Ct. 314, 317 (1990), the Appeals Court held that an amended plan must still be submitted within the 7-month period after the submission of the preliminary plan in order to preserve the 8-year zoning protection. However, an amended subdivision plan submitted after the 7-month period, if approved, remains valid, although now subject to intervening zoning changes.

4.0 – Approval Not Required (“ANR”) Plan Protection

4.1 – APPROVAL NOT REQUIRED (ANR) PLAN – Language in paragraph 6 of [G.L. c. 40A, § 6](#), provides for the following protection for an ANR plan and the actions that apply in order for the plan to receive

this protection.

- *when a plan, referred to in G.L. c. 41, § 81P, is submitted to the planning board; and*
- *written notice of the submission has been given to the city or town clerk; then*
- *the use of the land shown on the plan shall be governed by applicable provisions of the zoning ordinance or bylaw in effect at the time of the submission of the plan while it is being processed under the Subdivision Control Law, including the time required to pursue or await the determination of an appeal referred to in § 81P, for a period of 3 years from the date of the ANR endorsement by the planning board.*

Note the following:

- It is the endorsement of the plan by the planning board that triggers the 3-year protection, not the earlier date of its submission or the later date of its recording.
- It is not “the lots” shown on the plan, but only “the use of the land” on which the lots had been delineated. (See subsections 4.2 and 4.3 below for more details on this topic.)
- The endorsed ANR plan does not have to be recorded in order to receive the 3-year zoning protection. [*Long v. Board of Appeals of Falmouth*](#), 32 Mass. App. Ct. 232 (1992).

4.2 – THE PROTECTION – As noted above, it is only the use of the land shown on the ANR plan that is protected, a subtle but important difference from the protections accorded to definitive subdivision plans under paragraph 5 of [G.L. c. 40A, § 6](#). In [*Bellows Farm v. Building Inspector of Acton*](#), 364 Mass. 253 (1973), the Supreme Judicial Court determined that ANR freeze protection merely protected the land shown on an ANR plan as to the kinds of uses which were permitted by the local zoning at the time of submission of the plan.

4.3 – LIMITS OF PROTECTION – What this means is that other zoning amendments, not dealing with “uses”, are applicable to the land on the plan, including dimensional requirement amendments. Thus, an ANR endorsed plan depicting 10 one-acre house lots secures “the use” of the total parcel from which the lots are carved for the lawful purposes proposed (i.e., residential), notwithstanding a later zoning amendment changing permissible uses (to commercial, for example) that would render the protected use nonconforming.

Other zoning amendments consistent with the protected uses are applicable. If, for example, the amendments increased the minimum area requirement to 1-1/2 acres, a revised ANR plan would be necessitated showing a reduction in the number of lots.

4.4 – ADDITIONAL CONSIDERATIONS

- While dimensional changes (for example) in the zoning ordinance or bylaw are ordinarily applicable to ANR plans, a dimensional regulation amounts to a *de facto* use regulation if its practical impact eliminates or nullifies a protected use. [*Cicatelli v. Board of Appeals of Wakefield*](#), 57 Mass. App. Ct. 799 (2003).
- There are other provisions that a landowner might have recourse to in the face of a dimensional change in the zoning ordinance or bylaw, such as the “common lot” provisions of G.L. 40A, § 6, which protects up to 3 lots shown on the ANR plan.
- The board’s endorsement of the plan merely certifies that a formal subdivision approval is not required. The endorsement does not signify that the lots shown on the plan are in conformance with zoning, other than frontage requirements, or that they are buildable.

5.0 – Stay of Applicability

5.1 – DISAPPROVED DEFINITIVE OR APPROVAL NOT REQUIRED (ANR) PLANS – Disapproval of a subdivision plan or ANR plan shall not serve to terminate any rights that have accrued under G.L. c. 40A, § 6, provided an appeal from the disapproval decision is taken under applicable provisions of law. An appeal will stay the applicability to land shown on the plan of the provisions of any zoning ordinance or bylaw that became effective after the date of submission of the plan as well as time required to comply with any agreement or with any order or decree of the court.

The stay shall depend on either:

- the conclusion of voluntary mediation proceedings and the filing of a written agreement for judgment or stipulation of dismissal; or
- the entry of an order or decree of a court of final jurisdiction.

5.2 – DEFINITIVE OR ANR PLANS DURING APPEAL – In the event that any lot on a plan endorsed by the board is the subject of any appeal or litigation, the exemption provisions shall be extended for a period of time equal to that from the earlier of the date of the appeal filing or of the date of the commencement of litigation to the date of the final disposition, provided final adjudication is in favor of the lot owner.

6.0 – Waiver of Exemptions

6.1 – PROPERTY OWNER WAIVER – The record owner of the land has the right, at any time, by an instrument duly recorded in the registry of deeds, to waive the provisions of G.L. c. 40A, § 6. In that case, the zoning ordinance or bylaw then or thereafter in effect shall apply. Illustratively, where a vested owner determines that the land would be more favorably treated by the amended ordinance or bylaw, the owner, by a recorded waiver instrument, may opt to have the land governed under the zoning as amended rather than the zoning in effect upon vesting.

6.2 – AMENDED PLAN OR FURTHER SUBDIVISION – The submission of an amended plan or a further subdivision of all or part of the land shall:

- not itself constitute such a waiver,
- nor shall it have the effect of further extending the applicability of the ordinance or bylaw that was extended by the original submission.

7.0 – Subdivision Rules & Regulations in Effect – (G.L. c. 41, § 81Q)

7.1 – PRELIMINARY PLAN – When a preliminary plan of subdivision has been submitted to the planning board and written notice of the submission has been given to the city or town clerk, the preliminary plan and the definitive plan derived from it shall be governed by the rules and regulations in effect at the time of the submission of the preliminary plan, provided that the definitive plan is submitted within 7 months of the submission of the preliminary plan.

7.2 – DEFINITIVE PLAN – If, in the absence of a preliminary plan, a definitive subdivision plan has been submitted to the planning board and written notice of this submission has been given to the city or town clerk, and until final action has been taken on the plan by the planning board or the time for such action has elapsed as prescribed by G.L. c. 41, § 81U, the definitive plan shall be governed by the rules and regulations in effect at the time of submission of that plan.

7.3 – FREEZE DURATION – The freeze is valid until final action has been taken on the definitive plan by the planning board or the time for such action has elapsed as prescribed by G.L. c. 41, § 81U. The subdivision plan may be implemented under the zoning protected by the freeze. However, any subsequent amendments to the plan would require conformance to the new zoning.

8.0 – State Environmental Code & Board of Health Regulations - (G.L. c. 111, § 127P)

8.1 – SUBMISSION OF PLANS & PROTECTION – Whenever a person has submitted a definitive subdivision plan, or a preliminary plan which is followed within 7 months by a definitive plan, or a plan referred to in G.L. c. 41, § 81P (ANR plan), the land shown on the plan shall be governed by provisions of the state environmental code, or the provisions of the board of health regulations which differ from the code, which are in effect at the time of the first submission of the plan.

This protection shall apply during the time the plan is being processed, including the time required to pursue or await the determination of an appeal relative to the plan.

8.2 – FREEZE DURATION – If the plan is approved, or if it is found that such approval is not required under the Subdivision Control Law, the protections shall apply for a period of 3 years from the date of endorsement of approval or from the endorsement that approval under the Subdivision Control Law is not required.

8.3 – CONTINUING ROLE OF THE BOARD OF HEALTH – G.L. c. 111, § 127P does not preclude a town board of health from making recommendations for approval or disapproval of a subdivision plan that are not based on promulgated regulations under [G.L. c. 41, § 81U](#). Nor does it grant “freeze” protection to any subsequent and superseding subdivision plans filed by the same developer for the same area. Thus, for example, upon approval of a new or amended plan, newly enacted health regulations will apply to the superseding plan.

In [*Independence Park, Inc. v. Board of Health of Barnstable*](#), 403 Mass. 477 (1998), the board of health regulations required all lots within 3,000 feet of a sewer line to be connected. The regulations were silent as to lots beyond 3,000 feet. However, the board of health recommended in its review of the definitive plan that lots beyond 3,000 feet be connected to the sewer line. The applicant appealed on the basis that the board of health's regulations did not require lots beyond 3,000 feet from a sewer line to be connected, and therefore the board could not recommend that they be so connected.

The Court noted that a recommendation by a board of health may supplement the regulations when they are silent on a given matter, but its recommendation may not contradict an existing regulation. In the *Independence Park* case, the board of health did not contradict its existing regulations because there were none regarding property more than 3,000 feet from a municipal sewer line.

9.0 – The “Single” and “Common Lot” Exception

9.1 – THE ZONING ACT – SINGLE & COMMON LOT EXCEPTION – Where prior to any zoning change the planning board has endorsed a subdivision plan or an ANR plan, a limited zoning protection is accorded under G.L. c. 40A, § 6, covering area, frontage, width, yard, or depth requirements for lots shown on the plan for single or 2-family residential use. This is commonly referred to as either the “single lot” exception or “the common lot” exception depending on the number of lots shown on the plan.

This provision extends the protection for 5 years from the date of plan endorsement. For the “common lot” exception, this provision is applicable only to the first 3 adjoining lots for which the protection is sought. [*Baldiga v. Zoning Board of Uxbridge*](#), 395 Mass. 829 (1985).

There are other situations beyond those mentioned above where the single and common lot exceptions apply. Refer to Chapter 4, Zoning, Section 4-13, Vested Rights & Nonconformities for a more in-depth discussion of this topic.

Section 5-28

Subdivision Plans - Action Dates

[G.L. c. 41, § 81P; c. 41, § 81S; c. 41, § 81T; c. 41, § 81U]

1.0 – Introduction

1.1 – STATUTORY REFERENCES FOR ACTION DATES – The timelines for a planning board to act on preliminary subdivision plans, definitive subdivision plans, and approval not required plans are found in the following statutory sections of Massachusetts General Law.

[G.L. c. 41, § 81P](#) – Approval Not Required Plans

[G.L. c. 41, § 81S](#) – Preliminary Subdivision Plans

[G.L. c. 41, § 81T](#) – Definitive Subdivision Plans

[G.L. c. 41, § 81U](#) – Definitive Subdivision Plans

1.2 – OVERVIEW – These types of subdivision plans are also covered in a specific section of the this Chapter and those sections include more information about the timelines for actions by the parties involved in the subdivision review process. However, Section 5-28 is intended to provide an overview of all of the action timelines for each subdivision type in one location for easy reference.

1.3 – USE OF THE TABLES – There are 5 tables on the following pages. They are:

- 1) Nonresidential Subdivisions – Timeline & Actions
- 2) Residential Subdivisions – Timeline & Actions
- 3) Approval Not Required (ANR) Plans – Timeline & Actions
- 4) Timely Recording of a Definitive Plan
- 5) Late Recording of a Definitive Plan

The letter designations P, D, and A signify the following: P = Preliminary plan action date;

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D = Definitive plan action date; A = Approval Not Required plan action date

2.0 – Timeline & Action Tables

2.1 – INTRODUCTION – The first 3 tables (Nonresidential Subdivisions – Timeline & Actions; Residential Subdivisions - Timeline & Actions; and Approval Not Required (ANR) Plans – Timeline & Actions) are on a separate pages so that, if at some time in the future, the Guidebook is available in a PDF or downloadable form, they may be used by boards to track applications. The tables are not meant to serve as the board’s master case tracker, but only as a date checklist for legal timelines and deadlines for “action.” Deadlines often get lost in the profusion of subdivision review records and the tables can be used to track critical dates, to avoid potential legal problems.

The last 2 tables (Timely Recording of a Definitive Plan; and Late Recording of a Definitive Plan) are on the same page as they are for information only.

NONRESIDENTIAL SUBDIVISION PLAN – TIMELINE & ACTIONS		
Action	Action Date	Enter Date, or n/a
P1 – Preliminary plan (required) is submitted to planning board (PB) & to board of health (BoH) with written notice to the municipal clerk		
P2 – PB holds public meeting (no public hearing required)	Within 45 days of P1	
P3 – Both PB & BoH notify the applicant and the municipal clerk that: (a) the plan has been approved; or (b) the plan has been approved with modifications suggested by the board or agreed upon by applicant; or (c) the plan has been disapproved for stated detailed reasons	Within 45 days of P1	
P4 – Appeals	n/a	
D1 – Definitive plan is submitted to PB for approval	No statutory deadline; but if a preliminary plan had been submitted (P1), zoning, subdivision rules & regulations, environmental code, and BoH regulations freezes apply to a definitive plan where D1 is within 7 months of P1	
D2 – Written notice of the submission is given to municipal clerk	Forthwith following D1	
D3 – Plan is filed with BoH	Forthwith after D1, but not later than 45 days prior to D7	
D4a – BoH either reports to PB with approval (and any conditions) or disapproval (with specific findings and reasons); or	Within 45 days following D3	

NONRESIDENTIAL SUBDIVISION PLAN – TIMELINE & ACTIONS

Action	Action Date	Enter Date, or n/a
D4b – 45 days elapse without BoH report, and therefore approval of BoH is deemed to have been constructively given	After 45 days following D3 in absence of BoH report	
D5 – 1 st Notice of PB hearing	Not later than 14 days prior to D7	
D6 – 2 nd Notice of PB hearing	Within the calendar week next following D5, but prior to D7	
D7 – PB hearing commences	Not later than 90 days after D1	
D8 – PB hearing closes	Not later than 90 days after D1	
D9a – PB takes final action and files its certificate of action with municipal clerk; or	Not later than 90 days after D1	
D9b – PB takes final action and files its certificate of its action with municipal clerk; or	More than 90 days after D1 as agreed to with applicant in writing, with notice of time extension filed with municipal clerk	
D9c – Plan is constructively approved	After 90 days of D1 (or extended time agreed to in writing) in absence of either PB final action or of filing of certificate of final action with municipal clerk	
D10 – PB sends notice of final action to applicant	Forthwith following D9	
D11a – Appeal	Within 20 days of D9a or D9b	
D11b – Notice of constructive approval filed with clerk	Within 20 days of D9c	
P = preliminary plan actions D = definitive plan actions		

RESIDENTIAL SUBDIVISION PLAN – TIMELINE & ACTIONS

Action	Action Date	Enter Date, or n/a
P1 – Preliminary plan (not required) is submitted to PB and to BoH, with written notice to the municipal clerk.		
P2 – PB holds public meeting (no public hearing required).	Within 45 days of P1	
P3 – Both PB & BoH notify the applicant and the municipal clerk that: (a) the plan has been approved; or (b) the plan has been approved with modifications suggested by the board or agreed upon by applicant; or (c) the plan has been disapproved for stated reasons.	Within 45 days of P1	
P4 – Appeal	n/a	
D1 – Definitive plan is submitted to PB for approval.	No statutory deadline; but if a preliminary plan had been submitted (P1), zoning, subdivision rules & regulations, environmental code, and BoH regulations freezes apply to a definitive plan where D1 is within 7 months of P1.	
D2 – Written notice of the submission is given to municipal clerk.	Forthwith following D1	
D3 – Plan is filed with BoH.	Forthwith after D1, but not later than 45 days prior to D7.	
D4a – BoH either reports to PB with approval (and any conditions) or disapproval (with specific findings and reasons); or	Within 45 days following D2	
D4b – 45 days elapse without BoH report; therefore, the BoH approval is deemed to have been constructively given	After 45 days in absence of BoH report	

RESIDENTIAL SUBDIVISION PLAN – TIMELINE & ACTIONS

Action	Action Date	Enter Date, or n/a
D5 – 1 st Notice of PB hearing	Not later than 14 days prior to D7	
D6 – 2 nd Notice of PB hearing	Within the calendar week next following D5, but prior to D7	
D7 – PB hearing commences	Not later than 90 days of D1 (or 135 days if no preliminary plan)	
D8 – PB hearing closes	Not later than 90 days of D1 (or 135 days if no preliminary plan)	
D9a – PB takes final action and files its certificate of action with municipal clerk; or	Not later than 90 days of D1 (or 135 days if no preliminary plan)	
D9b – PB takes final action and files its certificate of its action with municipal clerk. or	More than 90 days after D1 (or 135 days if no preliminary plan), or as agreed to in writing, with notice of the time extension filed with municipal clerk.	
D9c – Plan is constructively approved.	After 90 days of D1 (or 135 days if no preliminary plan), or as agreed to in writing, if either no final PB action or no filing of final action certificate with the municipal clerk.	
D10 – PB sends notice of final action to applicant	Forthwith following D9	
D11a – Appeal	Within 20 days of D9a or D9b	
D11b – Notice of constructive approval filed with clerk	Within 20 days of D9c	
P = preliminary plan actions		D = definitive plan actions

APPROVAL NOT REQUIRED (ANR) PLAN – TIMELINE & ACTIONS		
Action	Action Date	Enter Date, or n/a
A1 – Plan is submitted to PB with written notice to the municipal clerk.		
A2 – PB action: (a) PB endorses the plan; or (b) PB determines that the plan needs definitive subdivision plan approval.	Within 21 days of A1	
A3 – Where PB has determined that the plan needs definitive subdivision plan approval, PB provides written notice to applicant and municipal clerk.	Within 21 days of A1	
A4 – Constructive approval	Either after 21 days have elapsed following A1 without PB action, or if having acted within 21 days of A1 the PB has failed to either endorse the plan or to notify the municipal clerk and the applicant of its action. The city or town clerk shall issue a certificate to the effect that constructive approval has occurred and shall deliver the certificate and the plan to the applicant.	
A5 – Appeal	a) Only the applicant may appeal under § 81BB and only if the PB determines that the plan requires approval under the Subdivision Control Law. Appeal must be filed within 20 days of A3. b) Other appeals are in the nature of certiorari ³ (G.L. c. 249, § 4) and must be filed within 60 days from the date of A2. c) If constructive approval has been attained and the city or town clerk fails to issue the required certificate, the remedy available to	

³ Roughly translated from the Latin, “certiorari” means “to be made certain.” Briefly stated, it means that an appellate court has ordered a lower court to provide the full record of a case for the appellate court to review or to retry. (Also, see Section 5-09, subsection 6.2, Footnote 1 of this Chapter.)

	the applicant is a <u>mandamus</u> ⁴ action (G.L. C. 254, § 5).	
A = approval not required plan actions		

TIMELY RECORDING OF DEFINITIVE PLAN	
Approved Plan	Constructively Approved Plan
D1 – Plan submitted to Planning Board (PB) for approval.	
D2 – Within the time prescribed for PB action, the PB approves the plan.	D2 – The time prescribed for PB action expires.
D3 – Within 6 months of D2, the plan, endorsed by the PB as approved, is submitted to the registry of deeds, along with the municipal clerk’s certificate of no appeal.	D3 – Within 6 months of D2, the municipal clerk’s certificate of PB’s failure to act within the prescribed time is submitted to the registry of deeds, along with municipal clerk’s certificate of no appeal.
D4 – The plan is accepted for recording.	
D = definitive plan actions	

Late Recording of Definitive Plan	
Approved Plan	Constructively Approved Plan
D1 – Plan submitted to PB for approval.	
D2 – Within the time prescribed for PB action, the PB approves the plan.	D2 – The time prescribed for PB action expires.
D3 – Later than 6 months of D2, the plan, endorsed by the PB as approved, is submitted to the registry of deeds, along with the municipal clerk’s certificate of no appeal.	D3 – Later than 6 months of D2, the clerk’s certificate of PB’s failure to act is submitted to the registry of deeds, along with municipal clerk’s certificate of no appeal.
D4 – Within the 30 days prior to D5, either by endorsement or separate certificate, the PB or municipal clerk certifies that the approval has not been modified, amended, or rescinded, nor the plan changed.	D4 – Within the 30 days prior to D5, either by writing in a separate certificate or on the plan itself, the PB or municipal clerk certifies that the constructive approval resulting from the PB’s failure to act within the prescribed time has not been modified, amended, or rescinded, nor the plan changed.
D5 – The plan is accepted for recording.	

⁴ Roughly translated from the Latin, “mandamus” means “we command.” It is the name of a writ issued by a court of superior jurisdiction commanding the performance of a particular act.

D = definitive plan actions



THE GUIDEBOOK TO MASSACHUSETTS LAND USE 2021

CHAPTER SIX MASSACHUSETTS – SELECTED OTHER LAND USE TOPICS

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American Planning Association
Massachusetts Chapter

Creating Great Communities for All

Chapter Six

Massachusetts – Selected Other Land Use Topics

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Section 6-01

Introduction

1.0 – Overview

1.1 – CAVEAT – This chapter provides information on selected land use and zoning topics that are governed by a variety of state statutes beyond G.L. c. 40A and G.L. c. 81. The chapter is not intended to be a comprehensive list of land use topics that might necessitate the attention of local land use boards and professional planners.

Nevertheless, the subject matter found in this chapter covers issues that local communities often deal with in the course of planning for, and regulating, growth and development.

The specific topics included in the chapter are:

- Scenic Roads and Public Shade Trees
- Local Historic Districts
- Urban Renewal

Section 6-02

Scenic Roads & Public Shade Trees

[G.L. c. 40, § 15C and G.L. c. 87]

1.0 – Introduction

1.1 – SCENIC ROADS – Under [G.L. c. 40, § 15C](#), cities and towns may designate certain roads as “Scenic Roads”. As of the initial date of this Guidebook, court decisions have offered scant guidance on how this statute is to be interpreted or implemented. It should be noted, however, that § 15C does not limit further regulation with respect to scenic roads under general or zoning laws not inconsistent with that section.

In a 2008 unpublished opinion – *Goren v. Town of Weston* (71 Mass. App. Ct. 1104) – the Court noted that the scenic road statute applies only to what is done within the boundaries of the right of way. On the other hand, zoning bylaw provisions that regulate lots abutting scenic roads are limited in their reach to land within the boundaries of the lots, and do not extend to the scenic roads themselves.

1.2 – PUBLIC SHADE TREES – The public shade tree statute is [G.L. c. 87](#). (See Sections 3.3 and 5.0 below)

1.3 – ELIGIBILITY TO RECEIVE AID – Designation of a road as a scenic road shall not affect the eligibility of a city or town to receive construction or reconstruction aid for that road pursuant to the provisions of [G.L. c. 90](#).

2.0 – Procedures

2.1 – NOMINATION – A recommendation to designate a scenic road may be made by the planning board, conservation commission, or historical commission.

2.2 – ROAD CRITERIA – A road recommended for scenic road status must be either:

- a road that is not a numbered route or state highway; or
- a road that is a numbered route only if the road’s entire length is contained within the boundaries of the city or town and no part of which is maintained by the Commonwealth.

2.3 – DESIGNATION – The designation of a road as a scenic road may be made by the chief legislative body of the municipality, typically the Town Meeting, or a City or Town Council.

3.0 – Scenic Road Requirements

3.1 – REPAIR, MAINTENANCE, RECONSTRUCTION, OR PAVING – After a road has been designated, any road work done shall not include or involve the cutting or removal of trees, or the tearing down or destruction of stone walls or portions thereof, except with the prior written consent of the planning board, or if none, then the city council or board of selectmen. The board may presumably apply

reasonable criteria that should be taken into account as to whether to consent, deny, or consent conditionally.

Where changes to a scenic road do not involve trees or stone walls, the statute is inapplicable; and where the cutting of trees or alteration of stone walls does not involve changes to the scenic road, the statute is likewise inapplicable (although doing so might trigger the applicability of G.L. c. 87 – public shade trees). The focus of the scenic road statute is limited to work done to the road that affects trees or stone walls.

3.2 – PUBLIC HEARING – The planning board shall hold a public hearing, which has been advertised twice in a newspaper of general circulation in the area, as to the time, date, place, and purpose of the hearing. The last publication of the notice shall be at least 7 days prior to the hearing.

3.3 – CONSOLIDATED JOINT PUBLIC HEARING – When a public hearing is required both for scenic roads under [G.L. c. 40, § 15C](#), and for public shade trees under [G.L. c. 87, § 3](#), prior to the cutting or removal of a tree on a scenic road, a consolidated public hearing shall be held by the planning board and the tree warden. Notice of the consolidated public hearing shall be given by the tree warden as provided by [G.L. c. 87, § 3](#).

3.4 – VIOLATIONS & FINES – A city or town that has adopted G.L. c. 40, § 15C, may also adopt an ordinance or bylaw establishing a fine not to exceed \$300 for a violation of this section.

3.5 – APPEALS – Judicial review of planning board decisions under the statute is limited to an action *in the nature of certiorari* – [G. L. c. 249, § 4](#), and is not included within the scope of a zoning appeal.

4.0 – Local Scenic Road Bylaw, Ordinance, or Regulation

4.1 – LOCAL SCENIC ROAD ORDINANCES OR BYLAWS – There is no language in the statute on scenic roads regarding the adoption of a local bylaw, ordinance, or regulation. However, municipalities should consider adopting regulations to guide their process in reviewing issues associated with scenic roads. While the specific regulations to be considered should be guided by local needs, there are a number of topics that could be considered for inclusion within a local scenic ordinance or bylaw. These include:

- purpose
- definitional criteria of a scenic road
- application procedure for approval of work on a scenic road
- public hearing notice requirements
- emergency provisions
- enforcement procedures
- planning board decision standards, criteria, and timelines

5.0 – Public Shade Trees

5.1 – PUBLIC SHADE TREES – Public shade trees are governed by [G.L. c. 87](#). The responsibility for public shade trees and approval for cutting or removal lies with the local Tree Warden. The only instance where a planning board would become involved in these actions would be when the cutting or removal of public shade trees occurs within the right-of-way of a designated scenic road. (see Section 3.3 above). Where the boundaries of the public way are uncertain, trees “*shall be taken to be within the highway and to be public property until the contrary is shown.*”

5.2 – RELATIONSHIP TO SCENIC ROADS – While the mayor, selectboard, road commissioners, or highway surveyor have authority under [G.L. c. 87, § 5](#), to order the removal of trees, this power is subordinate to the powers of the planning board to regulate scenic roads under [G.L. c. 40, § 15C](#).

5.3 – CITIZEN OBJECTION – In accordance with G.L. c. 87, § 4, if one or more persons file an objection, in writing, to the removal of a public shade tree, the decision on its removal shifts from the tree warden to the board of selectmen or the mayor. In those towns where the town charter designates the town manager as the chief executive officer, the decision shifts to the town manager.

5.4 – APPEALS – As with scenic road appeals, judicial review of the decision of the tree warden is likewise limited to an action *in the nature of certiorari* – [G. L. c. 249, § 4](#), and is not included within the scope of a zoning appeal.

Section 6-03

Local Historic Districts

[G.L. c. 40C]

1.0 – Introduction

1.1 – BACKGROUND – [G.L. c. 40C](#) (Historic Districts) sets forth a statutory framework for cities and towns to establish and administer local historic districts, and to promulgate regulations to implement the powers and duties of the local historic district commission.

Many of the statutory objectives of Chapter 40C are achievable under both the Zoning Act (G.L. c. 40A) and municipal home rule powers without having to establish a “40C District”. Chapter 40C is an optional legislative tool that equips cities and towns with the power to protect buildings and places that figure prominently in a community’s history. This statute offers a regulatory framework whose provisions focus exclusively on this objective.

1.2 – PURPOSE – The purpose of this chapter is stated in [G.L. c. 40C, § 2](#):

... to promote the educational, cultural, economic, and general welfare of the public through the preservation and protection of the distinctive characteristics of buildings and places significant in the history of the commonwealth and its cities and towns or their architecture, and through the maintenance and improvement of settings for such buildings and places and the encouragement of design compatible therewith.

1.3 – CAVEAT – Note that this Section 6-03 provides a short overview of statutory local historic districts. For detailed information on the creation and administration of local historic districts and other resources available to local communities, refer to the Secretary of State’s webpage devoted to the [Massachusetts Historical Commission](#).

2.0 – Historic Districts and Commissions

2.1 – OVERVIEW – There can be confusion regarding historic districts because there are other types of districts and entities with overlapping objectives. The list below includes the most important of them. (Further information follows in Sections 2.2 through 2.4).

Organizations

- United States National Park Service
- Massachusetts Historical Commission
- Local Historic District Commission
- Local Historical Commission
- Historic Society

Types of Historic Districts

- National Register of Historic Places (this includes National Register of Historic Districts)

- Local Historic Districts

2.2 – LOCAL HISTORIC DISTRICTS AND NATIONAL REGISTER HISTORIC PLACES & DISTRICTS – Local historic districts and National Register Historic Places & Districts are two separate methods available to cities and towns for historic recognition and preservation purposes. The National Register Historic Places (and Districts) are established through a process overseen by the National Park Service. There are considerably more National Register Historic Districts than local historic districts in Massachusetts.

The National Register of Historic Places is a formal recognition of the significance of a property or properties within a national district. There are no restrictions on the property owners unless there is state or federal involvement in a project on the property or unless there is some other federal, state, regional, or local regulation or requirement in effect.

However, this section of the Guidebook focuses on local historic districts. For information on the differences, visit the website of the [Massachusetts Historical Commission](#). On that site is a brochure entitled “[There’s a Difference: Understanding National Register Districts and Local Historic Districts](#).”

2.3 – MASSACHUSETTS HISTORICAL COMMISSION – The Massachusetts Historical Commission (MHC) was established in 1963 to identify, evaluate, and protect important historical and archaeological assets of the Commonwealth. It is located within the office of the Secretary of the Commonwealth. MHC offers a variety of programs for cities and towns for their own local efforts.

2.4 – HISTORICAL DISTRICT COMMISSIONS, HISTORICAL COMMISSIONS, AND HISTORIC SOCIETIES – Historic district commissions, historical commissions, and historic societies are separate and distinct and not to be confused with each other or referred to as interchangeable.

- A local historic district commission is established under G.L. c. 40C and has review authority of design changes within a local historic district.
- A local historical commission is established under G.L. c. 40, § 8D. It generally is a municipal advisory board whose duties include identifying, evaluating, and recommending protective measures for community historical assets. However, cities and towns can adopt ordinances or bylaws that give the local historical commission additional powers. This is illustrated by the adoption of local demolition delay ordinances and bylaws.
- A local historic society typically is a private non-profit organization that may well operate and manage historic house museums, maintain historic collections and records, and offer public programs on historic topics.

In some communities, the local historic district commission and the local historical commission are combined into a single consolidated entity.

2.5 – LOCAL HISTORIC DISTRICTS CREATED THROUGH SPECIAL ACTS – A number of local historic districts have been created through special acts of the Legislature, rather than under Chapter 40C. Examples of these types of districts are the Old Kings Highway Regional Historic District on Cape Cod and districts in Lexington, Concord, Falmouth, and Sudbury. The special act process is an option for the creation of local historic districts.

3.0 – G.L. Chapter 40C - Historic Districts

3.1 – OVERVIEW – One of the best “overviews” of the statute – [G.L. c. 40C](#) – is provided by the Supreme

Judicial Court in its opening paragraph in [*Springfield Preservation Trust, Inc. v. Springfield Library & Museums Association, Inc.*](#) 447 Mass. 408 (2006). There the Court observed that the statute provides for cities and towns to establish historic districts to preserve "distinctive characteristics of buildings and places . . . or their architecture." [G. L. c. 40C, § 2](#). The court noted:

Within a historic district, buildings or structures may not be constructed or altered in a manner that "affects exterior architectural features" without first submitting the proposed construction or alteration for review by the historic district commission. [G. L. c. 40C, § 6](#). See [G. L. c. 40C, § 10](#) (a)-(c).

A historic district commission is to consider various factors in deciding whether to issue certificate, including "the historic and architectural value and significance of the site, building or structure . . . and the relation of . . . their features to similar features of buildings and structures in the surrounding area." [G. L. c. 40C, § 7](#). A historic district commission is not to make recommendations or impose requirements "except for the purpose of preventing developments incongruous to the historic aspects or the architectural characteristics of the surroundings and of the historic district."

However, an ordinance or bylaw creating a historic district may provide that the historic district commission shall not have authority over certain "categories of buildings or structures or exterior architectural features," with the permissible list of such excluded categories expressly identified in the Act. [G. L. c. 40C, § 8 \(a\)](#) . It may also provide that a historic district commission's authority be limited to those exterior architectural features that may be seen from specified locations. [§ 8 \(c\)](#). Following its review, a historic district commission may issue a certificate of appropriateness, nonapplicability, or hardship with respect to the proposed construction or alteration. [G. L. c. 40C, § 6](#).

In order to create a historic district, a historic district study committee (or an already existing historic district commission) must investigate and report on "the historical and architectural significance of the buildings, structures, or sites to be included in the proposed historic district." [G. L. c. 40C, § 3](#). The buildings, structures, or sites to be included in the proposed historic district may consist of one or more parcels or lots of land, or one or more buildings or structures on one or more parcels or lots of land.

After completion of the report, the study committee is to hold a public hearing, giving notice thereof to owners of property that would be included in the proposed district. . . . After the hearing, the study committee must submit to the city council or town meeting its final report and recommendations, a map of the proposed district, and a draft ordinance or bylaw. . . . A two-thirds vote of the city council or town meeting is then required to adopt the ordinance or bylaw creating the district. . . . However, the ordinance or bylaw does not "become effective until a map . . . setting forth the boundaries of the historic district" has been filed with the city or town clerk and recorded in the registry of deeds.

Once established, a historic district "may be enlarged or reduced . . . in the manner provided for creation of the initial district," with the historic district commission conducting the investigation, report, and public hearing. . . . If the district is being reduced, notice of the public hearing must be sent to all owners of property in the district.

... As with the creation of the original district, an ordinance or bylaw "changing the boundaries" of a historic district is not effective until a map setting forth the changed boundaries has been filed with the clerk and recorded in the registry of deeds.

The Act gives municipalities unfettered discretion whether to establish a historic district and, if so, what lands, buildings, and structures to include in that district. [G. L. c. 40C, § 3](#). No matter how great its historic or architectural significance, nothing compels a municipality to include a particular property within a historic district, and nothing in the Act limits the permissible reasons for placing a particular property or properties outside the district. Properties may be excluded from a historic district either by the placement of the boundary lines pursuant to § 3, or they may be made exempt from review based on whether they can be seen from particular locations pursuant to § 8 (c). Thus, when a historic district is created, the municipality may vote to exclude or exempt whatever properties it wishes, and its reasons for doing so - i.e., on account of who owns a particular property - are beyond review.

4.0 – Definitions

4.1 – DEFINITIONS – The following definitions are found in [G.L. c. 40C, § 5](#).

Definitions	
"altered"	includes the words "rebuilt", "reconstructed", "restored", "removed", and "demolished" and the phrase "changed in exterior color"
"building"	a combination of materials forming a shelter for persons, animals or property.
"commission"	the commission acting as the historic district commission
"constructed"	includes the words "built", "erected", "installed", "enlarged", and "moved"
"exterior architectural feature"	such portion of the exterior of a building or structure as is open to view from a public street, public way, public park or public body of water, including but not limited to the architectural style and general arrangement and setting thereof, the kind, color and texture of exterior building materials, the color of paint or other materials applied to exterior surfaces and the type and style of windows, doors, lights, signs and other appurtenant exterior fixtures
"person aggrieved"	the applicant, an owner of adjoining property, an owner of property within the same historic district as the property within one hundred feet of said property lines and any charitable corporation in which one of its purposes is the preservation of historic structures or districts
"structure"	a combination of materials other than a building, including a sign, fence, wall, terrace, walk, or driveway

5.0 – Creation and Administration of Historic Districts

5.1 – CREATION OF HISTORIC DISTRICTS – Prior to the creation of an historic district, the city council or board of selectmen must appoint an historic district study committee.

5.2 – MAP REQUIRED FOR HISTORIC DISTRICT TO BECOME EFFECTIVE – No ordinance or bylaw creating an historic district, or changing the boundaries of an historic district, shall become effective until a map or maps setting forth the boundaries of the historic district, or the change in the boundaries, has been filed with the city or town clerk and has been recorded in the registry of deeds for the county where the district or districts are located.

5.3 – ADMINISTRATION OF HISTORIC DISTRICTS – Whenever a local historic district is created, an historic district commission is established by the community to administer the local regulations and review proposed changes in the district. The historic district commission process includes the following:

5.3.1 – Certificates – [G.L. c. 40C, § 6](#), provides that an applicant has 3 options for making a request to a commission:

- certificate of appropriateness¹
- a certificate of non-applicability
- a certificate of hardship

5.3.2 – Public Hearing & Decision – The commission shall hold a public hearing with notice to abutters and to other property owners deemed to be “*materially affected*”. Within 60 days of the application filing, the commission shall take action to approve or disapprove the certificate.

5.3.3 – Certificate of Hardship – As soon as is convenient after the public hearing, but in any event within 60 days after the filing of the application – or within any lesser period as provided by a local ordinance or bylaw, or within any additional time allowed by the applicant in writing – the commission shall make a determination on the application.

If the commission fails to make a determination within the required timeline, the commission shall issue a certificate of hardship, or it is subject to being ordered to do so by a court.

5.3.4 – Review Factors – [G.L. c. 40C, § 7](#), provides information on factors that can be considered by the commission. These include:

- the historic and architectural value and significance of the site, building, or structure;
- the general design, arrangement, texture, material, and color of features involved;
- the relation of such features to similar features of buildings and structures in the surrounding area; and
- in the case of new construction, or additions to existing structures, the appropriateness of the size and shape of the building or structure.

5.3.5 – Exemptions – [G.L. c. 40C, § 8](#), exempts the interior arrangement or features of buildings and structures from review by the commission. [G.L. 40C, § 9](#) exempts:

“... ordinary maintenance, repair, or replacement of any exterior architectural feature . . . which does not involve a change in design, material, color, or the outward appearance thereof.”

¹ In [Gumley v. Board of Selectmen of Nantucket](#), 371 Mass. 718, 719 (1977), the court determined that a certificate of appropriateness (CoA) was similar to a special permit in that there is no absolute right to a CoA. The commission has discretionary powers to act on such a request.

Additional exemptions include:

- Landscaping with plants, trees, and shrubs, but not retaining walls, stone walls, and fences.
- Emergency changes required for public safety.
- Under [G.L. c. 40C, § 8](#), a community may include additional exemptions in its ordinance or bylaw.

5.3.6 – Appeals – There are 2 potential appeal procedures available regarding historic district commission decisions. One is administrative and the other judicial. These are:

- Administrative Review – An ordinance or bylaw may include language that a person aggrieved by a decision can appeal to a *“person or persons of competence and experience in such matters designated by the applicable regional planning agency.”* The finding of this person shall be binding unless appealed to the Superior Court.
- Judicial Review – [G.L. c. 40C, § 12A](#), provides that an appeal to the Superior Court must be taken within 20 days of the filing of the decision with the city or town clerk.

6.0 – Other Provisions

6.1 – PLANNING BOARD ROLE – Under [G.L. c. 40C, § 3](#), the Planning Board reviews and makes recommendations on the required report proposing to establish any local historic district.

6.2 – ADDITIONAL POWERS, FUNCTIONS & DUTIES OF THE HDC – [G.L. c. 40C, § 10](#), sets forth a list of *“additional powers, functions, and duties”* of the historic district commission, equipping the commission with the authority to achieve the purposes of the bylaw. These include:

- decisions on a Certificate of Appropriateness
- certificate of non-applicability
- certificate of hardship
- signing of certificates
- retention of records;
- adoption of rules & regulations
- filing of certificates with municipal clerk
- adoption of certain design guidelines
- employment of staff or consultants; administration of historic properties
- other powers and duties assigned by the city or town

7.0 – Selected Court Cases

7.1 – COURT DECISIONS – The following court cases provide additional information regarding certain aspects of historic districts.

7.1.1 – Historic District Commission and Taking of Property – In [Collins v. Historic District Commission of Carver](#), 73 Mass. App. Ct. 388 (2008), the Appeals Court determined that the commission’s refusal to issue a certificate of appropriateness did not result in a “taking” of private property without just compensation under the Fifth Amendment of the U. S. Constitution.

7.1.2 – Chapter 40B and Local Historic District Commission – In a Supreme Judicial Court case, [*Dennis Housing Corp., v. Zoning Board of Appeals of Dennis*](#), 439 Mass. 71 (2003), the Court determined that the Dennis Old King’s Highway Historic District Commission was a “local board” under Chapter 40B, §§ 20-23. Consequently, the developer proposing a 40B housing development within the town’s historic district boundaries did not have to obtain a separate certificate of appropriateness from the historic district committee. The comprehensive permit before the zoning board of appeals would include the certificate otherwise needed from the historic district committee.

7.1.3 – Court Review of Historic District Commission Decision – The Court noted that a court may not annul or otherwise overturn a decision of a historic district commission unless the latter has exceeded its authority or the decision was arbitrary, capricious, or erroneous or unsupported by the evidence. (See G. L. c. 40C, § 12A) [*Harris v. Old King's Hy. Regional Historic Dist. Commission*](#), 421 Mass. 612, 615-616 (1995).

Section 6-04

Urban Renewal

[[G.L. c. 121B](#)]

1.0 – Introduction

1.1 – OVERVIEW – Under [G.L. c. 121B](#), municipalities, acting through their redevelopment authorities, are authorized to redevelop substandard, decadent, or blighted open areas for industrial, commercial, business, residential, recreational, education, hospital, or other purposes. Future development within these designated urban renewal areas must be done in accordance with use limitations specified in approved urban renewal plans. (See Section 3.0 below for more information on Urban Renewal Plans.)

1.2 – PURPOSE – Chapter 121B places great importance on the achievement of socio-economic development. This can include providing jobs for the unemployed, additional tax revenue to communities, and assembling parcels of land of sufficient size for the expansion or siting of industry, business, and housing. Urban renewal projects can assist municipalities revitalize deteriorated and underutilized areas by providing the economic environment to attract and support private investment.

1.3 – STATE ADMINISTRATION OF URBAN RENEWAL – The Massachusetts Department of Housing and Community Development (DHCD) is charged with the responsibility for the operation and administration of the Urban Renewal Program as defined under Chapter 121B.

1.4 – REDEVELOPMENT AUTHORITY THAT IS NOT ALSO A HOUSING AUTHORITY – Section 6-04 is specifically related to government bodies that are solely a redevelopment authority. Some redevelopment authorities are also concurrently a housing authority. [Chapter 358 of the Acts of 2020](#) made changes to G.L. c. 121B with regard to these two different types of redevelopment authorities. (See Section 2.5 below for further information on this subject.)

1.5 – CAVEAT – Section 6-04 of the Guidebook is intended to provide only a brief overview of the urban renewal program. For more detailed information regarding the program, contact the Department of Housing and Community Development. The information in this section includes excerpts from DHCD's [How to Establish a Redevelopment Authority](#) guidance document, one of the resources available from DHCD regarding this topic.

2.0 – Redevelopment Authorities

2.1 – REDEVELOPMENT AUTHORITIES – The legislative authorization for municipalities to form Redevelopment Authorities is found in [G.L. c. 121B, § 4](#), which states:

There is hereby created, in each city and town in the commonwealth, a public body politic and corporate to be known as the "Redevelopment authority" of such city or town; provided, that no such authority shall transact any business or exercise any

powers until the need for such an authority has been determined and a certificate of organization has been issued to it by the state secretary, both as hereinafter provided.

Whenever the municipal officers of a city, or the voters at an annual or special town meeting determine that there is a need for a redevelopment authority in such city or town for the purpose of engaging in urban renewal projects or other work under this chapter and that it is in the public interest that such an authority be organized in such city or town, a redevelopment authority shall be organized in such city or town.

Whenever a redevelopment authority determines that there is no further need for its existence, and that all outstanding obligations of the authority have been satisfied, it may, by a majority vote of the five members, submit the question of its dissolution, in a town, to the voters at an annual town meeting or, in a city, to the municipal officers. If a city or town votes for such dissolution in accordance herewith and the department is satisfied of the existence of the facts required herein, it shall so certify to the state secretary and said redevelopment authority shall be dissolved forthwith subject to the applicable provisions of section fifty-one of chapter one hundred and fifty-five.

2.2 – DOCUMENTS REQUIRED TO ESTABLISH A REDEVELOPMENT AUTHORITY – Once the resolution establishing the need for a redevelopment authority is approved and the certificate of authorization by the Secretary of State is issued, the documents below must be assembled and submitted to DHCD.

Establishment of a Need for a Redevelopment Authority	
City	Town
City Council or Board of Alderman: Two certified copies of the extracts from the proceedings of the City Council or Board of Alderman meeting showing the adoption of the article declaring a need for a local redevelopment authority and showing the presence of a quorum.	Annual Town Meeting: Two certified copies of the extracts from the proceedings of the Town Meeting showing the adoption of the article declaring a need for a local redevelopment authority and showing the presence of a quorum.
	Special Town Meeting: • two certified copies of the warrant including the article in question; • two attested copies of the returned warrant; • two certificates of the town clerk that the warrant was signed by a majority of the selectmen in office at the time; and • two certificates of the town clerk that the warrant was posted and published in accordance with state law
Two certified copies of the above resolution as passed without proceedings.	Two certified copies of the above resolution as passed without proceedings.

2.3 – POWERS – A redevelopment authority is an independent entity, and is not an agency of a municipality. It does not answer directly to the chief executive of the city or town. This affords the redevelopment authority more autonomy in planning and implementing revitalization and redevelopment projects. Redevelopment authorities have broad powers to plan and implement activities needed to redevelop underutilized, deteriorated, or blighted open areas, to encourage new

development and to promote sound growth. Redevelopment authorities have the power to:

- establish rehabilitation and design standards;
- assemble and dispose of land, including the taking of real estate through eminent domain;
- relocate businesses and residents occupying property in urban renewal areas;
- demolish or rehabilitate substandard structures;
- participate in real estate development and commercial revitalization;
- issue bonds, borrow money, invest funds, and receive grants; and
- accept gifts or requests.

2.4 – CHAPTER 30B – Redevelopment authorities are exempt from the state’s Uniform Procurement Act ([G.L. c. 30B](#)) when engaged in the development and disposition of real property in accordance with an approved Urban Renewal Plan. This exemption, coupled with the ability to use eminent domain powers, makes redevelopment authorities powerful tools for commercial revitalization, industrial park development, infrastructure improvements, facilities renovation, and brownfield site remediation. Redevelopment authorities are particularly effectively in large-scale and complex redevelopment projects and land assembly.

2.5 – GOVERNING BODY – Under [G.L. c.121B, § 5](#), every redevelopment authority shall be managed, controlled and governed by a 5 member board, appointed in a city and elected in a town. Legal counsel should be consulted to assure the proper interpretation of this provision to the town and how any provision of the town charter may otherwise provide.

In a city, the city council must confirm the 4 members appointed by the mayor. In a town, the voters elect 4 members of a redevelopment authority that is not a housing authority². These members serve until the next annual election. The Commonwealth, through DHCD, appoints one member to the redevelopment authority board in cities and towns.

The five-year terms of redevelopment authority members are staggered, such that only one member will be appointed or elected each year following the initial organization of the authority. Only residents of the city or town may serve as members of the redevelopment authority.

Vacancies, other than because of expiration of terms, shall be filled for the balance of the remainder of the unexpired term in the same manner and by the same body as the original redevelopment authority membership had been appointed or elected.

The city or town clerk is responsible for certifying the appointment or election of all redevelopment authority members. In addition to certifying the appointment or election of members, the city/town clerk shall also:

² In Section 71 of [Chapter 358, Acts of 2020](#), the 3rd paragraph of G.L. c. 121B, § 5, was deleted and replaced by 3 paragraphs that make separate and different provisions in the mode of election for a redevelopment authority that is not a housing authority and for a redevelopment authority that is also a housing authority. The main thrust of [Chapter 358](#) (the so-called “Housing Choice” law) regarding G.L. c. 121B is directed to housing authorities and to redevelopment authorities that are concurrently housing authorities. By substantially changing the definition of “tenant member” in G.L. c. 121B, § 1, by an amending c. 121B, § 5, and by adding § 5A, the Legislature has adopted robust new provisions governing housing authorities and redevelopment authorities that are concurrently housing authorities. The reader is urged to read these sections of Chapter 358 if necessary and, if a municipal official or staff member, to discuss this with the municipal attorney as needed.

- maintain copies of the original certificates (or minutes of the Board of Selectmen's meeting in a town) of appointment or election;
- administer the oath of office to each member;
- record the date on which the oath was administered; and
- file copies of Certificates of Appointment or Election with DHCD and file duplicate copies of the Certificates with the Office of the Secretary of the Commonwealth.

Whenever the membership of a redevelopment authority is changed by appointment, election, resignation, or removal, a certificate and duplicate certificate must be filed with DHCD and with the Office of the Secretary of the Commonwealth. The certificate shall state the names, offices, and dates applicable to the changes.

The following documents shall be submitted to DHCD:

Redevelopment Authority – Documents Required by DHCD	
City	Town
Four certified copies of the certificates of the four members appointed by the Mayor, and the fifth member appointed by DHCD.	Four certified copies of extracts from the minutes of the meeting of the Selectmen showing the appointment of 4 members by the town and a fifth member by DHCD.
Four certified copies of the extracts from proceedings of the City Council or Board of Alderman showing confirmation of the Mayor's appointments	No comparable action
Four certified copies of the extracts from the minutes of the organizational meeting of the redevelopment authority showing: 1. adoption of the bylaws; 2. election of officers and the appointment of a temporary secretary; 3. adoption of a seal; 4. designation of the location of the office; 5. designation of the time and place of regular meetings; and 6. designation of the time and place of the annual meeting	

2.6 – CERTIFICATE OF ORGANIZATION – Once the redevelopment authority is established, the following documents must be distributed as shown in the table below.

Certificate of Organization – Document Distribution
One set of all the documents shall be retained by the redevelopment authority for its own files. This does not include the extracts. The original minutes shall be retained in the book of minutes of the Redevelopment Authority.
One set of all the documents shall be retained by the city or town for bond counsel.
One set of all the documents shall be forwarded to DHCD, Urban Development Coordinator, 100 Cambridge Street, Suite 300, Boston MA 02114
One set of all documents shall be forwarded to the Secretary of the Commonwealth, Public Records Division, One Ashburton Place, Room 1719, Boston, MA 02108

Following review and approval of these documents by DHCD and the Secretary of the Commonwealth, the Secretary will issue a Certificate of Organization.

2.7 – STAFF – Staffing levels vary depending on the size of the municipality and the type of activity undertaken in accordance with the Urban Renewal Plan or other activities. Many redevelopment authorities consist of an executive director and an administrative assistant.

3.0 – The Urban Renewal Plan

3.1 – THE URBAN RENEWAL PLAN – The approval of an Urban Renewal Plan is necessary before a redevelopment authority can undertake projects. The Plan is submitted by a municipality through its redevelopment authority to DHCD. The Urban Renewal Plan must include all of the information as required by [760 CMR 12.00](#). Listed below is a summary of the required information.

- Executive Summary – An outline of the urban renewal agency's reasons for developing the Plan, what it hopes to accomplish and how it will accomplish it.
- Characteristics – Plans or maps of the project area and the immediately surrounding area, showing: boundaries of the project area; existing property lines and the footprint of buildings; existing uses and proposed uses; current zoning; thoroughfares, public rights of way and easements; parcels to be acquired; lots to be created for disposition; buildings to be demolished, rehabilitated, or constructed.
- Eligibility – Data and other descriptive material which demonstrates that the project area is a blighted open area, a decadent area, and/or a substandard area within the definitions set out in M.G.L. c. 121B, § 1.
- Objectives – A statement of the objectives of the Plan. including a specification and explanation of all proposed redevelopment; a detailed estimate of how many jobs will be retained, created, and eliminated; the specific provisions which exist or which will be established to control densities, land coverage, land uses, setbacks, off-street parking and loading, building height and bulk, and design guidelines.
- Acquisitions – The Plan must specify which parcels are to be acquired and which parcels need not be acquired.
- Relocation – A relocation plan conforming to all applicable requirements appearing in federal law, and M.G.L. c. 79A
- Site Preparation – Specifications of all proposed site preparation, including land protection and measures to address environmental, topographic, subsoil or flood problems.
- Public Improvements – Specification of any public improvements, a description of their general design and an explanation of how the improvements will help achieve the objectives of the Plan.
- Disposition – The Plan must specify the disposition proposed for each parcel.
- Redeveloper's Obligation – Specification of the obligations which have been imposed or will be imposed upon redevelopers for construction of improvements within a reasonable time and in conformity with the Plan.
- Time Frame – The proposed time lines for completing redevelopment. All Urban Renewal Plans must have a specified end date.
- Financial Plan – A project proforma/budget which shall include cost estimates for: site preparation; proposed public improvements; relocation expenses; planning, legal, financing and administrative costs; acquisitions; and an estimate of the amount and source(s) of project revenues.
- Citizen Participation. A report on citizen participation describing citizen participation in the planning process and a plan for continuing citizen participation during the project execution.
- Requisite Municipal Approvals – Evidence of a public hearing and the requisite municipal

approvals specified in M.G.L. c. 121B, § 48, and an opinion of counsel to the urban renewal agency certifying that the proposed Urban Renewal Plan was adopted in accordance with M.G.L. c. 121B, § 48 and is in compliance with applicable laws.

- Massachusetts Environmental Policy Act (MEPA) – The Plan must indicate if review of the Plan under MEPA and implementing regulations is complete and if review of any known redevelopment project under MEPA and implementing regulations is complete and/or MEPA has issued a Phase 1 waiver with respect to such project(s).

3.2 – APPROVAL OF AN URBAN RENEWAL PLAN – In order to approve a proposed Urban Renewal Plan, DHCD must make the following 6 findings:

- the project area would not, by private enterprise alone and without either government subsidy or the exercise of governmental powers, be made available for urban renewal -- i.e., without public involvement, the project or site would not be developed;
- the proposed land uses and building requirements in the project area will afford maximum opportunity for privately financed urban renewal consistent with the needs of the locality as a whole -- i.e., the project will enhance or promote desired private investment;
- the plan for financing the project is sound;
- the project area is a decadent, substandard, or blighted open area;
- the Urban Renewal Plan is complete as required under [760 CMR 12.00](#); and
- the Relocation Plan is approved under [G.L. c.79A](#).

When these findings have been made, DHCD will issue a letter of approval for project implementation. If the Urban Renewal Plan is not approved, it may be resubmitted with modifications, supporting data, or arguments as are necessary to meet DHCD's written objections.

3.3 – URBAN RENEWAL PROJECT – No urban renewal project may be undertaken until a public hearing relating to the urban renewal plan for the project has been held before the city council or the municipal officers of a town and approval is obtained by the municipal officers and DHCD.



THE GUIDEBOOK TO MASSACHUSETTS LAND USE 2021

CHAPTER SEVEN FEDERAL – SELECTED LAND USE TOPICS

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Creating Great Communities for All

Chapter Seven

Federal – Selected Land Use Topics

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Section 7-01

Federal Land Use Topics

1.0 – Introduction

1.1 – OVERVIEW – The power to adopt zoning ordinances and bylaws is within the purview of cities and towns and is not generally seen as a power that the federal government exercises. Nevertheless, it is the case that the United States government occasionally interjects itself into land use topics in a way that either prohibits or restricts how local governments address those topics.

In addition, the United States Court system also influences the ability of municipalities to prohibit, restrict, regulate, or otherwise treat certain land uses; the process by which communities take actions related to land use issues; and the potential outcomes of local government actions related to private property rights.

It is thus important for public officials, and others, to be as knowledgeable about the federal role in local land use as they are about state and local roles.

2.0 – Selected Federal Topics

2.1 – ISSUES – Chapter Seven addresses 4 particularly important issues where the federal government, through legislation and regulations, and the federal courts, through their case decisions, influence local actions related to land use matters.

Public officials and planners should be aware that there are many other federal laws and court decisions with implications for local government on a variety of topics that are not covered by this Guidebook.

The 4 issues are:

- (1) Signs and the First Amendment – The First Amendment of the United States Constitution states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Abridging freedom of speech is the pertinent phrase of the First Amendment relating to sign codes, whether they are a zoning code or a general code.

- (2) Takings – The Fifth Amendment to the United States Constitution provides as follows: “Nor shall private property be taken for public use, without just compensation.” This is referred to as “the takings clause”.
- (3) Religious and Institutional Persons Land Use Act (RLUIPA) – Specifically related to land use issues, RLUIPA provides protections for religious institutions against onerous zoning restrictions on the use of their property.

(4) Telecommunications – Telecommunications (wireless facilities, cell towers etc.) is a land use issue that has been a prominent feature on municipalities regulatory landscape since 1996. It is also a land use topic where the federal government has interjected itself in a significant manner. The [Telecommunications Act of 1996](#) included a number of restrictive regulations related to local powers to regulate telecommunication facilities.

Later federal legislation and regulations on this topic have also incorporated restrictions on local regulatory powers including those related to the procedures and timelines local communities may use to review applications for these types of facilities.

2.2 – CAVEAT – Telecommunications has been, and continues to be a quickly evolving regulatory, technology, and judicial arena. The Guidebook does not attempt to include all the specifics of legislation, regulations, and court cases, as it is more than likely that much of the information will quickly be out-of-date due to those changing technologies and the concomitant changing federal regulations and newer court decisions at the both the federal and state level.

In light of the complex and rapidly changing situation relating to this topic and the diminishing shelf life of any local regulatory response, the authors have stood down from addressing this important topic in any depth in the Guidebook.

Communities should maintain an on-going knowledge of what is new on the telecommunications topic before adopting or implementing ordinances and bylaws intended to regulate or limit where wireless facilities can be located. In addition, timely consultation with the municipal attorney and experts on the telecommunications field would be well advised.

Section 7-02

Sign Regulations and the First Amendment

1.0 – Introduction

1.1 – OVERVIEW – Cities and towns have long and lawfully regulated signs under their general and zoning ordinances and bylaws. See [*City of Ladue v. Gilleo*](#), 512 U.S. 43 (1994). Signs by their nature are composites of a blend of physical structure and expressive content. Because of this expressive component, great care is required to assure consistency with the First Amendment. The First Amendment states that governments “*shall make no law . . . abridging the freedom of speech . . .*”

Section 7-02 is devoted largely to examining the United States Supreme Court’s 2015 decision in [*Reed v. Town of Gilbert*](#), 576 U. S. ___, 135 S.Ct. 2218 (2015), and its implications for cities and towns in regulating signs.

1.2 – CAVEAT – This topic is evolving as lower federal courts and state courts hear and decide sign cases that trigger a *Reed* analysis and those courts have been, and will continue to be, interpreting the Supreme Court’s decision and the various opinions of the Court justices. There are extensive and ongoing discussions among planners and land use attorneys across the country as to how best communities can draft a sign ordinance or bylaw – or review existing ordinances or bylaws – for consistency with *Reed*. Moreover, consistency in court interpretation of *Reed* is only slowly advancing as of the time of the release of the Guidebook (spring, 2021).

It is incumbent on readers to become knowledgeable about the evolution of federal and state court decisions as time goes on. There will have been many reports, webinars, and workshops available to public officials on this topic and likely will be for the foreseeable future. Local officials should use the information and resources available prior to beginning the process of revising their sign codes. They should also work closely with their municipal attorney, and with the municipal planner if there is one.

1.3 – TIME, PLACE, & MANNER – Historically, the “time, place, and manner” metric has served as the government’s litmus test to determine if a regulation that implicates “free speech” goes too far; and this had been the test for all signs whether commercial or noncommercial. The United States Supreme Court has repeatedly ruled that governments may place reasonable restrictions on the time, place, and manner of noncommercial free expression in which the degree of scrutiny falls somewhere along a spectrum from high (e.g. political or religious speech) to medium (commercial signs) to low (e.g. adult entertainment).

These metrics can be described as:

- Time restrictions regulate when messages may be expressed.
- Place restrictions regulate where messages may be expressed.
- Manner restrictions regulate the mode of expression.

There are four tests for time, place, and manner restrictions. They are:

- Does the regulation serve an important governmental interest?
- Is the government interest served by the regulation unrelated to the suppression of a particular message?
- Is the regulation narrowly tailored to serve the government's interest?
- Does the regulation leave open ample alternative means for communicating messages?

When faced with a legal challenge, the burden had rested with the municipality to demonstrate the reasonableness of any time, place, and manner restrictions it had adopted.

1.4 – SIGNS & SIGN REGULATION – One might think that there is a universally shared understanding of what the term “sign” means. This understanding is reinforced by the shared experience of having looked at “signs” and having agreed that indeed they are “signs.” But is there unanimity about what a sign’s defining characteristics really are?

The regulation of the physical component of signs has long been, and remains, a legitimate subject of local regulation under the municipality’s “police powers.” Signs typically take up space, provide messages, may distract motorists, may displace alternative uses of land, have various physical construction characteristics, and trigger many other considerations that are characteristically addressed by regulating size, proportion, location, illumination, construction, color, lettering, material, moving parts, mobility, and more.

The significant issue is the symbiotic relationship between what the sign is physically (structure) and what the sign expresses (content), and how best to fashion defensible regulations that achieve valid planning purposes without expressly or by implication regulating the sign’s content in ways that violate the Supreme Court’s ruling in *Reed*.

It might be beneficial to consider the word “sign” as more of an adjective than a noun. In this way consideration of signs can be more meaning to speak of sign structures on the one hand and sign messages on the other. This is very important because regulating structures and messages placed upon them can be – constitutionally speaking – very different indeed.

Structures alone enjoy no constitutional protection other than their regulations must be reasonable. Messages, considered apart from any structure to which they are attached, do enjoy constitutional protections and are subject to either intermediate scrutiny or strict scrutiny (See Section 3.0 below) depending on a variety of factors, including whether the message is commercial or noncommercial, on-premises or off-premises, and more.

Every sign is a blend of structure and content. Balancing both structure and content into the proper constitutional equilibrium is the challenge that communities face.

2.0 – *Reed v. Town of Gilbert* - Background

2.1 – THE REVEREND REED AND TOWN OF GILBERT SITUATION – The Town of Gilbert is a very large suburb of Phoenix Arizona. The *Reed* case began with an action brought by Rev. Clyde Reed, the pastor of the Good News Community Church, a “homeless church” that met at different times and at various locations throughout the town, announcing its services by posting temporary signs with this information. Under the town’s sign code, temporary directional signs were subject to very short durational (and other) limitations that differed from regulations applicable to other categories of temporary signs.

Gilbert's sign regulations were similar to those in countless other communities that have historically passed constitutional muster; but here the Supreme Court reversed the lower federal courts that had upheld Gilbert's code.

2.2 – TOWN OF GILBERT SIGN CODE REGULATIONS – Gilbert's sign code required a permit for all signs, but with 23 separate exceptions based on their purpose(s). Among the exceptions were:

- temporary political signs;
- ideological signs (for communicating a message or idea for noncommercial purposes); and
- temporary directional signs (to direct persons to a qualifying religious, charitable, educational, or non-profit event, but limited in size and duration – 12 hours before the event and 1 hour after the event).

The problem was that while there was no content-based distinction among signs within each category, the categories themselves differed depending on sign content. In other words, the enforcing official would have to read the sign's content to know which category the sign fell under, and then would have to apply the regulations applicable to that category.

2.3 – FEDERAL COURT DECISIONS – Reverend Reed appealed to the Federal District Court based on the fact that regulations for temporary event directional signs for religious institutions were more restrictive than other temporary signs. The District Court upheld the Gilbert sign regulations. That decision was appealed to the Federal Ninth Circuit Court. That court reasoned that just because an enforcement official would have to read the sign to ascertain which sign code category the sign falls into does not mean that the code was for that reason content-based. The Ninth Circuit held that the categorical distinctions were based not on content nor on the government's views about the sign's message, but rather on the purpose(s) for which the sign was displayed. The Circuit Court's decision was, in its view, consistent with the First Amendment of the United States Constitution and with prior federal court decisions.

2.4 – U.S. SUPREME COURT DECISION – In June of 2015, the United States Supreme Court, in [*Reed v. Town of Gilbert*](#), effected a sea-change in the constitutional analysis of sign regulation. The holding in *Reed* subjects any noncommercial "content based" sign regulation – regardless of laudable purposes or motivations – to the "strict scrutiny" standard, and not to the lesser "intermediate scrutiny" standard then prevailing in most states. (See Section 4.0 below for complete information on this decision.)

3.0 – Level of Scrutiny

3.1 – BACKGROUND – The analytic tool fundamental to the discussion of sign regulations is what the courts refer to as the level of scrutiny. A level of scrutiny review must be given to any regulation that implicates the First Amendment's right of free speech.

The First Amendment states that governments "*shall make no law . . . abridging the freedom of speech . . .*" Thus, while governments may exercise their police powers by adopting general and zoning laws, when the exercise of those powers implicates free expression, those regulations must satisfy levels and standards of scrutiny higher than "reasonableness" level of scrutiny applicable to police powers generally.

3.2 – STRICT SCRUTINY & INTERMEDIATE SCRUTINY – There are two standards of scrutiny that may be

applicable in considering sign regulations.

3.2.1 – Strict Scrutiny – Strict scrutiny is applied to noncommercial messages. A regulation that is content-based must survive strict scrutiny, meaning the government must prove that:

- the regulation has a compelling governmental interest;
- the regulation is the least restrictive means to serve that interest; and
- the regulation is narrowly tailored to achieve that interest.

3.2.2 – Intermediate Scrutiny – A sign regulation that is content-neutral is subject to a less rigorous, or intermediate scrutiny, which requires that there merely be:

- a significant or important government interest unrelated to the suppression of speech;
- a substantially related means of advancing that interest;
- narrow tailoring of those means; and
- ample alternative means of communicating the sign's message.

Under this more lenient standard, viewpoint-neutral time, place, and manner restrictions could be fashioned by the government. Intermediate scrutiny is applied to commercial messages. While rarely does a local regulation pass strict scrutiny, more often than not local regulations will pass intermediate scrutiny. However, noncommercial sign regulations must pass strict scrutiny.

3.3 – GILBERT SIGN CODE ISSUE – At issue in *Reed* was whether the Gilbert sign code was content-neutral (as the U. S. Ninth Circuit Court had concluded), or content-based. More specifically, the question before the Supreme Court was whether the need to consider the content of the sign for administrative or enforcement purposes made the sign code “content-based,” and whether the viewpoint-neutrality of the code or the laudable motivations of the government insulated the code from strict scrutiny.

4.0 – U.S. Supreme Court Majority Opinion - [Reed v. Town of Gilbert](#)

4.1 – COURT DECISION – *Reed v. Town of Gilbert* held that the regulation of noncommercial signs must pass a heightened level of constitutional scrutiny (i.e., “strict scrutiny”) rather than merely the lesser level (“intermediate scrutiny”) applicable to commercial signs, for which the “time, place, and manner” metric continues to be appropriate.

The majority opinion (written by Justice Thomas, and joined by five other justices) reasoned that government regulation of speech is content-based if a law applies to particular speech because of the topic discussed or the idea or message expressed. Thus, speech regulation targeted at specific subject matter is content-based even if it does not discriminate among viewpoints within that subject matter.

The Court also held that a law that is content-based is subject to strict scrutiny regardless of whether the government had a benign motive in regulating the speech. The Gilbert sign code, on its face, was content-based and could not survive strict scrutiny, because the Town did not demonstrate that the code's distinctions furthered a compelling governmental interest or was

narrowly tailored towards that objective.

Justice Thomas commented that Gilbert's code was "*hopelessly under-inclusive*," allowing as it does for unlimited numbers of other types of signs that create the same problems. Gilbert also had available ample content-neutral alternative options to resolve its safety and aesthetic concerns - size, materials of construction, lighting, moving parts, location, portability, etc. - all of which would have nothing to do with the message.

4.2 – JUSTICE KAGAN CONCURRING OPINION – In her concurring opinion, Justice Kagan contended that it was unnecessary in this case to decide whether a strict-scrutiny test must be applied to sign ordinances that differentiate signs by subject matter, but that do not have the intent or effect of governmental control of ideas or viewpoints. In her view, the Gilbert code was so overly broad, and lacking in a coherent justification for its distinctions, that it was unconstitutional under any standard. Justice Kagan stated that the Gilbert code "*does not pass strict scrutiny, or intermediate scrutiny, or even the laugh test.*" Nevertheless, she feared that entirely reasonable local sign regulations that posed no threat to First Amendment values would be invalidated under the majority's opinion.

4.3 – CONCLUSION – The Court concluded that the Town of Gilbert sign code was not narrowly tailored, and suffered from both under-inclusion and over-inclusion, with the result that it could not pass muster under either strict scrutiny or intermediate scrutiny.

5.0 – Justice Alito's Concurring Opinion

5.1 – BACKGROUND – What is also an interesting part of the *Reed* story is Justice Alito's concurring opinion. Alito advanced a "laundry list" of sign regulations that in his opinion should not be considered content-based. These include regulations having content-neutral criteria for:

- size;
- location (including distinctions between free-standing and attached to buildings);
- lighted vs. unlighted signs;
- placement on public vs. private property;
- placement on commercial vs. private property;
- distinguishing between on-premises vs. off-premises signs;
- number of signs per mile (or other distance);
- time restrictions or duration on signs advertising a one-time event; and
- signs erected by government to promote safety, directional signs, and signs pointing out historic or scenic places

"Properly understood," Alito concluded, the Court's decision "*will not prevent cities from regulating signs in a way that fully protects public safety and serves legitimate esthetic objectives.*" It must be pointed out that Justice Alito's opinion is not the settled law of the case, nor does it serve as precedent. Justice Thomas's majority opinion is controlling; that is, if you have to read the message to know if the regulation applies then it is content-based and subject to strict scrutiny.

6.0 – Reed – Implications for Massachusetts

6.1 – MASSACHUSETTS CITY AND TOWN CONSIDERATIONS – There are many questions about how the *Reed*

decision will play out locally. Massachusetts cities and towns regulate signs under their general or zoning ordinances and bylaws, and sometimes under both and *Reed* has relevance to both.

About a month after *Reed* was argued in the U. S. Supreme Court but about 4 months prior to the Supreme Court rendering its decision, the Massachusetts Attorney General's Office on February 23, 2015, under its authority to review and approve town bylaws - [G.L. c. 40, § 32](#), - issued a sign bylaw opinion to the Town of Foxborough (Case # 7442), foreshadowing to some extent Justice Alito's concurring opinion in *Reed*. The Attorney General, (citing [Metromedia, Inc. v. City of San Diego](#), 453 U.S. 490 (1981), articulated 3 fundamental constitutional principles applicable to a municipality's regulation of signs.

The 3 principles, excerpted and quoted from AG Case #7442, are:

- (1) Onsite vs. offsite commercial signs – A municipality may legitimately choose to prefer onsite commercial messages to offsite commercial messages. In reviewing San Diego's sign ordinance, a majority of the [Supreme] Court held that *"San Diego has obviously chosen to value one kind of commercial speech – onsite advertising – more than another kind of commercial speech – offsite advertising – . . . We do not reject that judgment . . . [O]ffsite commercial billboards may be prohibited while onsite commercial billboards are permitted."*

However, it may be impermissible to regulate differently onsite and offsite noncommercial speech. See [Ackerley Comm. of Mass., Inc. v. City of Cambridge](#), 88 F.3d 33, 37 (1st Cir. 1996) (striking down ordinance that impermissibly drew "a line between two types of noncommercial speech – onsite and offsite messages").

- (2) Commercial vs. noncommercial signs – Wherever signs displaying commercial messages are allowed, identical signs displaying noncommercial messages must also be allowed. The U.S. Supreme Court held that . . . *"[i]nsofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages."* [Metromedia, Inc. v. City of San Diego](#), 453 U.S. at 513 (plurality opinion).

The 1st Circuit Court of Appeals stated: *"[i]n other words, if the owner of Joe's Hardware wants to replace his 'Joe's Hardware' sign with a sign saying, 'No Nukes', he must be allowed to do so."* [Ackerley Comm. of Mass., Inc. v. City of Somerville](#), 878 F.2d 513, 517 (1st Cir. 1989).

The Attorney General's opinion noted that *"[i]t is impermissible to regulate noncommercial speech more restrictively than commercial speech."* See [Tauber v. Town of Longmeadow](#), 695 F. Supp. 1358, 1361 (D. Mass. 1988) ("By favoring commercial speech over noncommercial speech, the Longmeadow bylaws clearly violate the First Amendment of the Constitution.").

- (3) Relative value of various noncommercial signs – A municipality may not distinguish among different types of noncommercial speech or regulate some types of noncommercial speech more restrictively than other types. The U. S. Supreme Court stated that:

"[a]lthough the city may distinguish between the relative value of different categories of commercial speech, the city does not have the same range of

choice in the area of noncommercial speech to evaluate the strength of, or distinguish between, various communicative interests . . . With respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse . . .” [*Metromedia, Inc. v. City of San Diego*](#), 453 U.S. at 514-15.

The Attorney General’s helpful cautionary comments to the Town of Foxborough remain as constitutionally relevant following *Reed* as before *Reed* and continue to serve as useful guideposts on how best to accommodate *Reed* in actual practice.

7.0 – Systematic Approach

7.1 – FIRST AMENDMENT ANALYSIS – In conducting a sign analysis, an indispensable first step would be to clearly identify the valid public purposes (e.g., aesthetics, safety, etc.) to be achieved by the regulation. A second step would be to then link the purposes to the restrictions imposed in order that they be in constitutional balance under a *Reed* analysis. A good legislative record that reflects the local need for the restriction and the specifics of the restriction based upon that need should be conducted.

The first question to ask is whether a provision is “content-based”. The second question to ask is whether (if it is content based) it is commercial speech or noncommercial speech. (See the [*Central Hudson*](#) decision, below).

First Amendment protections apply to both commercial and noncommercial speech, but the latitude accorded to regulation of commercial speech is greater, while the regulation of conduct is greater still. Here’s the key:

First Amendment Analysis		
Conduct or Speech	Scrutiny	Statute
Conduct, but not speech – (police powers generally)	Low-moderate scrutiny	Government interest need only be lawful; (1) the means to achieve the interest need only be reasonably related; and (2) the tailoring need not necessarily be narrow.
Commercial speech	Intermediate scrutiny	Government must prove that: (1) there is a significant or important governmental interest; (2) the regulation is a substantially or rationally related means to serve that interest; (3) the regulation is narrowly tailored to serve that interest; and (4) there are ample alternative means of communicating the sign’s message.
Noncommercial speech	Strict scrutiny	Government must prove that: (1) there is a compelling governmental interest; (2) the regulation is the least restrictive means to serve that interest; and (3) the regulation is narrowly tailored to serve that interest.

7.2 – [*Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm.*](#) (447 U.S. 557 (1980) – Any review of current or proposed local sign regulations must start by considering whether they touch on protected speech, and how they do so. Courts across the country are gradually refining how to interpret and apply *Reed* and how to reconcile it with the Supreme Court’s 1980 decision in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm.*

This case affirmed that regulation of commercial speech is governed by intermediate scrutiny. In contrast, the *Reed* case established that regulation of noncommercial speech is subject to strict scrutiny. The so-called *Central Hudson* test has 4 parts:

- (1) Does the sign concern lawful, non-misleading activity?
- (2) Will the government’s asserted substantial interest be advanced by the regulation’s safety and aesthetics considerations? (e.g., traffic, appearance of the community, clutter)?
- (3) Under-inclusion: does the restriction advance the government’s interest? (i.e., it must not be under-inclusive by failing to apply to signs that are clearly of the sort that the restriction was intended to regulate)?
- (4) Over-inclusion: does the restriction capture in its net signs that are clearly not of the sort that the restriction was intended to regulate? (It need not be the least restrictive means of accomplishing the government’s goal; but there still must be a reasonable fit between the means and the goal)?

8.0 – Considerations in Adopting or Revising Sign Codes

8.1 – OVERVIEW – When cities and towns consider adopting or amending their sign ordinances and bylaws, compliance with the First Amendment must be a consideration. A critical review of the sign bylaw/ordinance should be understood as an effort to assign a reasonable level of probability to a provision’s consistency or inconsistency with constitutional law relating to signs. Also, the review should always keep in mind the stated purposes of the regulation to assure the appropriate constitutional fit between the restriction on speech and purpose(s) intended to be served.

The information in Section 8.0 is intended to provide a framework of questions and issues to consider and to provide some guidance as to what communities can include in their sign codes.

8.2 – THE BASICS – As a starting point, communities should keep the following in mind when examining sign codes and sign code amendments.

8.2.1 – Community Intent – *Reed* makes it clear that motivation or best intentions do not insulate government restrictions of noncommercial speech, unless the restriction passes strict scrutiny.

8.2.2 – Commercial versus Noncommercial Signs – Looking at any provision of a sign bylaw prompts the question of whether that provision is meant to regulate commercial speech, noncommercial speech, or both. As noted above, different levels of scrutiny apply. Thus, the bylaw should at least be very clear as to which types of signs are being regulated. The follow-up question is then whether the regulation either on its face – as distinct from as it may be applied – falls under strict scrutiny or intermediate scrutiny. In any case, a sign bylaw or ordinance should always be clear and not vague or ambiguous.

8.2.3 – “Banning”, “Exempting”, or “Categorizing” Signs – If a community is banning signs,

exempting signs, or categorizing signs, then it must be careful not to run the risk that the regulatory distinctions being made are based on content. If a community's sign code includes these categories, then it should conduct a First Amendment analysis on any existing or proposed language regarding "banning," "exempting," or "categorizing" signs.

8.2.4 – Questions to Ask – Prior to adoption of new sign codes or amendments to the code, a community should consider asking, and answering, the following questions:

- What? What is it about signs that you want to regulate?
- Why? Why do you want to regulate signs and why do so in a certain manner?
- Who? Should it matter whose sign it is, or whose name is on the sign?
- When? (How long?) This is the TIME aspect of regulating signs.
- Where? (Where can signs be placed?) This is the PLACE aspect of regulating signs.
- How? (How are the signs regulated?) This is the MANNER aspect of regulating signs.

Because local sign codes have most likely come into existence during an era in which they were seen to be subject merely to intermediate scrutiny – i.e., reasonable time, place, and manner – the Supreme Court's pronouncements in the *Reed* decision have forced a reassessment of those codes. Time, place, and manner restrictions of noncommercial speech will no longer suffice if the speech is content-based.

8.2.5 – Suggested Sign Code Considerations – Listed below are some suggestions for communities to consider when rewriting the sign bylaw or ordinance:

- Reduce (or eliminate) the number of exceptions to permitting provisions.
- Reduce (or eliminate) the number of exemptions to any list of prohibited signs.
- Reduce the number of categories of signs.
- Consider bans or approvals (deregulation) of some categories.
- Avoid provisions conferring discretion on the part of the government regulator.
- Provide clear standards and criteria for all permitting functions.
- Provide for the right to change, or substitute, the content of signs.
- Create sign regulations that are short and simple, remembering that any nuances that are tied to content could potentially run afoul of First Amendment considerations.

8.3 – GUIDELINES – Since the *Reed* decision, there have been a number of lower federal court decisions and some state court decisions on *Reed* sign issues. (The authors are not aware of any such decisions in Massachusetts as of the date this Guidebook was first made available.) These decisions are not all based on the same set of facts and therefore no broad conclusions can be drawn. In addition, there are varying opinions in the legal community across the country as to what regulations would, or would not, adhere to the *Reed* decision.

Sections 8.3.1 and 8.3.2 below provide some cautious guidance as to what aspects of sign regulations would seem to adhere to the *Reed* decision and those that would not. These sections are not all-encompassing, and importantly could be changed by newer court decisions at any time. Readers should stay informed and up-to-date as to sign bylaw judicial decisions and consult with their municipal attorneys and experts in sign constitutional law.

8.3.1 – Acceptable Sign Regulations – Time, Place, and Manner Restrictions (as long as they

are reasonable and content neutral).

- Regulation Examples: size; height, dimensions, and setbacks; lighting and illumination; location on a building, wall or window; design, materials and colors; number of signs per property, wall, window or similar; fixed versus changeable message signs; free standing versus building signs; time restrictions on one-time event signs; and portability.
- Type of signs: Traffic control, safety, government, directional, and commercial.

8.3.2 – Unacceptable Sign Regulations – These include;

- Sign regulations that prohibit noncommercial free speech. For example, allowing “campaign” political signs but prohibiting “opinion” political signs.
- Sign regulations that regulate equivalent noncommercial signs in a different manner.
- Noncommercial signs that are regulated by their content.

8.4 – COMMERCIAL MESSAGE SIGN AND NONCOMMERCIAL MESSAGE SIGN – A noncommercial message can be substituted for a commercial message on a sign. The content of that noncommercial message can be changed to another noncommercial message without the need for approval or a permit as long as the size or other dimensional characteristics of the sign are not changed.

Section 7-03

Takings

1.0 – Introduction

1.1 – THE TAKINGS CLAUSE – The Fifth Amendment to the United States Constitution provides as follows: *“Nor shall private property be taken for public use, without just compensation.”* This is referred to as the “takings” clause.

On this constitutional foundation, the U. S. Supreme Court has evolved a line of cases that seek to set the boundaries within which government land use regulations and adjudicatory actions may safely apply without becoming an unconstitutional taking. Examples of potential takings include:

- the improper use of eminent domain;
- improper denial of land use permits; or
- the attachment of conditions that go too far in imposing an undue burden on the applicant.

The day-to-day business faced by land use boards typically involves processing applications for an assortment of local permits and approvals. The denial of applications or the imposition of conditions on them is often the basis for a legal challenge.

Section 7-03 discusses interactions between the applicant and the board related to takings issues. It explores how the applicant and the board might effectively look at alternatives to denial or to constitutionally questionable conditions of approval.

1.2 – PUBLIC PURPOSE & EMINENT DOMAIN – The underlying premise of this subject is that it is a lawful, constitutional function of government to “take” private property for a “public purpose,” provided that “just compensation” is paid. Over time, the litmus test has focused more on what the owner of private property is deprived of and less on property interests accruing to the government.

Illustrative of this, in [*Kelo v. City of New London*](#), 545 U.S. 469 (2005), the U. S. Supreme Court held that the government’s eminent domain powers extend to the power of the government to compel the transfer of land from one private owner to another private owner to further economic development. The Court found that general community benefits resulting from the “taking” of the Kelo property as part of a comprehensive redevelopment plan was a valid “public purpose,” justifying the exercise of the government’s eminent domain power.

1.3 – TYPES OF TAKINGS – A variety of government actions, some noted below, may, depending on the individual circumstances, constitute a “taking.” (See Section 6.0, Table 7-B, below for case citations)

- Private Property Appropriation – Where the government directly appropriates private property and permanently occupies the property, that is a *per se* taking, and is compensable under the takings clause.
- Inverse condemnation – An “inverse condemnation” occurs where government regulation amounts either to a total denial of value (*Lucas* – See the Table in Section 6.1 below), or

imposes substantial restrictions on land use, in which case the courts consider the level of economic impact, the degree of interference with investment-backed expectations, and the character of the government action (*Penn Central* – See the Table in Section 6.1 below).

- Constitutional Claim – A constitutional claim under the takings clause most often arises when the government grants a permit (which it could have denied without triggering takings liability), on the condition that the applicant grant the government an interest in property – an “exaction” – which the government could have taken directly only if it paid just compensation.

2.0 – Takings – Permit Conditions

2.1 – DEVELOPMENT PERMIT CONDITIONS & TAKINGS – Recent cases affirm that private property applicants are able to sue a land use board based on the “takings clause” even where the property owner has not been deprived of property. This occurs (see *Koontz* in Section 4.0 below) where the denial of a local permit or where the approval is accompanied by an exaction or by a requirement for the payment of money that fails to satisfy the requirements of *Nollan* and *Dolan* cases. These requirements consist of: an essential nexus (*Nollan*), and a rough proportionality (*Dolan*) between the exaction or requirement and the demonstrable impacts of the development project.

2.2 – CAUTIONS FOR BOARDS – The handwriting on the wall for zoning and planning officials is that when processing a land use application (e.g., special permit, or subdivision plan etc.), the board must make a well-studied, individualized determination of the negative impacts of the applicant’s project and then - before making a demand or otherwise acting in a coercive way - settle on carefully crafted mitigating conditions that are related to and proportionate to the deficiencies of the project. Even in cases where the board would be justified in denying an application, attempts to take unfair advantage of an applicant by otherwise imposing conditions that exceed the *Nollan/Dolan* test expose the government to a possible “takings” claim.

3.0 – Takings – Nollan and Dolan

3.1 – THE NOLLAN AND DOLAN CASES – [*Nollan vs. California Coastal Commission*](#), 483 U. S. 825 (1987)) and [*Dolan vs. City of Tigard*](#), 512 U. S. 374 (1994) provide the Court’s reasoning as to the relationship between an exaction and a taking. Not all exactions are takings, but rather only those that fail to satisfy two tests, referred to by the Court as the “*essential nexus*” test and “*rough proportionality*” test.

3.1.1 – ESSENTIAL NEXUS – In *Nollan* it was determined that an “exaction” of a property interest in the context of a permitting process is not a taking, provided the exaction meets the “essential nexus” test. The *Nollan* “essential nexus” test is where a regulatory body would be otherwise lawfully justified in prohibiting a use or in denying a permit but then allows the use or grants the permit subject to conditions that utterly fail to further the end initially advanced as justification for the prohibitions, essential nexus is lacking, and the absence of the essential nexus amounts to a “taking.”

3.1.2 – ROUGH PROPORTIONALITY – In *Dolan* it was determined that even where an essential nexus can be shown, a “taking” can be still found where the exaction was disproportionate to the impact of the project. The *Dolan* rough proportionality test can be stated as whether the degree of the exactions demanded by permit conditions is in appropriate parity with the

degree of projected impacts of the proposed development. No precise mathematical calculation is required; but the land use board must make some sort of individualized determination that the required exaction is related both in nature and extent to the impact of the proposed development.

3.2 – BURDON OF PROOF – If the exaction fails either of the 2 tests, it will be a compensable “taking”. The burden of proof is on the government to verify that both tests have been satisfied.

4.0 – Takings – Koontz

4.1 – OVERVIEW – In [*Koontz vs. St. Johns River Water Management District*](#), 570 U. S. ____ (2013), the regulatory body proposed coercive conditions for approval that would violate the *Nollan/Dolan* tests and the applicant refused to agree to them. The regulatory body then denied the permit.

The U. S. Supreme Court held that the government’s demand upon a land use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when the government’s demand is for money. Moreover, the government cannot deny a land use permit or deny a land use benefit on the condition that the applicant makes a dedication in excess of its proportionate negative impact. That the government could deny the permit cannot be the basis for an excessive demand.

The extension of the *Nollan* and *Dolan* standards to monetary exactions by *Koontz* represents a significant expansion of *Nollan* and *Dolan*.

4.2 – QUESTIONS ADDRESSED – In *Koontz*, the Supreme Court addressed the following questions:

- whether the *Nollan/Dolan* standards apply when the government denies a development application because the applicant has refused to accede to a government “demand” that the applicant comply with a requirement that would trigger *Nollan/Dolan* if it were a condition of project approval; and
- whether the *Nollan/Dolan* standards apply to “monetary exactions” imposed as permit conditions requiring applicants to pay or expend money to mitigate project impacts.

On the first bullet above, the Court held that *Nollan/Dolan* tests apply regardless of whether the government approves a permit subject to an exaction (a condition subsequent) or rejects an application because the applicant refuses to accede to a government “demand” for an exaction (a condition precedent). The Court stated that a permit denial in these circumstances is a “*Nollan/Dolan* unconstitutional-conditions violation.”

On the second bullet above the Court held that the *Nollan/Dolan* standards are not limited to exactions involving an interest in real property, but also apply to “monetary exactions” (*i.e.*, permit requirements to expend or pay money).

4.3 – REASONABLE CONDITIONS – The *Koontz* Court pointed out, however, that its decision does not bar the government regulator from reasonable regulation of land uses that result in costs to the public, such as development impact fees. The Court went on to say that landowners must bear the costs otherwise borne by the public in dealing with “*the negative externalities of their conduct*,” citing [*Village of Euclid v. Ambler Realty Co.*](#), 272 U. S. 365 (1926).

Permitting authorities may lawfully insist that applicants bear the full costs of their proposals. The conundrum facing the government is that of having to choose between “conditions” and “denial,” where even by negotiating conditions the government runs the risk of a claim that a “demand” has been made for which *Koontz* can be cited.

Justice Elena Kagan speculated that if every failed negotiation over development conditions can give rise to a *Nollan/Dolan* claim, the wisest course for most municipalities will be to deny permit applications without offering any specific advice to developers. She should not be taken seriously, of course; but denials should be made based on good faith consideration of relevant aspects of the proposal and then supported by defensible findings.

In any case, the government should always document the community costs of the proposed development and the *Nollan/Dolan* rationale for the community’s proposed development conditions.

5.0 – Good Practice

5.1 – DECISIONS REGARDING ATTACHING CONDITIONS TO LAND USE PERMITS – Based on the Supreme Court decisions on these 3 cases, there are some recommended “good practices” for communities to follow when deciding on land use permits and attaching conditions to those permits:

- Development conditions (land and fees) should be established, where possible, through general legislation, bylaws, or rules to preclude *ad hoc* decision making and demands within the context of application reviews.
- When considering alternatives to the denial of an application, findings and analysis should be made that are sufficient to justify exactions under *Nollan/Dolan*.
- To the extent a community negotiates over conditions, it must engage in detailed fact finding and analysis measuring the project impacts and relating the impacts to the proposed conditions.
- If negotiations fail, communities could deny applications based on the totality of unacceptable adverse impacts.
- Land use boards should avoid acting in any manner that later could be said to be “coercive” or by making “demands” or “conditions” unaccompanied by analysis and findings

6.0 - Key “Takings” Cases – Supreme Court of the United States

6.1– CASE HISTORY – The cases in the Table below are cases that were decided by the Supreme Court of the United States (USSC) and show an overview of the history of “takings” cases.

United States Supreme Court - Key “Takings” Cases			
Year	Case	Holding	Comment
1887	<i>Mugler</i>	It is a “taking” only if government action deprives owner of title to or possession of land. “Categorical taking” = acquisition of title or physical invasion by government.	No taking found where state prohibition laws destroyed the value of Mugler’s brewery.

United States Supreme Court - Key “Takings” Cases			
Year	Case	Holding	Comment
1922	<i>Pennsylvania Coal</i>	It is a “taking” if government regulation “goes too far.” Taking is to be determined with respect to the property as a whole, not merely the portion affected by government action.	Whether a regulatory act constitutes a taking requiring compensation depends on the extent of diminution in the value of the owner’s property in contrast to the exercise of the government’s police power to protect the public health, safety, welfare, and morals. This case offers no test, or standards, for “going too far.”
1978	<i>Penn Central</i>	Offered a basis (rather than a formula) for determining if government action “goes too far” – i.e., balancing the impact of regulation, importance of governmental interest, and character of governmental action.	Denial of permit to construct glass and steel tower over historic train station. Significant impact on owner vs. aesthetics. Test: the “reasonable investment-backed expectations of the owner”.
1980	<i>Agins</i>	A government regulation of private property effects a “taking” if such regulation does not substantially advance legitimate state interests.	Served as basis for analysis until 2005 when <i>Lingle</i> re-established <i>Pennsylvania Coal</i> as the appropriate test.
1987	<i>Nollan</i>	It is a “taking” if there is no “essential nexus” between a “legitimate state interest” and the “permit condition exaction.”	Question is whether an “essential nexus” exists between a legitimate state interest and the permit condition.
1992	<i>Lucas</i>	It is a “taking” if there is deprivation of all “economic value.”	This is another type of taking, where government action results in deprivation of all value.
1994	<i>Dolan</i>	It is a “taking” if there is no “rough proportionality” between the interest acquired by government and the government interest, i.e., the “degree of connection” between the exaction and the proposed impact.	Even where “essential nexus” is established, an “individualized determination” that the dedication of land is related in nature and extent to the impact of the proposed development is required. The burden rests with the government.

United States Supreme Court - Key "Takings" Cases			
Year	Case	Holding	Comment
2005	<i>Lingle</i>	Rejects the " <i>Agins</i> " test, reverts to " <i>Penn Central</i> " test.	Either a physical taking, a Lucas-type total-deprivation regulation, a Penn Central-style taking, or a land-use exaction that acts as a taking (Nollan/ Dolan) must be shown.
2012	<i>Koontz</i>	Nollan/Dolan analysis applies even where permit is denied; constitutional claim may be brought where the exaction is of money as well as of a real property interest.	Even where a denial might have been lawful, government has burden of showing that "demand" for mitigation satisfies Nollan/Dolan.

[*Mugler vs. State of Kansas*, 123 U.S. 623 \(1887\)](#)
[*Pennsylvania Coal vs. Mahon*, 260 U.S. 393 \(1922\)](#)
[*Penn Central Trans. Co. vs. City of New York*, 438 U.S. 104 \(1978\)](#)
[*Agins vs. City of Tiburon*, 447 US 255, \(1980\), 447 U.S. 255 \(1980\)](#)
[*Nollan vs. California Coastal Commission*, 483 U. S. 825 \(1987\)](#)
[*Lucas vs. South Carolina*, 505 U.S. 1003 \(1992\)](#)
[*Dolan vs. City of Tigard*, 512 U. S. 374 \(1994\)](#)
[*Lingle vs. Chevron U.S.A., Inc.*, 544 U. S. 528 \(2005\)](#)
[*Koontz vs. St. Johns River Water Management District*, 570 U. S. ____ \(2013\)](#)

Section 7-04

The Religious Land Use and Institutional Persons Act (RLUIPA)

1.0 – Introduction

1.1 – ENACTMENT & PURPOSE – The [Religious Land Use and Institutionalized Persons Act](#) (RLUIPA) was enacted by Congress in 2000 in part to correct problems with the 1993 Religious Freedom Restoration Act (RFRA). RLUIPA gives churches and other religious institutions a way to address and minimize burdensome zoning restrictions on their property use, in addition to prohibiting the imposition of substantial burdens on the ability of prisoners to worship as they please.

The Religious Land Use and Institutionalized Persons Act of 2000 (42 U.S.C. § 2000cc-1(a)) provides that:

“No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person - (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”

Thus, strict scrutiny will be given to the government’s asserted justification for a restriction that amounts to a substantial burden on the religious plaintiff.

1.2 – MASSACHUSETTS EXPERIENCE – While RLUIPA is a federal law, Massachusetts statutes provide religious land uses a slate of protections under the provisions of the [G.L. c. 40A, § 3](#). This is sometimes referred to as the “Dover amendment,” and has been a part of Massachusetts zoning law since 1950. Because the scope of the state statute is in many respects broader than RLUIPA, there have been relatively few case claims under RLUIPA in Massachusetts. Some cases have been decided by Massachusetts courts under Massachusetts law grounded on RLUIPA’s “institutionalized persons” provisions, rather than the land use provisions. There are, however, lessons to be learned from those cases.

The Appeals Court in [In Re Jaynes](#), 88 Mass. App. Ct. 245 (2015), noted that in Massachusetts the scope of protections accorded under the state constitution are broader than those provided by RLUIPA. Although *Jaynes* arose in the context of a claim by an institutionalized person rather than a land use restriction, the Appeals Court judge concluded that since the trial court judge’s decision passes muster under the Massachusetts Constitution, it necessarily meets the requirements of RLUIPA. See [Ahmad v. Department of Correction](#), 446 Mass. 479, 485 (2006): “While RLUIPA holds the government to a higher standard than that . . . with respect to the free exercise of religion . . . that standard is consistent with the stricter standard we adopted [under the Massachusetts Constitution] in [Rasheed v. Commissioner of Correction](#), 446 Mass. 463 (2006). No further analysis is required.”

The Court in *Rasheed* explained that the Massachusetts Constitution broadly protects the rights of individuals to exercise their religious beliefs freely. Article 2 of the Massachusetts Declaration of Rights ensures that no person "*shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping GOD in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession or sentiments.*" Article 46, § 1, of the Amendments to the Massachusetts Constitution (in language similar to that contained in the First Amendment to the United States Constitution) further provides that "*[n]o law shall be passed prohibiting the free exercise of religion.*"

The constitutional standards applicable in Massachusetts to land use restrictions on religious properties provide more stringent limitations on local land use powers than RLUIPA.

1.3 – FEES – It should be noted that a plaintiff prevailing in a federal court RLUIPA claim may be entitled to attorney's fees, something that is not available in a state court action under Massachusetts law.

2.0 – Religious Land Use

2.1 – RELIGIOUS EXERCISE – While the vast majority of court decisions nationally are made under the "institutionalized persons" part of RLUIPA, the focus of local planning and zoning officials will be on religious land use.

RLUIPA defines "religious exercise" as "*any exercise of religion, whether or not compelled by, or central to, a system of religious belief,*" 42 U.S.C. § 2000cc-5(7)(A), and it specifically provides that "*[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise.*"

The Department of Justice holds that "religious exercise" includes any such exercise whether or not compelled by, or central to, a system of religious belief. Whether the activities in question are part of the core faith of the entity or merely something that the plaintiff wants to do rather than what they must do to conform to requirements – for example, night gatherings in addition to mandatory Sunday services, enjoys the same level of protection.

Remember that it is the "use" of the building that RLUIPA focuses on and thus "religious exercise" may be found to include homeless shelters, food distribution, various faith-based social services, parish halls, classrooms, and more.

2.2 – ZONING CODES & LANDMARK LAWS – Regarding religious land use, the United States Department of Justice summarizes RLUIPA in the following excerpts:

Religious assemblies, especially new, small, or unfamiliar ones, may be illegally discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation. Zoning codes and landmarking laws may illegally exclude religious assemblies in places where they permit theaters, meeting halls, and other places where large groups of people assemble for secular purposes. Or the zoning codes or landmarking laws may permit religious assemblies only with individualized permission from the zoning board or landmarking commission, and zoning boards or landmarking commissions may use that authority in illegally discriminatory ways.

To address these concerns, RLUIPA prohibits zoning and landmark laws that substantially burden the religious exercise of religious assemblies or institutions, absent the least restrictive means of furthering a compelling governmental interest. This prohibition applies in any situation where:

- the state or local government entity imposing the substantial burden receives federal funding;
- the substantial burden affects, or removal of the substantial burden would affect, interstate commerce; or
- the substantial burden arises from the state or local government's formal or informal procedures for making individualized assessments of a property's uses.

In addition, RLUIPA prohibits zoning and landmarking laws that:

- treat churches or other religious assemblies or institutions on less than equal terms with nonreligious institutions;
- discriminate against any assemblies or institutions on the basis of religion or religious denomination;
- totally exclude religious assemblies from a jurisdiction; or
- unreasonably limit religious assemblies, institutions, or structures within a jurisdiction.

The Department of Justice can investigate alleged RLUIPA violations and bring a lawsuit to enforce the statute. The Department can obtain injunctive, but not monetary, relief. Individuals, houses of worship, and other religious institutions can file suit in federal or state court to enforce RLUIPA.

2.3 – PLAINTIFF’S BURDEN – A RLUIPA plaintiff bears the burden of demonstrating that the enactment of a local ordinance or bylaw imposes a "substantial burden" on its religious exercise; but RLUIPA does not define "substantial burden." See Section 2.5 below, which defines and discusses the "substantial burden test."

2.4 – LAND USE RESTRICTIONS & "SUBSTANTIAL BURDEN" – RLUIPA does not mean that every land use restriction on a religious organization imposes a substantial burden, which would be to push the constitutional protection beyond its legislative intent.

2.5 – SUBSTANTIAL BURDEN TEST – The main portion of the statute, section 2000cc entitled "*Protection of land use as religious exercise*," bars governments from imposing a substantial burden on religion with respect to certain land use regulations. This is stated as:

... No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest.

"Substantial burden" is thus a fact-intensive inquiry. The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief; and the use or construction of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.

In a presentation¹ made by Attorney Evan J. Seeman of Robinson & Cole LLP, he suggested several factors that support a conclusion of “substantial burden”:

- unable to use a particular property for religious purposes;
- imposition of excessive and unjustified delay, uncertainty, or expense; or
- religious animus expressed by public officials or the public, which is not renounced by officials (keep a good record).

By contrast, Seeman cited the following as supporting the opposite conclusion:

- timely denial that leaves other sites available;
- denial that has a minimal impact;
- denial where there is no reasonable expectation of an approval; or
- personal preference of the religious institution, cost, inconvenience.

The bullet points above are general principles; the circumstances of an individual case may vary.

2.6 – MASSACHUSETTS CASE ON THE SUBSTANTIAL BURDEN TEST – The question of whether a local land use regulation amounted to a “substantial burden” was an issue in the First Circuit Court of Appeals in a Massachusetts decision broadly discussing RLUIPA: [*Roman Catholic Bishop of Springfield vs. City of Springfield*](#), United States Court of Appeals for the 1st Circuit, No. 11-1117 (2013). This case makes the point that the asserted “burden” may not be prematurely attributed where avenues of relief have not first been exhausted.

In this case, the Diocese of Springfield challenged the City’s historic landmark designation of a church. The Plaintiff filed a lawsuit challenging the city’s land use restriction on the day after the Ordinance went into effect. The Court noted that:

“[t]he city had no opportunity to demonstrate whether or not it will accommodate some, all, or none of RCB’s requests for changes to the exterior of the Church. Indeed, RCB has not settled upon any plan for future use of the property that would necessarily entail changes to the Church’s exterior. Without knowing what RCB can or cannot do with the Church under the Ordinance, we cannot know to what extent, if any, RCB will suffer from a burden on its religious practice.”

Springfield also illustrates why a city or town ought to sail into what is often reported to be the “safe harbor” expressly provided for in RLUIPA:

A government may avoid the preemptive force of any provision of this chapter by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.” - 42 U.S.C Section 2000c-3(e)

RLUIPA cases must address the undefined “substantial burden” language of the statute in a fact- intensive, case-by-case manner. Where a substantial burden is found, a heightened

¹ With permission from Evan J. Seeman, Esq., Robinson & Cole LLP. Presented at the 2016 National Planning Conference of the American Planning Association. See www.RLUIPA-Defense.com for more information.

standard of review will make it difficult for the challenged land use regulation to survive under RLUIPA.

2.7 – ADDITIONAL TESTS – Additional tests to be aware of regarding government actions include:

2.7.1 – SECTION 42 U.S.C. § 2000CC(A)(1) – This includes certain provisions regarding "equal terms," "nondiscrimination," and "unreasonably limits":

- Equal Terms – No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.
- Nondiscrimination – No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.
- Exclusion and Limits – No government shall impose or implement a land use regulation that: (a) totally excludes religious assemblies from a jurisdiction; or (b) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

2.7.2 – SECTION 42 U.S.C. § 2000CC(B) – This section allows for "*governmental discretion in alleviating burdens on religious exercise. A government may avoid the preemptive force of any provision of this chapter by:*" (as noted in Section 2.6 above.)

- changing the policy or practice that results in a substantial burden on religious exercise;
- retaining the policy or practice and exempting the substantially burdened religious exercise;
- providing exemptions from the policy or practice for applications that substantially burden religious exercise; or
- any other means that eliminates the substantial burden.

2.8 – ADDITIONAL TERMS – Other terms in RLUIPA that are either not defined or are left to ordinary understanding are: "religious exercise," "land use regulation," and "compelling governmental interest." Even if it can be established that a land use regulation is a "substantial burden," it may still be permissible if a "compelling governmental interest" is advanced by the least restrictive means. Individual assessments should be undertaken by the local board accompanied by findings lending support to the conclusion that the governmental interest trumps the burdens imposed.

2.9 – ZONING EXEMPTION STATUS – It is important to note that religious uses under RLUIPA are not totally exempt from zoning or the requirements for permits and approvals that are required under laws and regulations of general applicability; they are only protected from being treated less favorably than non-religious uses. Where regulations are uniformly imposed, such matters as traffic, parking, maximum capacity, intensity of use, setbacks, and frontage are no less applicable to RLUIPA uses than to other uses. However, be reminded that G.L. c. 40A, § 3, provides broader zoning protection to religious uses than RLUIPA provides.

3.0 – RLUIPA Claims

3.1 – STATUTE OF LIMITATIONS – The statute of limitation for RLUIPA lawsuits filed in state or federal

court is 4 years from the date of the alleged RLUIPA violation.

3.2 – TYPES OF CLAIMS – Generally, there have been 3 types of claims. They are:

- where demonstrated social animus (hostile bias) against a religious school or place or worship can be shown;
- where religious uses have been prohibited when secular assemblies such as clubs, lodges, or community centers have been permitted; and
- where the comparative regulatory burdens fall disproportionately on religious uses over secular ones.

3.3 – MUNICIPAL CLAIM RESPONSE – RLUIPA provides that municipalities may be protected from enforcement actions by taking corrective measures. These measures may include:

- changing the regulations or policies that result in a substantial burden on religious exercise;
- exempting the substantially burdened religious exercise from those regulations or policies;
- providing clear exemptions in the regulations or policies that substantially burden religious exercise for applications that would meet this test; or
- adopting any other means that would eliminate the substantial burden or other violations of RLUIPA.

4.0 – RLUIPA & the “Dover” Amendment

4.1 – U.S. FIRST CIRCUIT COURT OF APPEALS – In a U. S. First Circuit of Appeals decision ([*Boyajian v. Gatzunis*](#), U. S. Circuit Court of Appeals for the 1st Circuit, #99-1760 (2000)), relating to a proposed Mormon Temple in Belmont, neighbors brought a federal lawsuit against the Church and the town challenging both the Belmont zoning bylaw and the Dover Amendment (G.L. c. 40A, § 3) as violating the Establishment Clause of First Amendment of the U. S. Constitution. (*“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”*)

At issue was the church’s proposal to construct a temple in a residential zone and its having obtained a special permit from the town to exceed the allowable height limit. While the bylaw allowed religious uses by right in the residential zone, such uses under Dover may be subject to “reasonable regulations,” such as bulk and height of structures. Although the Free Exercise Clause of the U.S. Constitution cautions governments from impinging on beliefs and expressions, the Establishment Clause cautions governments from adopting the cause of religion as its own. The Court noted that the juxtaposition of the two clauses, and the internal tension they create, makes total separation between religion and government impossible. The First Circuit concluded that the Dover Amendment fits easily within the established boundaries of benevolent neutrality. Thus, preferred zoning status under Dover is support for, rather than the establishment of, religion.

4.2 – MASSACHUSETTS SUPREME JUDICIAL COURT – Although not a RLUIPA decision – but of parallel relevance to this discussion of RLUIPA – the SJC in [*Arleen Martin vs. The Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*](#), 434 Mass. 141 (2001), commented that the exemption accorded by the state’s Zoning Act (G.L. c. 40A, § 3) to religious structures applies to the totality of a structure whose primary purpose is religious. Once that threshold determination is made, the characterization of the whole structure as religious spreads to its constituent parts whose isolated functions are not independently religious, such as steeples, rose windows, and kitchen equipment.

Section 7-05

Telecommunications

1.0 – Introduction

1.1 – OVERVIEW – Telecommunications (wireless facilities, cell towers etc.) is a land use that has been a prominent feature on municipalities regulatory landscape since 1996. It is also a land use topic where the federal government has asserted broad federal control to a significant degree.

The [Telecommunications Act of 1996](#) was the trigger that paved the way for restriction of local powers to regulate in this arena, providing in part that local regulation may not “*unreasonably discriminate*” among personal wireless service providers, nor may they “*have the effect of prohibiting*” the provision of personal wireless facilities. A local decision to deny permission for such a facility must be “*in writing and supported by substantial evidence contained in a written record.*”

Through legislation and regulations, certain zoning powers of local communities have been preempted by the federal government. In addition, the legislation and regulations have imposed federal requirements related to the procedures and timelines local communities may use to review applications for these types of facilities. Nevertheless, municipalities retain legal authority for some local regulatory actions.

1.2 – CAVEAT – In light of the complex and rapid changes of both telecommunications technology and federal regulations, and the diminishing shelf life of any local regulatory response, the authors have refrained from addressing this important topic in any comprehensive manner in the Guidebook. When the need to address local planning and zoning efforts relating to telecommunications arises in a community, more contemporary resources should be consulted. Municipal attorneys and other experts in this field should also be consulted.

2.0 – Federal Regulation

2.1 – REGULATORY ACTIONS – Since the adoption of the TCA, the Act has been amended and the FCC has issued administrative rulings a number of times. The amendments have resulted from advances in technology, political reasons, court decisions, and other purposes. Amendments have included revisions to, and new, provisions related to the scope and extent of municipal jurisdictional powers. An administrative ruling in 2010 was related to the “shot clock” deadlines for local action on land use permit applications.

In Section 6409 of the Federal Middle Class Tax Relief and Job Creation Act of 2012, there is language stating that state or local governments may not deny and shall approve any eligible facilities’ request for modification of an existing wireless facility on an existing wireless tower or base station that does not substantially change the physical dimensions of the tower or base station.

More recently, with the roll-out of the Distributed Antenna Systems (DAS) and 5G technology

networks, there have been a number of FCC actions over the last few years related to these topics' technology. The 2018 [Declaratory Ruling and Third Report and Order](#) was enacted that impacted local control. Provisions in this Order included language related to municipal fees, aesthetics, shot clocks, and remedies to providers.

In June 2020, another [Declaratory Ruling and Notice of Proposed Rulemaking](#) was issued as part of the FCC's 5G FAST Plan which is a comprehensive strategy to Facilitate America's Superiority in 5G Technology (the 5G FAST Plan). The strategy includes 3 key parts: (1) pushing more spectrum into the marketplace; (2) updating infrastructure policy; and (3) modernizing outdated regulations. The second strategy includes reducing the review process time by state and local governments. .

Specifically, the Declaratory Ruling specifies when a 60-day shot clock for local approval begins and clarifies Section 6409 of the Spectrum Act to enable upgrades on existing macro towers.

The ruling also clarifies how certain aspects of proposed modifications – height increases, equipment cabinet additions, and impact on concealment elements and aesthetic conditions – affect eligibility for streamlined review under Section 6409(a). In addition, the action clarifies that, under the Commission's rules on environmental and historic preservation review, FCC applicants do not need to submit environmental assessments based only on potential impacts to historic properties when parties have entered into a memorandum of agreement to mitigate effects on those properties.

2.2 – COURT ACTIONS – There have been, and continue to be, appeals to the federal courts in response to FCC actions on telecommunications. For a list of appeals in the federal court system on this topic go to: [Archive of Major Court Cases of the FCC](#).

2.3 – INTERSECTION OF TECHNOLOGY AND REGULATION – The whole area of telecommunications regulations is a fast-moving target. As noted above, cell towers are increasingly casting their shadows on a proliferation of newer, smaller, but more numerous distributed antenna systems. (DAS). Small cell site technology known as the Cloud-RAN or C-RAN is a newer technology for providing cell phone service.

The September 2018 FCC Declaratory Ruling and Third Report and Order included various provisions related to small wireless facilities.

3.0 – Chapter 40A, The Zoning Act

3.1 – G.L. c. 40A, § 4, UNIFORMITY REQUIREMENT – Cities and towns have occasionally attempted unsuccessfully to limit the areas within which wireless facilities can be sited in ways which offend the “uniformity” requirement found in G.L. c. 40A, § 4, e.g., by restricting qualifying sites to only “municipally owned land,” or by a specification of parcels divorced from relevant planning considerations.

3.2 – SPOT ZONING – In addition to being cognizant of the uniformity provision of Chapter 40A when zoning for wireless facilities, cities and towns should also be cautious of not adopting zoning in a manner that that would raise “spot zoning” concerns.



THE GUIDEBOOK TO MASSACHUSETTS LAND USE 2021

CHAPTER EIGHT ADMINISTRATION & MEETINGS

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American Planning Association
Massachusetts Chapter

Creating Great Communities for All

Chapter Eight

Administration & Meetings

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Section 8-01

Administration & Meetings

1.0 – Introduction

1.1 – OVERVIEW – This Chapter provides information on topics related to the administration, organization, and operation of board meetings, hearings, and decisions. Topics cover the following:

- Associate (Alternate) Members; Quorums; Voting Requirements
- “Mullin Rule” & Remote Participation
- Meetings, Hearings, & Decisions
- Findings of Fact
- Review Fees & Performance Guarantee
- Rules & Regulations
- Tables – Table 8-A – Due Process, Bias, Conflict of Interest & *Ex Parte* Communications
Table 8-B – Decision Template

This is intended to supplement information on these topics that is found throughout the entire *Guidebook*. The information is provided to assist boards and staff in organizing their meetings and hearings, in managing their meetings and hearings, and in making decisions.

1.2 – STATUTORY REFERENCES – Specific statutory references for topics in this Chapter include the following:

- Associate (or Alternate) Members
 - Planning Board [G.L. c. 40A, § 9](#)
 - Zoning Board [G.L. c. 40A, § 12](#)
- Quorum and Voting Requirements [G.L. c. 40A, §§ 9, 12, 15](#)
- The “Mullin Rule” statute [G.L. 39, § 23D](#)
- Remote Participation [940 CMR 29.10](#)
- Rules & Regulations
 - Special Permit Granting Authority [G.L. c. 40A, § 9](#)
 - Zoning Board of Appeals [G. L. c. 40A, § 12](#)
 - Zoning Board of Appeals [760 CMR 56.05\(1\)](#)
 - Subdivision Rules & Regulations [G.L. c. 41, § 81Q](#)
- Review (Consultant) Fees [G.L. c. 44, § 53G](#)
- Performance Guarantee [G.L. c. 44, § 53G½.](#)

Section 8-02

Associate Members

[GL.

c. 40A, §§ 9, 12]

Quorum & Voting Considerations

[GL. C. 40A, §§ 9, 12, 15]

1.0 - Introduction

1.1 – OVERVIEW – This section covers the subjects of associate board members as well as the board’s quorum and voting requirements.

1.2 – ASSOCIATE MEMBERS – Sometimes referred to as “alternate” members, associate members are intended to be available to substitute for absent members, but only in 3 specific circumstances related to the absentee member. Those circumstances are; 1) conflict of interest, 2) inability to act, and 3) absence. An associate member may also sit in the event of a vacancy on the board.

1.3 – Quorum – In the absence of any other specific statutory or regulatory requirement, the default quorum requirement for boards is a simple majority of the whole board, and, where no other provision of law otherwise requires, a simple majority of the quorum can act.

2.0 – Associate Members

2.1 – PGA/SPGA – [G.L. c. 40A, § 1A](#), defines “Permit Granting Authority” (PGA) as “the board of appeals or zoning administrator,” and “Special Permit Granting Authority” (SPGA) as “the board of selectmen, city council, board of appeals, planning board, or zoning administrator as designated by zoning ordinance or by-law for the issuance of special permits.”

Other sections of the Zoning Act authorize “associate members” for planning and zoning boards as noted in sections 2.2 and 2.3 below.

2.2 – PLANNING BOARD – [G.L. c. 40A, § 9](#), provides the following:

- *Zoning ordinances or by-laws may provide for associate members of a planning board when a planning board has been designated as a special permit granting authority.*
- *One associate member may be authorized when the planning board consists of five members, and two associate members may be authorized when the planning board consists of more than five members.*
- *A city or town which establishes the position of associate member shall determine the procedure for filling such position.*
- *If provision for filling the position of associate member has been made, the chairman of the planning board may designate an associate member to sit on the board for the purposes of acting on a special permit application, in the case of absence, inability to*

act, or conflict of interest, on the part of any member of the planning board or in the event of a vacancy on the board.

2.3 – ZONING BOARD OF APPEALS – [G.L. c. 40A, § 12](#), requires that cities and town, by ordinance or bylaw, shall provide for a “*zoning board of appeals*” consisting of 3 or 5 appointed members “*for terms of such length and so arranged that the term of one member shall expire each year.*”

Vacancies on the board are filled for unexpired terms in the same manner as original appointments. However, “*in case of absence, inability to act or conflict of interest on the part of any member thereof, or in the event of a vacancy on the board until said vacancy is filled,*” and where the zoning ordinance or bylaw provides for the appointment of associate members, that member may be designated to sit in the place of the absent member for a particular meeting or hearing, subject to any constraints that may be applicable under the “Mullin Rule” (See Section 8-03 below).

The statute is silent on the number of associate members that may be appointed to a zoning board of appeals. Designation to sit is made by the board chair.

3.0 – Quorum and Voting Considerations

3.1 – QUORUM PROCEDURES – Once a quorum of the board convenes and commences a hearing – whether the quorum consists of members or a combination of members and designated associate members – the hearing board’s composition is then fixed for the remainder of hearing and the making of the decision. On the other hand, a vacancy on the board might thereafter occur that triggers the need for an associate member to join the panel, who must be someone who has attended all evidentiary sessions of the public hearing.

3.2 – QUORUMS AND ASSOCIATE MEMBERS – A current associate member who was not sitting on a case for the first hearing, and then subsequently was chosen to sit because of an unexpected vacancy, would be able to use the Mullin Rule to review the evidence of the first hearing. However, it is not clear whether it would be possible for an associate member who missed only one evidentiary session prior to being appointed an associate member would qualify to participate on the panel by satisfying the requirements of G.L. c. 39, § 23D (the Mullin Rule). To the best of the authors’ knowledge, as of the date of the *Guidebook*, there is no language in the statute or in a court decision that would settle this question.

3.3 – DESIGNATED ASSOCIATE MEMBERS – Lastly, the statute does not authorize the chair to act as if the members and associate members are a variable pool from which to constitute different panels for the different matters before the board; that is, an associate member may not be designated to sit where a regular member is available to serve.

3.4 – RULE OF NECESSITY – CONFLICT OF INTEREST AND QUORUM PROBLEM – For an elected board – but not an appointed board – where a quorum problem is caused by certain conflicts of interest, the so-called “rule of necessity” may be invoked to constitute the quorum required for the matter.

Those conflicts consist of matters coming before the board involving a member’s own financial interest or that of a partner, an immediate family member, a business organization with which the board member has certain affiliations, or a person or organization with whom the board member is negotiating or has any arrangement concerning future employment. There are other conflicts that may not be relied upon for invoking the rule. Dependence on the rule should always be

discussed with the municipal attorney or the State Ethics Commission.

The Massachusetts State Ethics Commission has ruled that the “rule of necessity” is unavailable to appointed boards, since the Conflict of Interest Law (G.L. c. 286A) has provisions that make it possible for appointed board members with a conflict of interest to participate in the matter at hand by disclosing information related to the situation to their appointing authority. Elected board members have no “appointing authority,” and must depend on the “rule of necessity” to participate.

The rule of necessity is not a law enacted by the Legislature. Rather, it was developed by judges who applied it in their court decisions. It may only be used as a last resort and only when an elected board is legally required to act on a matter but lacks a quorum to act solely due to a board member or members being disqualified by having a qualifying conflict of interest in the matter. Once the rule is invoked, all board members with a qualifying conflict shall once again be able – but are not required – to participate and vote in the matter.

As indicated above, not every conflict qualifies for invoking the rule. For example, if one or more members of an elected board have “appearances” of conflicts of interest that can be cured by making a written disclosure, the member must take advantage of that means of dealing with the conflict, and the rule of necessity may not be invoked. (See [G.L. c. 268A, § 23\(b\)\(3\)](#))

Whenever the rule of necessity is invoked, it must be indicated in the meeting minutes. Each member who participates under the rule of necessity must disclose the facts that created the conflict of interest.

4.0 – Summary Table – Composition, Quorum, & Voting

Subject	Zoning Board	Planning Board
Number of Regular Members	3 or 5 members	5, 7, or 9 members
Number of Associate Members	Any number	1 for 5 member board 2 for 7 and 9 member boards
Default Quorum	Simple majority	Simple majority
Applications where Associate Members may participate, decide, and vote	Special permit Variance Appeals	Special permit only ¹
Special Permit voting requirement	3-member board = unanimous 5-member board = 4	5-member board = 4 7 and 9 member boards = 2/3 7-member board = 5 9-member board = 6
Variance & Appeals voting requirement	3-member board = unanimous 5-member board = 4	N/A

¹ If a municipality has adopted a by-right Site Plan Review procedure, the municipal regulations for that procedure may include the use of associate members by the planning board, as this type of procedure is a function of the local community and not found in G.L. c. 40A.

Section 8-03

The “Mullin Rule” [G.L. c. 39, § 23D] & Remote Participation [940 CMR 29.10]

1.0 – Introduction

1.1 – BACKGROUND – Boards and commissions must satisfy quorum requirements in meeting their responsibilities. There are quorum requirements for holding a meeting, for holding a public hearing, and for taking other action. (See Section 8-02 above for more information on quorums.) Situations can occur that prevent a quorum from being achieved that result in the inability of the body to hold a meeting or hearing, or to act on an application in a timely manner. Examples include:

- Due to illness, vacations, work, or family responsibilities, or for other reasons, a member’s absence results in an inability to meet the quorum requirements for a meeting.
- For similar reasons as above, a board member is unable to attend all the evidentiary sessions of a public hearing on a single application.
- Evidentiary sessions on an application have started prior to the election or appointment of a new member. Under the Open Meeting Law, the new member – having missed the first hearing – would be unable to participate, leaving the board without a quorum to act.

However, this circumstance leaves open the question of whether the new member qualifies for use of the Mullin Rule statute. The authors are unaware of any case law on this point as of the date of the *Guidebook*.

Because of these difficulties, 2 procedures have been approved for use by boards to address quorum issues. These include a local option statute regarding the so-called “Mullin Rule” and the Remote Participation provisions of the Open Meeting Law.

2.0 – The Mullin Rule

2.1 – [G.L. c. 39, § 23D](#) – This statute is widely – but inappropriately – referred to as “the Mullin Rule.” This is a local option statute that allows individual board members to participate in a public hearing and as well as in the decision vote even when not having attended one (but not more than one) of the evidentiary sessions of a public hearing conducted for the review of a land use application or appeal.

The original “rule” was first announced – and later eponymously referred to as the “Mullin Rule” – in [Mullin v. Planning Board of Brewster](#), 17 Mass. App. Ct. 139 (1983). The Appeals Court held that when only 4 of the 7 members of a planning board had attended the special permit hearing and then where 6 members subsequently voted in favor of the special permit application, the board’s decision was not valid.

As originally framed, the Mullin Rule held that a member must have attended all the hearings to

be counted for the quorum and qualified to vote on the decision. Although 6 of 7 members voted to grant the special permit, only 4 of the votes were valid which did not meet the supermajority vote requirement. G.L. c. 39, § 23D – now commonly referred to as the “Mullin Rule” – somewhat remedies the problems that occasionally arise in obtaining a quorum.

2.2 – ADOPTION – The legislative body (e.g., the town meeting, or the city/town council) must accept the provisions of G.L. c. 39, § 23D, “*for 1 or more types of adjudicatory hearings.*” An adjudicatory hearing is a hearing where a determination of rights is being made by the board as distinct from a hearing where a recommendation is made. For example, a special permit hearing is adjudicatory. A planning board hearing to make a recommendation on a proposed zoning amendment is not. Section 23D equips the local legislative body with some flexibility in accepting the statute. It may:

- determine which types of adjudicatory hearings Section 23D may be used for;
- determine which boards may take advantage of the Section 23D when holding adjudicatory hearings; and
- adopt minimum additional requirements for implementing Section 23D.

It would be advisable to discuss with the municipal attorney which hearings of the individual boards are “adjudicatory” in nature that trigger the applicability of Section 23D.

2.3 – PROCEDURES – A board member may miss one session of a public hearing on a pending application. There is no statutory limit on how many members may take advantage of the statute. If a member misses one evidentiary session of the hearing, the member must then do all of the following:

- review all evidence submitted for and at that public hearing, including plans, documents, video or audio, written testimony, and any written notes taken that are to be used for drafting the meeting minutes;
- certify in writing that the evidence of the public hearing has been reviewed, including that the member has listened to or watched the recording, or has read the transcript of the hearing; and
- file a written certification with the record of the hearing.

3.0 – Remote Participation

3.1 – In 2011, the Attorney General announced new regulations ([940 CMR 29.10](#)) under the Open Meeting Law that permit, in certain circumstances, remote meeting participation. The regulations allow the adoption and use of remote participation under the procedures and conditions that are covered in detail in Chapter 2, Section 3.4, of this Guidebook (Good Government Laws).

Section 8-04

Meetings, Hearings, & Decisions

1.0 – Introduction

1.1 – OVERVIEW – This section reviews topics related to meetings, hearings, and decisions by public bodies. It is divided into 3 categories – due process, meetings and hearings, and decisions – each covered separately below. For more information on specific land use permits and procedures, refer to those particular chapters and sections of the Guidebook.

1.2 – BOARD FUNCTION – One of the foremost functions assigned by law to the zoning board and planning board is the processing of land use applications in conformity with all applicable governing federal, state, and local laws and regulations. This process includes the following:

- reviewing the applicant’s submissions;
- noticing and holding a hearing;
- making required findings based on substantial evidence and testimony;
- deliberating on that evidence and making a decision consistent with the findings; and
- producing a written decision that concisely covers the testimony, plans, and deliberations that determined the outcome.

2.0 – Due Process

2.1 – DUE PROCESS – Due process is a feature of constitutional law that accords to an applicant the right to adequate notice, a fair hearing before an unbiased board, and an opportunity to present and rebut evidence. The board is expected to be familiar with the applicable laws and regulations involved, familiar with the scope of its own authority, and fully versed on the procedural history of the matter before it. The use of checklists and templates is recommended to avoid missing something indispensable to the complete record of the case.

2.2 – CONFLICT OF INTEREST – The impartiality of the board presumes that no member has a conflict of interest under [G.L. c. 268A](#) (the Conflict of Interest Law). But this is a minimum expectation. A member would be advised to consider whether to sit on a land use case where circumstances are such that a person might reasonably believe the member to be so predisposed to an outcome that the member’s judgment may be based upon factors beyond the evidence presented.

2.3 – *EX PARTE* COMMUNICATIONS – An *ex parte* communication means an informational exchange outside the public hearing process with someone involved or potentially involved in the matter pending before the board. *Ex parte* communications must be avoided. However, if a board member either has had an *ex parte* communication or otherwise comes into possession of information that bears on the case, this should be disclosed at the public hearing so that the parties have an opportunity to rebut or comment upon it.

2.4 – DUE PROCESS, BIAS, CONFLICT OF INTEREST, AND *EX PARTE* COMMUNICATIONS – See [Table 8-A](#) for a

more expanded discussion of these topics.

3.0 – Meetings & Hearings

3.1 – OVERVIEW – This section reviews several important aspects of meetings and hearings that a board should be aware of and be responsive to in its deliberations.

It is important that boards hold meetings and hearings that not only meet the minimum requirements of the Open Meeting Law and the notice requirements of Chapter 40A and Chapter 41, but that they ensure the meetings and hearings are fair, transparent, and responsive to the public. For land use permits, a “defensible decision” is based in part on the testimony and other evidence and in part on how the board has conducted itself during the public hearing.

3.2 – PUBLIC HEARING DATE LIMITATION – PUBLIC ELECTIONS – A public hearing required by Chapter 40A, § 11, for special permits, variances, and appeals, shall not be held on any day on which a state or municipal election, primary, or caucus is held in the city or town. While there is no similar statutory prohibition on holding other public hearings on election days (e.g., a subdivision plan public hearing), best practice would be to avoid holding any public hearing on an election day.

3.3 – THE QUORUM – A board should be fully aware of the quorum requirements and the quantum of vote required to hold a meeting or hearing or to make a decision. The board should distinguish where necessary between (a) actions needing only a simple or specified majority of those present and voting, from (b) actions requiring a simple or specified majority of the full board without regard to absences or vacancies. (See Section 8-02, 4.0 – Summary Table)

The board acts by a simple majority vote except where state law provides for a different quantum of vote – supermajority, four-fifths, etc. *“In the absence of statutory restriction, the general rule is that a majority of a board or council is a quorum and a majority of the quorum can act.”* [Duddy v. Mankewich](#), 66 Mass. App. Ct. 789, 792, 851 (2006).

3.4 – SITE VISIT – Information obtained from a site visit – sometimes referred to as a “viewing” or “view” – typically qualifies as “evidence”. The visit is not an opportunity for the parties to argue their case or to offer other evidence, but is solely an opportunity for the board members to become familiar with the site.

Although the site visit is itself expressly not a violation of the Open Meeting Law, board members should resist any discussions either among themselves or with any party or member of the public who are at the site visit about what is seen or pointed out as this could result in a claim that the board violated the OML by “deliberating” outside an open meeting of the board.

3.5 – NOTICE TO OTHER BOARDS – Where notice to other boards is prescribed (such as the 45-day notice to the board of health relative to subdivision plans) the board should take full advantage of viewpoints of the other boards as may be helpful in the board’s ultimate decision-making. If for no other reason, networking with other city or town boards and officials demonstrates that the board has exercised due diligence before deciding on a matter before it.

3.6 – CONDUCTING THE PUBLIC HEARING – As for the conduct of the public hearing, the key is to give all interested parties a fair and reasonable time and opportunity to make a full presentation, as well as time and opportunity to rebut the evidence and testimony of others.

Best practice would be for the Chair to begin the hearing with a brief introduction that explains the matter before the board (application, relevant provision of law, etc.). Next, a brief introduction of the parties whose participation in the case can be anticipated. Then an explanation should be given as to the order of testimony and evidence, and to any rules the board expects to follow.

In addition, the physical arrangements in the hearing room should be such that everyone can see and be seen, hear and be heard. All documents and plans introduced at the hearing should be available for all to see and review.

Lastly, it should be made clear that it is the Chair's responsibility to maintain order and decorum, and that all questions and comments are to be directed to the Chair with no cross talk. If disruptive behavior occurs, a short recess or adjournment is preferable to sustained hostilities.

3.7 – EVIDENCE – In weighing the evidence, “substantial evidence” has been variously defined as “*what a reasonable mind might accept as adequate to support a conclusion,*” or “*what a reasonable person would use as a basis for making important decisions.*” While more strict standards of proof may be applicable to other civil and criminal matters, the standard for hearings before boards is more of a “balanced judgment” that is grounded on the testimony and other evidence presented.

3.8 – HEARING CONTINUANCE – The public hearing can often be held and completed on the same day; but the hearing may require several sessions. It is important for officials to know that the time constraints for hearings for land use permits such as special permits, variances, and subdivision plans differ in some respects. In addition, the applicant and the board may agree to extend statutory deadlines such as the 65 day time limit to open the public hearing. The agreement must be written and must be filed with the municipal clerk. Agreements are not required for a board to simply continue a public hearing.

A notice of the continued hearing conforming to the requirements of the Open Meeting Law suffices, as there is no mandatory requirement for additional mailings or publications. A vote to continue a public hearing must include the time, date, and place of the continued hearing.

3.9 – WITHDRAWAL REQUESTS – [G.L. c. 40A, § 16](#), governs requests for withdrawal of any petition for a variance or special permit. There are essentially 4 circumstances that should be considered regarding any such request:

- (1) If the request is made prior to the publication of notice of the public hearing on the request, the withdrawal is a matter of right, and is without prejudice. It would not bar the refilling of the same request at any time thereafter.
- (2) If the request is made after the publication of notice, and the PGA or SPGA approves the withdrawal expressly “without prejudice,” the petition for variance or special permit petition may be brought again at any time thereafter.
- (3) If the request is made after the publication of notice, and the PGA or SPGA approves the withdrawal request “with prejudice,” the 2-year bar from a repetitive petition (See Chapter 4-20 for more information on repetitive petitions.) is triggered and applies; and,
- (4) If the request is made after the publication of notice, and the PGA or SPGA denies the request to withdraw, the matter before the board continues until final action – whether favorable or unfavorable – or until constructive grant.

There is no language in the Zoning Act that provides guidance as to what process the board is to use when it receives a withdrawal request or what process to use when considering this request.

3.10 - CLOSING THE HEARING – When all evidence and testimony has been submitted, and the board is ready to deliberate and decide the matter, it may close the hearing but continue in an open “deliberative” session for discussing the evidence and reaching a decision. Once the hearing is closed, the board may request only clarifying information from the applicant. It may not have an open discussion with the applicant or others or accept new evidence into the record. For this reason, some boards prefer to deliberate prior to closing the hearing.

Once the board is ready to close the hearing, best practice would be to vote to close the public hearing. However, as a practical matter, the hearing would also be closed when the board votes on its decision. The “written decision” must then be filed within 14 days thereafter for special permits and variances. However, if filed later than 14 days but prior to 90 days after the close of the public hearing for a special permit, or prior to 114 days from the filing of a variance or appeals, then the late filing is not fatal.

Any issue arising about closing the hearing or taking additional information from an applicant should be discussed with the municipal attorney. That said, prudence and best practice should discourage unreasonably long intervals between evidentiary sessions and the making of a decision. Although decided under the more stringent provisions of G.L. c. 40B, the SJC in [*Pheasant Ridge Associates Ltd. Partnership v. Town of Burlington*](#), 399 Mass. 771 (1987), noted that even though the ZBA’s decision was made within the 40 days of the last scheduled hearing, the comprehensive permit was constructively granted because the 40-day period is to be calculated from “*the date of the last session at which interested persons presented information and argument*,” citing to [*Milton Commons Assoc. v. Board of Appeals of Milton*](#), 14 Mass. App. Ct. 111 (1982). The Court said that “[t]he date may be even earlier if a board of appeals has not conducted the public hearing expeditiously, scheduling adjourned sessions at reasonable intervals in the circumstances.” Holding a hearing “open” until a later date without supporting reasons evident in the record is problematic. This should be a cautionary tale for zoning and planning boards.

3.11 – REOPENING A PUBLIC HEARING – There are several issues that boards should be aware of regarding the need or desire to reopen a public hearing. Consider the following circumstances in which reopening a public hearing might arise.

3.11.1 – Clerical Errors – A board is not required to reopen a public hearing simply to correct an inadvertent or clerical error. In [*Board of Alderman of Newton v. Maniace*](#) 429 Mass. 726, (1999) the SJC stated that “*The board has the inherent power without holding a further public hearing, to correct an inadvertent or clerical error in its decision so that the record reflects its true intentions.*”

3.11.2 - Additional Information – If the board has closed a public hearing but discovers during its deliberations that it requires additional information prior to making its decision, then the board must reopen the hearing. In doing so, it must meet all the same requirements for posting notice – notice to abutters and others etc. – as required for the original hearing. Generally, a case that is appealed to the courts because a board considered evidence outside of a public hearing will likely be remanded to the board for reconsideration at a duly noticed public hearing. [*Lovaco, Inc. v. Zoning Board of Appeals of Attleboro*](#), 23 Mass. App. Ct. 239 (1986).

3.11.3 – Change in the Decision – If, after making and filing its decision, the board decides that it needs to change the decision in some substantive way, it must then schedule a new public hearing with all of notice requirements of Chapter 40A, Section 11. “*The board may*

not make a substantive amendment which changes the result of an original deliberative decision, or which grants relief different from that originally granted, without compliance with the relevant notice and hearing requirements". [Huntington v. Board of Appeals of the Town of Hadley](#), 12 Mass. App. Ct. 710, 714-715 (1981).

3.12 – THE MULLIN RULE – The board should ascertain if the municipality has accepted the provisions of [G.L. c. 39, § 23D](#), (the “Mullin Rule”) whereby members of designated boards who may have missed one evidentiary session of the hearing can re-qualify to be counted for a quorum and to vote by certifying that all evidence presented at the missed sessions has been reviewed. (See Section 8-03 of the Guidebook for more information on the Mullin Rule.)

3.13 – EXECUTIVE SESSION – For information regarding executive sessions, see Chapter Two, Section 2-02, subsection 4.0.

4.0 – Decisions

4.1 – OVERVIEW – It may be helpful to think of the written decision as the physical mirror image of the relevant elements of the hearing and deliberative process. The written decision should furnish anyone, including possibly a judge on appeal, with a concise summary of the following:

- the application request;
- the evidence presented;
- the board’s ultimate and subsidiary findings of fact based upon that evidence;
- the board’s conclusions of law in which it links the findings it has made to the required elements of the applicable ordinances, bylaws, regulations, and law; and
- the board’s final decision explaining its conclusion and any conditions attached to it.

Perhaps the most important duty of the board is the necessity of boldly declaring what the facts are before going on to reach conclusions on whether, and on what conditions, the applicant will be granted their request.

4.2 – COMPONENTS OF A DECISION – A good written decision is logically organized, objectively written, concise, and composed illustratively of the essential ingredients as follows:

- the authority of the board;
- the administrative history of the case;
- a brief statement of the case;
- specification of the relevant laws or regulations involved in the case;
- a summary of evidence and testimony;
- the board’s findings of relevant facts and conclusions of law;
- the board’s final decision;
- the conditions (if any) attached to that decision; and
- a statement of any right of appeal.

Clear English is preferable to jargon and technical language except where technical language is necessary, in which case it is important that an explanation or definition be provided.

4.3 – FINDINGS – A common mistake made in deciding the matter well and in fashioning a

defensible decision is failure to make – and state – the board’s findings of fact, or by launching an endless recitation of the evidence and testimony as if these were “findings” of the board.

“Findings” are the board’s own conclusions as to what the facts are. While the evidence and testimony of others may serve as the basis for the board’s findings, when the board “finds” something to be a “fact”, it is through sifting and sorting the often conflicting evidence and testimony. A recitation of the evidence and testimony is not a substitute for findings, as it does not explain the board’s reasoning that serves as a basis for reaching its decision or the conditions, if any, the board has imposed. (See Section 8-05 of this Chapter for more information regarding “findings.”)

4.4 – CONDITIONS – The board may decide to approve an application with or without conditions. Whether the conditions are agreed to by the applicant or imposed by the board, they should be spelled out in careful detail to avoid later disputes on the meaning and purpose of them. Conditions must be reasonable in relation to the project and the criteria of the zoning ordinance or bylaw or other regulations and cannot be of a sort that the applicant has no means of satisfying.

Conditions are reasonable to the extent that they address some identifiable deficiency of the project, mitigate the negative impacts of the project, or are otherwise appropriate in satisfying the standards and criteria of applicable law. The board must make the appropriate findings of fact related to the conditions, with explicit cross-reference to the relevant evidence and testimony.

In negotiating with the applicant, the board should not seek to exact concessions – monetary or other – that either have no essential nexus to the project or are disproportionate to the negative impacts. (See Chapter 7, Section 7-02 for more on “Takings”.)

4.5 – STIPULATION – A “stipulation” is an agreement by the parties that a relevant fact will be treated as having been established. For example, a witness of the party appealing the grant of a special permit as an “expert witness” with respect to some technical aspect of the case may, by a stipulation of the parties, testify as an expert without the introduction of evidence to support their professional credentials. “Main Street” may be stipulated to be a “public way” without evidence or testimony in a case in which Main Street’s status as a public way is an element of that case.

Thus, when a party stipulates to something that ordinarily requires testimony or other evidence, the matters stipulated stands on equal footing with matters that enter the record through evidence and testimony. Applicants and the board may not stipulate to the jurisdiction, authority, powers, or duties of the board that conflict with state or local law. Stipulations do not necessarily preclude entering evidence into the record on the matter stipulated, but rather merely dispense with the necessity of producing the evidence otherwise required.

4.6 – SPECIAL PERMIT & VARIANCES DECISION TIMELINE – It bears repeating that while written decisions for special permits and variances both require that the decision be filed with the municipal clerk within 14 days of making the decision, for special permits, that 14th day must be no later than the 90th day from the close of the public hearing. For variances, the 14th day must be no later than 14 days beyond the 100th day following the application date for the variance.

4.7 – DECISION TEMPLATE – See [Table 8-B](#) for a suggested template example that boards might adopt or adapt, either as is or as modified, to guide their decision making for land use permits such as special permits, variances, appeals, site plan review, and subdivisions plans.

Section 8-05

Findings of Fact

1.0 – Introduction

1.1 – BACKGROUND – Planning boards and zoning boards in Massachusetts are called upon to be both judge and jury in matters properly before them.

- As judge, the board must be familiar with the state and local laws and regulations on matters before it, which it must correctly interpret and apply. When the board does this, it can be considered as making “rulings of law,” such as when the board determines that an application is complete or that it has been brought under the right section of the bylaw or ordinance.
- As jury, the board is charged with grounding its decision on facts that it finds to be relevant, persuasive, and true, and to do that it will need evidence and testimony from others.

1.2 – FINDINGS OF FACT – Following prescribed procedures, the board must exercise critical judgment in determining what facts are necessary and appropriate to the matter before it. Then the board must link those facts to the relevant laws and regulations to make a final decision. This might take the form of approving or disapproving something, granting or denying something, endorsing or withholding endorsement of something, waiving or refusing to waive something, or otherwise exercising the authority conferred upon it by state or local law.

2.0 – Required Findings

2.1 – OVERVIEW – Sometimes state and local laws are clear and explicit in mandating that the board make “findings,” or, more accurately, “findings of fact.” On the other hand, and far more frequently, findings are only implicitly necessitated, such as where the authority of the board cannot be exercised without specified findings having first been made. Where an applicant must first be found to have satisfied statutory or bylaw or ordinance conditions, standards, or criteria, someone must make that determination – and that someone is the board.

Whether explicitly or implicitly, findings are vital to the work of the board. A much longer list of required findings should be found in local ordinances and bylaws rather than state statutes.

Most required findings are of the “implicit” variety, where, for example, what an applicant seeks is conditioned on having first satisfied certain statutory or local ordinance or bylaw criteria or standards – a determination (or “finding”) of the ultimate facts that must be established for the board to exercise its authority with respect to the application pending.

2.2 – G.L. CHAPTER 40A, THE ZONING ACT “FINDINGS” – Explicit statutory mandates for “findings” employing some variation of the word “find” occur in at least 6 sections of the Zoning Act. These are listed below.

2.2.1 – Nonconformities – [G.L. c. 40A, § 6](#), states that “*pre-existing nonconforming structures or uses may be extended or altered, provided, that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority or by the special permit granting authority designated by ordinance or by-law that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood.*” (Emphasis added.)

2.2.2 – Special Permits – Multi-family Residential in a Nonresidential Zone – In [G.L. c. 40A, § 9](#), special permits for multi-family residential uses in nonresidentially zoned areas are subject to the condition that “*the public good would be served and only served*” and only may be granted “*after a finding by the special permit granting authority, that such nonresidentially zoned area would not be adversely affected by such a residential use, and that permitted uses in such a zone are not noxious to a multi-family use.*” (Emphasis added.)

2.2.3 – Special Permits – Accessory Uses to Research & Development Uses – Section 9, also permits accessory uses to research and development uses upon the issuance of a special permit where the SPGA finds “*that the proposed accessory use does not substantially derogate from the public good.*” (Emphasis added.)

2.2.4 – Special Permits – Research & Development Uses in Non-Residential Zoning Districts – Finally, Section 9, also permits local zoning ordinances and bylaws to include language allowing research and development uses in non-residentially zoned districts upon the issuance of a special permit where the SPGA finds “*that the uses do not substantially derogate from the public good.*” (Emphasis added.)

2.2.5 – Variances – In [G.L. c. 40A, § 10](#), variances require that the permit granting authority “finds that owing to circumstances relating to the soil conditions, shape, or topography of such land or structures and especially affecting such land or structures but not affecting generally the zoning district in which it is located, a literal enforcement of the provisions of the ordinance or by-law would involve substantial hardship, financial or otherwise, to the petitioner or appellant, and that desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of such ordinance or by-law.” (Emphasis added.)

2.2.6 – Repetitive Petition – In [G.L. 40A, § 16](#), any appeal, application or petition which has been unfavorably and finally acted upon by the special permit granting authority or permit granting authority may not be favorably acted upon within 2 years after the date of final unfavorable action “*unless the PGA or SPGA finds specific and material changes in the conditions upon which the previous unfavorable action was based . . .*.” (Emphasis added.)

2.3 – SUBDIVISION CONTROL LAW “FINDINGS” – Explicit statutory mandates for “findings” employing some variation of the word “find” occurs in at least 2 sections of the Subdivision Control Act. They are:

2.3.1 – Approval Not Required (ANR) Plan – In [G.L. c. 41, § 81P](#), endorsement by the planning board of the ANR plan is mandatory “*if the board finds that the plan does not require such approval.*” (Emphasis added.)

2.3.2 – Definitive Subdivision Plan – Board of Health – Although [G.L. c. 41, § 81U](#), includes

an explicit mandate for “findings,” it is the board of health that is directed that *“in the event of disapproval, it shall make specific findings as to which, if any, areas shown on such plan cannot be used for building sites without injury to the public health, and include such specific findings and the reasons therefor in [its] report”* to the planning board. (Emphasis added.)

2.4 – DISTINCTIONS REGARDING FINDINGS – There is a distinction between:

- a finding that compels the board to take some action such as where endorsed approval of an ANR plan is required if the board makes a finding that the plan does not show a subdivision; and,
- a finding that equips the board with discretion to take an action if certain findings are made, but does not compel such action (as with special permits and variances). There are, however, limits on the board’s exercise of discretion, and a discretionary decision that is subject to judicial review runs the risk of being set aside in the face of a conflict between the decision and the evidence.

3.0 – Findings – Special Permits & Variances

3.1 – SPECIAL PERMIT – OVERVIEW – Perhaps the most familiar situation in which a special permit granting authority is called upon to make findings is with an application for a special permit, governed both by [G.L. c. 40A, § 9](#), of the Zoning Act and, typically, by assorted sections of the local zoning ordinance or bylaw.

A “special permit” is defined by Section 9 as a type of use *“which shall only be permitted in specified districts”* and *“only for uses in harmony with the general purpose and intent”* of the ordinance or bylaw. Special permits must be *“subject to general or specific provisions”* set forth in the ordinance and bylaw, and subject also to *“conditions, safeguards and limitations on time or use”* to be determined by the board. A finding that a proposed use is “in harmony with the general purpose and intent” of the ordinance or bylaw is an ultimate finding of fact that in turn depends on subsidiary findings of fact; that is, the facts the board finds to be based on credible evidence that are both relevant and true and that substantively support the ultimate finding of “harmony.”

3.2 – SPECIAL PERMIT – LOCAL ZONING STANDARDS & FINDINGS – A typical bylaw or ordinance might, for example, require that, in addition to the “harmony” prescribed by statute, the board shall review a proposed use for any substantial impact upon traffic, utility systems, surrounding properties, and character of the neighborhood or city or town. In this instance, “harmony” is re-stated with a specificity not found in Section 9 of the Zoning Act. Local zoning typically includes specific criteria applicable to special permit uses that require the board, as fact finder, to make an assortment of general ultimate findings that must in turn be supported by subsidiary findings.

For example, local zoning might provide the following review criteria:

- the use is compatible with existing uses in the district;
- the use does not pose a substantial inconvenience or hazard to abutters;
- the use protects adjoining properties from detrimental or offensive impacts related to water, noise, dust, vibration, lights, and visual impacts, etc.;
- the use provides convenient and safe auto and pedestrian movement on and off the site;
- the use has adequate landscaping for screening purposes; etc.

Each of the forgoing findings can only be made if the board is provided with testimony, plans, or other evidence to support them. The board will be the judge of whether the evidence, plans, or testimony is both (1) relevant to the ultimate findings the board must make, and (2) accurate and true.

Evidence submitted can be true (trustworthy) but not relevant to the pending application; similarly, evidence submitted can be entirely relevant but not true (i.e., untrustworthy).

A written decision that does no more than restate what others have said or what they believe to be relevant and true does not amount to “findings” of the board. The board must make its own declaration of what the facts are, citing in support of that declaration the evidence and testimony that the board accepts as true and relevant.

To the extent that the ordinance or bylaw contains special provisions that govern uses within specific districts, any special permit issued by the SPGA must be understood to be governed by those provisions. The board must match the proposed use with the requirements of the bylaw or ordinance, and may grant the special permit only if it finds the proposed use meets those requirements. This is more a ruling of law rather than a finding of fact.

3.3 – SPECIAL PERMIT – DENIAL – However, a denial of a special permit does not strictly require detailed findings. If the SPGA has stated a permissible reason for the denial, courts are likely to uphold the denial. *“Refusal to grant a special permit does not require detailed findings.”* [*MacGibbon v. Board of Appeals of Duxbury*](#), 369 Mass. 512, 515 (1976). This case should not be interpreted as exempting the board from having to state a basic explanation for its decision.

3.4 – VARIANCE - In the case of a variance ([G.L. c. 40A, § 10](#)), the statute requires the PGA to make 3 ultimate findings of fact, but does not compel the granting of the variance even if all 3 findings are made. They are:

- to make an ultimate finding of fact identifying specifically those *“circumstances relating to the soil conditions, shape, or topography of such land or structures and especially affecting such land or structures but not affecting generally the zoning district,”*
- to make an ultimate finding of fact that *“a literal enforcement of the provisions of the ordinance or by-law would involve substantial hardship, financial or otherwise,”*
- to make an ultimate finding of fact *“that desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of such ordinance or by-law.”*

The board must make all 3 of these required findings if it intends to grant the variance. Each of these ultimate findings of fact must be grounded on subsidiary findings of fact that serve as substantive evidentiary support for the ultimate finding. If, even upon having made all 3 findings, the board decides not to grant the variance, it should provide a basic explanation of how it reached that conclusion.

4.0 – Court Decisions on Findings

4.1 – COURT DECISION EXAMPLES – The following cases provide further guidance for local boards regarding the issue of findings.

4.1.1 – Sufficient Findings – In [Wolfson v. Sun Oil Co.](#), 357 Mass. App. Ct. 87, 89 (1970), the Court held that a city zoning board of appeals did not make findings sufficient to demonstrate substantial hardship for a variance to permit a service station to build an inspection bay.

The board’s “findings” merely repeated language contained in the statute. The Court found that the possible hardship that would be suffered if the variance were to be denied did not relate to locus, but rather to preclusion of the service station owner’s competitive and economic advantage, and that the board’s decision permitting the variance was invalid. Specific findings necessary to satisfy requirements for granting a variance are not met by a mere repetition of statutory words.

4.1.2 – Substantial Evidence – The standard of proof required of a zoning board or planning board lies well below that for criminal cases (beyond a reasonable doubt), and civil cases (by a preponderance of the evidence), but lies within the more relaxed realm of needing only to be supported by “substantial evidence”. In the following excerpt from a Land Court decision ([Lydon v. Town of Milton Board of Appeals](#), 20 LCR 251, MISC 09-399701 (2012)) the Land Court judge’s comments on this point are very informative:

Plaintiff cites several cases in which zoning authorities failed to make sufficient findings for their decisions; however, precedent is clear that zoning decisions may be upheld despite “meager” findings. (See e.g. [Josephs v. Bd. of Appeals of Brookline](#), 362 Mass. 290, 293 (1972) - (decision to grant variance upheld even though findings were characterized as “meager”); [Sherman v. Bd. of Appeals of Worcester](#), 354 Mass. 133, 133 (1968) (“The board of appeals, after somewhat meager subsidiary findings, made the necessary findings to meet the statutory requirements.”). See also [Davis v. Zoning Bd. of Chatham](#), 52 Mass. App. Ct. 349, 356 n. 11 (2001) (“Judicial deference appears especially appropriate as to decisions ... which reflect the intimate knowledge, experience, and judgment of local officials.”). Plaintiff is correct that the ZBA may not have used the phrase “we find that” or words to that effect, but such words are not necessary because Special Permit 4 contains implied findings that show the criteria and evidence the ZBA considered. For comparison see, [Pierce v. Bd. of Appeals of Carver](#), 2 Mass. App. Ct. 5, 6–7 (1974) (zoning board’s failure to make “a finding, express or implied” that was “essential to the validity of the board’s decision” meant that the decision had to be annulled”).

4.1.3 – Adequate Findings – In [Brackett v. Board of Appeal of Boston](#), 311 Mass. 52, 54 (1942), the Court held that “minute recitals may not be necessary, but there must be a definite statement of rational causes and motives, founded upon adequate findings.” See also [Prusik v. Board of Appeal of Boston](#), 262 Mass. 451, 457, 458 (1928).

Section 8-06

Review Fees & Performance Security

[G.L. c. 44, § 53G and G.L. c. 44, § 53G½]

1.0 – Review Fees

1.1 – OVERVIEW – By default, except for funds specifically created by the General Court (State Legislature) funds received by a city or town go into the municipality’s “general fund” and may be used only in accordance with the appropriations adopted by the municipality’s legislative body. ([G.L. c. 44, § 53](#))

As originally approved by the Legislature, review (or consultant) fees under [G.L. c. 44, § 53G](#), authorized only certain boards acting under specified sections of the General Laws to adopt rules and regulations whereby reasonable fees may be assessed for the employment of consultants. The statute does not automatically equip the board to assess the fees; the board also must adopt regulations to do so.

1.2 – AUTHORIZED BOARDS/COMMISSIONS/OFFICER – On August 9, 2016, the Legislature approved [Chapter 218, Acts of 2016](#) Section 91, which modified the existing review fee statute. This amendment expanded the use of funds for review fees to any municipal officer or board with permitting or licensing authority. As in the original statute, the municipal board or officer must adopt regulations to implement the fees. This Legislature Act took effect on November 7, 2016.

A board, commission, or officer is authorized to both establish a special account (sometimes referred to as “escrow”) for the deposit of the fees collected and to draw upon that account to pay the reasonable fees of consultants who assist in the review of projects.

1.3 – REASONABLE FEES – The statute expressly equips the board or municipal officer to impose “reasonable fees” in accordance with regulations adopted by the board or officer. The statute does not prescribe the fee, nor does it specify the timing, number, or frequency of the fee, only that it be received, retained, expended, and refunded in accordance with the statute. Municipal attorneys and the Department of Revenue are of the view that it would be reasonable, and consistent with Section 53G, for such regulations to require an initially smaller fee that must be periodically replenished as necessary during the progress of the matter for which they were imposed.

1.4 – USE OF FEES – The funds from the account are properly limited to a review of technical aspects of a specific pending application as distinguished from on-going independent professional services. Consultants may include, but are not limited to, the following:

- acoustical engineer
- architect
- attorney
- civil engineer
- historic preservationist
- hydro geologist
- landscape architect
- planner
- soil scientist
- traffic engineer
- urban designer
- wetland botanist

2.0 – Adoption, Regulations, & Procedures

2.1 – ADOPTION: RULES & REGULATIONS – Implementation of [G.L. c. 44, § 53G](#), is by the individual board's or officer's adoption of rules & regulations governing the procedures for the use of review fees.

2.2 – FEE ACCOUNT – A review fee account shall be established by the municipal treasurer in the municipal treasury and shall be kept separate and apart from other monies. All review fees shall be deposited in a special account. The special account, with any accrued interest, shall be expended at the direction of the board or officer without further appropriation. Such funds are to be expended by the board or officer only to carry out its responsibilities under this law.

2.3 – ANNUAL REPORT – The municipal accountant shall annually submit a report of the review fee account to the chief elected body and chief administrative officer. This report shall be printed in the annual city or town report. The municipal accountant shall also submit this report annually to the director of the Bureau of Accounts in the Massachusetts Department of Revenue.

2.4 – EXCESS FEE AMOUNT – Any excess amount in the account attributable to a specific project, including any accrued interest, shall be repaid to the applicant or to the applicant's successors in interest at the completion of the project.

2.5 – FINAL REPORT – A final report of the account shall be made to the applicant.

3.0 – Consultant Selection

3.1 – CONSULTANT QUALIFICATIONS – The minimum qualifications for consultants to be hired under this provision is that they have an educational degree related to the field for which they are being hired or that they have 3 or more years of practice in the field of issue or a related field. Of course, the consultant must be an "outside" consultant; the fee assessed is not available to underwrite the compensation of municipal employees who perform the review.

3.2 – ADMINISTRATIVE APPEAL – The adopted rules shall provide for an administrative appeal process regarding the consultant selection. The appeal must be taken to either the city council or board of selectmen. The grounds for an appeal shall be limited to claims that the selected consultant either has a conflict of interest or does not have the minimum required qualifications noted in 3.1 above.

If the city council or board of selectmen does not act within one month of the filing of the appeal, then the selection made by the board shall stand.

3.3 – APPLICATION REVIEW TIME LIMIT EXTENSION – The required time limits for action upon an application shall be extended by the duration of the administrative appeal process.

4.0 – Performance Guarantee

4.1 – OVERVIEW – On August 9, 2016, the Legislature approved [Chapter 218, Acts of 2016](#) Section 92, which added a new section, [G.L. c. 44, § 53G½](#), "*Special account for deposits to secure the performance of an obligation by an applicant for a license or permit.*". This amendment stipulated that cities and towns may,

. . . by bylaw, ordinance, rule, regulation or contract, provide for the deposit of cash, bonds, negotiable securities, sureties or other financial guarantees to secure the performance of any obligation by an applicant as a condition of a license, permit or other approval or authorization.

The monies or other security received may be deposited in a special account. This Legislature Act took effect on November 7, 2016.

4.2 – REGULATORY REQUIREMENTS – The local bylaw, ordinance, rule, regulation, or contract shall specify the following:

- the type of financial guarantees required;
- the treatment of investment earnings, if any;
- the performance required and standards for determining satisfactory completion or default;
- the procedures the applicant must follow to obtain a return of the monies or other security;
- the use of the monies in the account upon default; and
- any other conditions or other rules as the city or town determines are reasonable to ensure compliance with the obligations.

4.3 – ACCOUNT REQUIREMENTS – This type of account must be established by the municipal treasurer in the municipal treasury. It shall be kept separate from other monies. The funds in the account may be spent by the authorized board, commission, department, or officer, without further appropriation, to complete the work, or to satisfy the obligations of the approval, license, or permit.

4.4 – SUBDIVISION PLAN OBLIGATIONS – G.L. c. 44, § 53G½, shall not apply to any financial guarantee received by a city or town under G.L. c. 41, § 81U, Definitive Subdivision Plan Performance Guaranty.

4.5 – OTHER OBLIGATIONS – G.L. c. 44, § 53G½, shall also not apply to any other general or special law regarding performance guarantees.

Section 8-07

Rules & Regulations

1.0 – Introduction

1.1 – OVERVIEW – Rules & regulations, sometimes required by statute, can be of great assistance in both making the permitting process more efficient and the board meetings more productive and effective. Beyond the statutory requirements, boards should have adopted rules & regulations governing, at a minimum, their operation, administration, and procedures.

2.0 – Statutory Requirements

2.1 – STATUTORY REQUIREMENTS – There are several statutory requirements and circumstances under which a board is required to adopt rules and regulations. These include:

- [G.L. c. 40A, § 9](#) Special Permit Granting Authority
- [G. L. c. 40A, § 12](#) Zoning Board of Appeals
- [760 CMR 56.05\(1\)](#) Zoning Board of Appeals
- [G.L. c. 41, § 81Q](#) Subdivision Rules & Regulations
- [G.L. c. 44, § 53G](#) Review Fees
- [G.L. c. 44, § 53G½](#) Performance Guarantee

2.2 – ZONING BOARD OF APPEALS – There are 5 circumstances in the statutes that require the board of appeals to adopt rules and regulations. These are:

- (1) Conduct of Business – They are required for the conduct of the business of the zoning board of appeals. [G. L. c. 40A, § 12](#), requires that *“The board of appeals shall adopt rules, not inconsistent with the provisions of the zoning ordinance/by-law, for the conduct of its business and for purposes of this chapter and shall file a copy of said rules with the city or town clerk.”*
- (2) Special Permit Granting Authority – If a zoning board of appeals is the special permit granting authority (SPGA), then [G.L. c. 40A, § 9](#), requires that the SPGA adopt rules relative to the issuance of special permits. The rules shall set forth the procedures and forms required for special permit applications. They shall also be filed with the municipal clerk.
- (3) Chapter 40B – If the zoning board of appeals receives an application for affordable housing filed under Chapter 40B, the ZBA shall adopt rules, not inconsistent with [G.L. c. 40B, §§ 20 - 23](#), for the conduct of its business and file a copy of those rules with the municipal clerk. The rules shall be consistent with the purpose of providing a streamlined permitting process that overcomes regulatory barriers to the development of low or moderate income housing.

Rules adopted by a board shall be presumed consistent with 40B to the extent that they conform to [760 CMR 56.05\(1\)](#) and are consistent with the comprehensive permit statute ([G.L. c. 40B, §§ 20 - 23](#)). A board may seek non-binding advice from DHCD as to whether a

proposed set of local rules is consistent with the statute and the regulations. If a board does not adopt and file rules, it shall by default conduct business pursuant to 760 CMR 56.05.

- (4) Review Fees – If the zoning board wishes to adopt review fees for the employment of outside consultants under [G.L. c. 44, § 53G](#), it may do so only by adopting rules and regulations for the imposition of reasonable fees in accordance with the statute.
- (5) Performance Guarantee – If the zoning board wishes to require the deposit of cash, bond, securities, sureties, or other financial guarantee to secure the performance of an obligation as a condition of a permit under [G.L. c. 44, § 53G½](#), it may do so only by adopting rules and regulations for the creation of this procedure. Note that the municipality may also amend its zoning ordinance or bylaw to adopt this procedure.

2.3 – PLANNING BOARD – There is no equivalent to G.L. c. 40A, § 12, (applicable to zoning boards of appeal) for the planning board. However, the planning board must adopt rules and regulations under the following 4 circumstances:

- (1) Special Permit Granting Authority – If a planning board is the special permit granting authority (SPGA), then [G.L. c. 40A, § 9](#), requires that the SPGA to adopt rules relative to the issuance of special permits. The rules shall stipulate the procedures and forms required for special permit applications. They shall also be filed with the municipal clerk.
- (2) Review Fees – If the planning board wishes to adopt review fees for the employment of outside consultants under [G.L. c. 44, § 53G](#), it may do so only by adopting rules and regulations for the imposition of reasonable fees in accordance with the statute.
- (3) Performance Guarantee – If the planning board wishes to require the deposit of cash, bond, securities, sureties, or other financial guarantee to secure the performance of an obligation as a condition of a permit under [G.L. c. 44, § 53G½](#), it may do so only by adopting rules and regulations for the creation of this procedure. Note that the municipality may also amend its zoning ordinance or bylaw to adopt this procedure.
- (4) Subdivision Rules and Regulations – If a city or town has accepted the Subdivision Control Law, the planning board is required to adopt rules and regulations for the subdivision of land. The statutory authority for adopting subdivision rules and regulations and the details regarding those rules can be found in [G.L. c. 41, § 81Q](#). (See Chapter 5, Section 5-10 for more information about subdivision rules and regulations.) The rules and regulations are intended to carry out the purposes of the Subdivision Control Law as set forth in [G.L. c. 41, § 81M](#), and may not be inconsistent with those purposes; nor may the rules and regulations extend beyond those areas of regulation authorized under the Subdivision Control Law.

The planning board is required to hold a public hearing prior to adopting or amending the subdivision rules and regulations. A notice of the public hearing, including the time, place and subject matter of the hearing, shall be published in a newspaper of general circulation in each of 2 successive weeks, the first publication to be not less than 14 days before the

day of the hearing. A simple majority of a quorum of the planning board may vote to adopt or amend the subdivision rules and regulations.

3.0 – Administrative Rules and Regulations

3.1 – OVERVIEW – Boards should adopt a good set of rules and regulations governing, at a minimum, their operation, administration, and procedures. A set of rules and regulations should be comprehensive and should be reviewed and updated from time to time.

3.2 – TOPICS – Each individual board should decide what the most important topics are to be included in its rules and regulations. Listed below are several topics commonly found in administrative rules and regulations.

- organization of the board
- election and functions of the board officers
- role of the chair
- appointments
- meeting procedures, conduct, schedules, agendas etc.
- rules of order
- recording of meetings, cable TV procedures
- writing of decisions
- liaisons with other boards and staff
- fee schedules
- application form and submission requirements
- site plan review, special permits, and other application procedures
- code of conduct/ethics
- other matters relating to board functions

Section 8-08

Tables

Table 8-A	
Due Process, Bias, Conflict of Interest, Ex Parte Communications	
<i>(Return to 8-04, § 2.4) (Return to Table of Contents)</i>	
Due Process	
Procedural Due Process ("PDP")	• Core concept – To ensure that government acts in a fundamentally fair, transparent, and reasonable manner in making decisions that affect individuals, by means of a fair and open process
PDP Defined	• <i>"No person shall . . . be deprived of property without due process of law."</i> • <i>"Nor shall any state deprive any person of life, liberty, or property without due process of law."</i> ("Due process" clause of the United States Constitution)
Elements of PDP	• adequate notice • an unbiased decision maker • avoidance of <i>ex parte</i> contacts • an opportunity to be heard • the right to present evidence • prompt decision making • a record of the proceedings • a written decision based upon the record and supported by reasons and findings of fact
Substantive Due Process Distinguished	• This ensures that laws, rules, and regulations imposed by the government rationally and reasonably advance a legitimate public purpose. (Substantive Due Process is beyond the scope of this Guidebook)
Adjudicative vs. Legislative	• Adjudicative (hearings) – Due Process requires detailed notice, hearing, participation, and action in conformity with the criteria established by law or regulation. • Legislative (laws and regulations) – Due Process may or may not require detailed notice, hearing, or participation when establishing policies and criteria, unless otherwise required by law.
Minimum Requirements	• State and local laws and regulations can accord more than the minimums required by the constitutions of the Commonwealth of Massachusetts and the United States.
Due Process and Findings	• Due Process requires that findings of fact be made based upon the evidence presented during the case review and by assessing the credibility of witnesses.
The Decision	• Distills the facts found, articulates assumptions, and clearly describes how facts and assumptions apply to the legal requirements of the laws and regulations.

Table 8-A

Due Process, Bias, Conflict of Interest, *Ex Parte* Communications

Conflict of Interest	
Conflict of Interest	• G.L. c. 268A (the Conflict of Interest Law) • Your own or a family member's personal interest in the matter. • Consult with legal counsel or Ethics Commission if questions arise. • Recess if questions arise during hearing. • Recuse yourself if you have conflict.
Bias	
Bias	• Whether positive or negative, it exists when you are so predisposed to a matter before you that you cannot reasonably be expected to adjudicate the matter in a fair and impartial manner. • Impartiality is required. • Do not form an opinion about the case or to have expressed any opinion or taken a position on the matter at hand prior to the hearing. • Be diligent in avoiding any prior investigation, communication, or other pre-hearing actions that might later be said to have influenced your decision. Your decision must be based solely on the record. • Ask yourself – Is the matter that is before the Board something I have bias for or against before I hear any evidence in my capacity as a board member?
<i>Ex parte</i> Communications	
<i>Ex parte</i> Communication	• If general information is brought to your attention, or if someone approaches you with information to discuss a matter that will be, or is, before your board, consider stating something to the effect: <i>"These are serious issues that will be thoroughly, carefully, and fairly examined at a hearing. If you have something to say, come to the hearing and ask to be heard. Or submit written testimony expressing your viewpoint."</i> • Any information that has inadvertently come to your attention should be disclosed at the hearing so that either party will have an opportunity to comment, respond, or introduce evidence relating to it. In addition, you as a board member can pose questions at the hearing relating to it.

Table 8-B Decision Template

[\(Return to 8-4, § 4.7\)](#) [\(Return to Table of Contents\)](#)

Heading	• “Podunk Zoning Board of Appeals” and any application identifiers.
Caption of Case & Application Number	• “Application for Special Permit under § xxx of the Podunk Zoning Bylaw”.
ID or Unique Alphanumeric Identifier	• Case number or designation.
Identification of Applicant	• Name, address, of owner and/or applicant.
Applicant’s Attorney and/or Other Representatives	• Identifying information and role in the proceedings.
The Application	• Include a concise statement of what the applicant is requesting and relevant provisions of laws or regulations.
Procedural History	• Cross-reference to the appropriate parts of the record; notices, official reports, etc., including dates. • Include specific reference to the relevant provisions of laws and regulations relating to the matter at hand. • Print and mark those provisions as Exhibits in the case, and in an Appendix to the Decision.
Dates of the Hearings(s)	• Date the hearing convened and of any continued hearing sessions.
Identification of Persons and/or Property Involved	• Include a brief description, with reference to the record for source of information.
Summary of the Evidence	• A brief, concise statement of the record. (evidence) ○ Witnesses ○ Exhibits ○ Stipulations ○ Site Visit – A site visit is not an occasion to advocate or argue the case, but merely to “point out” things that are to be discussed in detail at the hearing itself; e.g., “Notice this; notice that;” etc.
Findings of Fact – (See Section 8-05 of this Chapter for More Information on “Findings”)	• “Findings” are required for every required factual element of the requested relief or permit. • Suggested board language - <i>“Based on the testimony, exhibits, and evidence presented at the hearing and the reasonable inferences to be drawn therefrom, the board makes the following findings of fact:”</i> • List by number the findings of fact that are necessary to render a decision. • Cross-reference all findings of fact to the applicable provisions of the relevant laws and regulations. • Ensure your findings address each of the elements of the relevant laws and regulations.

**Table 8-B
Decision Template**

Conditions – Board’s explanation of its decision to include identified conditions	• Suggested board language – <i>“Based on the testimony, exhibits, and evidence presented at the hearing and the reasonable inferences drawn therefrom, the board adopts the following conditions as part of this decision:”</i> • List by number the conditions that are necessary to address the concerns of the Board. • Cross-reference each condition to the applicable provisions of the relevant laws and regulations.
Right of Appeal	• Include a clear and concise statement of the avenues of appeal from the decision, including relevant deadlines and other pre-conditions to appeal if any.
Vote of the Board	• Provide the vote of the board. A split vote should identify which members voted yea, nay, or abstained and their specific reasons for voting in that manner.
Date of Decision	• The date of the board’s final decision explaining its decisions and any conditions attached to it.



THE GUIDEBOOK TO MASSACHUSETTS LAND USE 2021

APPENDIX

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American Planning Association
Massachusetts Chapter

Creating Great Communities for All

Appendix

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Appendix A

Article 89 of the Articles of Amendment to the Massachusetts Constitution – Home Rule Amendment

1.0 – Introduction

The power to zone is grounded in the 1966 Home Rule Amendment - Article 89 of the Articles of Amendment to the Massachusetts Constitution - and is implemented as part of the municipality's "police power." *Section 6. Governmental Powers of Cities and Towns* is the specific section where the language related to municipal powers is found.

The police power provides the authority of government to protect the public's health, safety, and welfare, and zoning is included as one of those protections. Zoning by its very nature exercises that authority by, in part, imposing restrictions on what the owners of property may do with their land and buildings.

2.0 – Article 89 – Home Rule Amendment

Article II (2) of the Articles of Amendment to the Constitution of the Commonwealth, as amended by Article LXX (70) of said Articles of Amendment, is hereby annulled and the following is adopted in place thereof:

Section 1. Right of Local Self-Government.

It is the intention of this article to reaffirm the customary and traditional liberties of the people with respect to the conduct of their local government, and to grant and confirm to the people of every city and town the right of self-government in local matters, subject to the provisions of this article and to such standards and requirements as the general court may establish by law in accordance with the provisions of this article.

Section 2. Local Power to Adopt, Revise or Amend Charters.

Any city or town shall have the power to adopt or revise a charter or to amend its existing charter through the procedures set forth in sections three and four. The provisions of any adopted or revised charter or any charter amendment shall not be inconsistent with the constitution or any laws enacted by the general court in conformity with the powers reserved to the general court by section eight. No town of fewer than twelve thousand inhabitants shall adopt a city form of government, and no town of fewer than six thousand inhabitants shall adopt a form of government providing for a town meeting limited to such inhabitants of the town as may be elected to meet, deliberate, act and vote in the exercise of the corporate powers of the town.

Section 3. Procedure For Adoption or Revision of a Charter by a City or Town.

Every city and town shall have the power to adopt or revise a charter in the following manner:

A petition for the adoption or revision of a charter shall be signed by at least fifteen per cent of the number of legal voters residing in such city or town at the preceding state election. Whenever such a petition is filed with the board of registrars of voters of any city or town, the board shall within ten days of its receipt determine the sufficiency and validity of the signatures and certify the results to the city council of the city or board of selectmen of the town, as the case may be. As used in this section, the phrase "board of registrars of voters" shall include any local authority of different designation which performs the duties of such registrars, and the phrase "city council of the city or board of selectmen of the town" shall include local authorities of different designation performing the duties of such council or board. Objections to the sufficiency and validity of the signatures on any such petition as certified by the board of registrars of voters shall be made in the same manner as provided by law for objections to nominations for city or town offices, as the case may be.

Within thirty days of receipt of certification of the board of registrars of voters that a petition contains sufficient valid signatures, the city council of the city or board of selectmen of the town shall by order provide for submitting to the voters of the city or town the question of adopting or revising a charter, and for the nomination and election of a charter commission.

If the city or town has not previously adopted a charter pursuant to this section, the question submitted to the voters shall be: "Shall a commission be elected to frame a charter for (name of city or town)?" If the city or town has previously adopted a charter pursuant to this section, the question submitted to the voters shall be: "Shall a commission be elected to revise the charter of (name of city or town)?"

The charter commission shall consist of nine voters of the city or town, who shall be elected at large without party or political designation at the city or town election next held at least sixty days after the order of the city council of the city or board of selectmen of the town. The names of candidates for such commission shall be listed alphabetically on the ballot used at such election. Each voter may vote for nine candidates.

The vote on the question submitted and the election of the charter commission shall take place at the same time. If the vote on the question submitted is in the affirmative, the nine candidates receiving the highest number of votes shall be declared elected.

Within [ten months] after the election of the members of the charter commission, said commission shall submit the charter or revised charter to the city council of the city or the board of selectmen of the town, and such council or board shall provide for publication of the charter and for its submission to the voters of the city or town at the next city or town election held at least two months after such submission by the charter commission. If the charter or revised charter is approved by a majority of the voters of the city or town voting thereon, it shall become effective upon the date fixed in the charter. [See Amendments, Art. CXIII (113)].

Section 4. Procedure For Amendment of a Charter by a City or Town.

Every city and town shall have the power to amend its charter in the following manner:

The legislative body of a city or town may, by a two-thirds vote, propose amendments to the charter of the city or town; provided, that [1] amendments of a city charter may be proposed only with the concurrence of the mayor in every city that has a mayor, and [2] any change in a charter relating in any way to the composition, mode of election or appointment, or terms of office of the legislative body, the mayor or city manager or the board of selectmen or town manager shall be made only by the procedure of charter revision set forth in section three. All proposed charter amendments shall be published and submitted for approval in the same manner as provided for adoption or revision of a charter.

Section 5. Recording of Charters and Charter Amendments.

Duplicate certificates shall be prepared setting forth any charter that has been adopted or revised and any charter amendments approved, and shall be signed by the city or town clerk. One such certificate shall be deposited in the office of the secretary of the commonwealth and the other shall be recorded in the records of the city or town and deposited among its archives. All courts may take judicial notice of charters and charter amendments of cities and towns.

Section 6. Governmental Powers of Cities and Towns.

Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by section eight, and which is not denied, either expressly or by clear implication, to the city or town by its charter. This section shall apply to every city and town, whether or not it has adopted a charter pursuant to section three.

Section 7. Limitations on Local Powers.

Nothing in this article shall be deemed to grant to any city or town the power to (1) regulate elections other than those prescribed by sections three and four; (2) to levy, assess and collect taxes; (3) to borrow money or pledge the credit of the city or town; (4) to dispose of park land; (5) to enact private or civil law governing civil relationships except as an incident to an exercise of an independent municipal power; or (6) to define and provide for the punishment of a felony or to impose imprisonment as a punishment for any violation of law; provided, however, that the foregoing enumerated powers may be granted by the general court in conformity with the constitution and with the powers reserved to the general court by section eight; nor shall the provisions of this article be deemed to diminish the powers of the judicial department of the commonwealth.

Section 8. Powers of the General Court.

The general court shall have the power to act in relation to cities and towns, but only by

general laws which apply alike to all cities or to all towns, or to all cities and towns, or to a class of not fewer than two, and by special laws enacted: (1) on petition filed or approved by the voters of a city or town, or the mayor and city council, or other legislative body, of a city, or the town meeting of a town, with respect to a law relating to that city or town; (2) by a two-thirds vote of each branch of the general court following a recommendation by the governor; (3) to erect and constitute metropolitan or regional entities, embracing any two or more cities or towns or cities and towns, or established with other than existing city or town boundaries, for any general or special public purpose or purposes, and to grant to these entities such powers, privileges and immunities as the general court shall deem necessary or expedient for the regulation and government thereof; or (4) solely for the incorporation or dissolution of cities or towns as corporate entities, alteration of city or town boundaries, and merger or consolidation of cities and towns, or any of these matters.

Subject to the foregoing requirements, the general court may provide optional plans of city or town organization and government under which an optional plan may be adopted or abandoned by majority vote of the voters of the city or town voting thereon at a city or town election, provided, that no town of fewer than twelve thousand inhabitants may be authorized to adopt a city form of government, and no town of fewer than six thousand inhabitants may be authorized to adopt a form of town government providing for town meeting limited to such inhabitants of the town as may be elected to meet, deliberate, act and vote in the exercise of the corporate powers of the town. This section shall apply to every city and town whether or not it has adopted a charter pursuant to section three.

Section 9. Existing Special Laws.

All special laws relating to individual cities or towns shall remain in effect and have the force of an existing city or town charter, but shall be subject to amendment or repeal through the adoption, revision or amendment of a charter by a city or town in accordance with the provisions of sections three and four and shall be subject to amendment or repeal by laws enacted by the general court in conformity with the powers reserved to the general court by section eight.

Appendix B

Purposes of Zoning - Chapter 808, Section 2A of the Acts of 1975

1.0 – Overview

1.1 – BACKGROUND – The “purposes of zoning” are not found in G.L. c. 40A, The Zoning Act, but instead are located in Section 2A of [Chapter 808 of the Acts of 1975](#).

Section 3 of Chapter 808 of the Acts of 1975 repealed the “old Chapter 40A” (titled “The Zoning Enabling Act”), replacing it with “new Chapter 40A” (titled “The Zoning Act”). As a preface to its substitution of the new statute for the old one, Section 2A of Chapter 808 set forth the purposes of local zoning laws. The Legislature elected, however, not to codify the “purposes” as part of the new chapter of the General Laws. Along with the powers conferred by Article 89 (the “Home Rule Amendment”) they stand, nonetheless, as the official set of statutory purposes of local zoning laws that cities and towns were empowered to adopt under Home Rule.

1.2 – SECTION 2A – PURPOSES OF ZONING – The following rendering of Section 2A has been reformatted for easier reading:

SECTION 2A. The purposes of this act are to facilitate, encourage, and foster the adoption and modernization of zoning ordinances and by-laws by municipal governments in accordance with the provisions of Article 89 of the Amendments to the Constitution and to achieve greater implementation of the powers granted to municipalities thereunder.

This act is designed to provide standardized procedures for the administration and promulgations of municipal zoning laws. This section is designed to suggest objectives for which zoning might be established which include, but are not limited to, the following:

- 1) to lessen congestion in the streets; to conserve health;*
- 2) to secure safety from fire, flood, panic and other dangers;*
- 3) to provide adequate light and air;*
- 4) to prevent overcrowding of land, to avoid undue concentration of population;*
- 5) to encourage housing for persons of all income levels;*
- 6) to facilitate the adequate provision of transportation, water, water supply, drainage, sewerage, schools, parks, open space and other public requirements;*
- 7) to conserve the value of land and buildings, including the conservation of natural resources and the prevention of blight and pollution of the environment;*
- 8) to encourage the most appropriate use of land throughout the city or town,*

including consideration of the recommendations of the master plan, if any, adopted by the planning board and the comprehensive plan, if any, of the regional planning agency; and,

- 9) to preserve and increase amenities by the promulgation of regulations to fulfill said objectives.*

Said recommendations may include but are not limited to restricting, prohibiting, permitting, or regulating:

- 1) uses of land, including wetlands and lands deemed subject to seasonal or periodic flooding;*
- 2) size, height, bulk, location and use of structures, including buildings and signs except that billboards, signs, and other advertising devices are also subject to the provisions of sections twenty-nine through thirty-three, inclusive, of chapter ninety-three, and to chapter ninety-three D;*
- 3) uses of bodies of water, including water courses;*
- 4) noxious uses;*
- 5) areas and dimensions of land and bodies of water to be occupied or unoccupied by uses and structures, courts, yards and open spaces;*
- 6) density of population and intensity of use;*
- 7) accessory facilities and uses, such as vehicle parking and loading, landscaping and open space; and,*
- 8) the development of the natural resources, scenic and aesthetic qualities of the community.*

Appendix C

List of Guidebook Court Cases

1.0 – Introduction

1.1 – OVERVIEW – Appendix C includes a listing of all of the court cases cited in the Guidebook. These cases include Massachusetts Court decisions (primarily Supreme Judicial Court and Court of Appeals cases, with some Land Court and Superior Court cases) as well as United States Federal Court decisions (U.S. 1st Circuit Court, U.S. Court of Appeals, and U.S. Supreme Court.) Citations to federal courts include hyperlinks to web sources that make PDF versions of the cited case available to the public at no charge. The information below explains how to use this Appendix C and how to use the resources of the Massachusetts Trial Court Library.

1.2 – MASSACHUSETTS COURT CASE RESEARCH – Case citations throughout the chapters of this Guidebook are, whenever possible, hyperlinked to the full text of the decisions, and most of these are linked to the Massachusetts Trial Court Library (“MTCL”) cases database. The universal recourses locator (“URL”) for the MTCL website is: mass.gov/orgs/trial-court-law-libraries. However another – and much easier route to navigate – is available to the reader at: masscases.com. This link brings the reader to a much more intuitive page of further links to the decisions.

On the Mass Cases homepage, cursor down to: [Massachusetts Laws by Source](#); then click on: [Massachusetts Court Cases](#). This takes the reader to the Massachusetts Court Cases home page. On that page, cursor down to: [Cases 1938-date](#). By clicking on the [Cases 1938-date](#) hyperlink, that will navigate to the main case search engine that allows one to search for the desired case either by party name or official citation.

In addition, the hyperlinks in the Table in Section 1.3 on the next page go directly to case listings by citation or name as they are categorized by the Trial Court Library.

1.3 – CASE CITATION OR PARTY NAME – A search for the desired case on the MTCL website can be made by clicking on the appropriate listing by either case citation or name. On the MTCL website, the column on the left side, by default, contains links to the decisions of the Supreme Judicial Court (SJC) organized by ranges of volume numbers (e.g., 687 Mass. 123) and links to the decisions of the Massachusetts Appeals Court (e.g., 98 Mass. App. 687). Below the “Cases by Cite” a similar search “by Name” is available with links to both the SJC and Appeals Court decisions.

However, the links in the Supreme Judicial and Appeals Court Case Links Table below provide direct access to the categories of citation numbers and letter designations of case names.

Supreme Judicial Court & Appeals Court Case Links	
Cases by Cite	Cases by Name
Supreme Judicial Court	Supreme Judicial Court & Appeals Court
• 1-199 Mass. • 200-299 Mass • 300-324 Mass.	• Cases A-B • Cases C-E • Cases F-I

Supreme Judicial Court & Appeals Court Case Links	
Cases by Cite	Cases by Name
• 325-349 Mass. • 350-374 Mass. • 375-399 Mass. • 400-424 Mass. • 425-449 Mass. • 450-47 Mass. • 475-date Mass.	• Cases J-K • Cases L-M • Cases N-R • Cases S-U • Cases V-Z
Appeals Court • 1-24 Mass. App. • 25-49 Mass. App. • 50-74 Mass. App. • 75-date Mass. App	

1.4 – LAND COURT AND OTHER COURTS – In addition to the decisions of the SJC and the Appeals Court, the Massachusetts Court Cases home page has entry points for the decisions of the Massachusetts Land Court and other courts of the Commonwealth, with search functions similar to those for the SJC and the Appeals Court.

1.5 – UNPUBLISHED CASES – NO LINK – Some court decisions cited in the Guidebook are “unpublished,” and not accessible via the MTCL database. Therefore while they are listed in the table below they are not hyperlinked. The text of these decisions, however, may be obtained via subscription based legal resources such as WestLaw, Lexis, or the Massachusetts Social Law Library data base, which is a subscription based resource. Local municipal attorneys might be able to provide planning and zoning officials with an unpublished court decisions.

2.0 – Cases

2.1 – CASE LISTING INFORMATION – The following hyperlinked listing of the court cases referenced in the text of the Guidebook is meant to facilitate quick access to the case decision text. For those using a printed version of the Guidebook, the actual case citation is included so that a user with Internet access can navigate to the full text of the decision by logging on to the MTCL website.

Massachusetts & Federal Court Case Links
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81 Spooner Road LLC v. Town of Brookline , 452 Mass. 109, at 112 (2008) A.F.M. Ltd. V. City of Medford , 428 Mass. 1020 (1999) Ackerley Comm. of Mass., Inc. v. City of Cambridge , 88 F.3d 33, 37 (1st Cir. 1996) Ackerley Comm. of Mass., Inc. v. City of Somerville , 878 F.2d 513, 517 (1st Cir. 1989) Adamowicz v. Ipswich , 395 Mass. 757 (1985) Adams v. Board of Appeals of Concord , 356 Mass. 709 (1970) Addison Wesley Publishing Co. v. Town of Reading , 354 Mass. 181, 185 (1968) Agins vs. City of Tiburon , 447 US 255, (1980), 447 U.S. 255 (1980) Ahmad v. Department of Correction , 446 Mass. 479, 485 (2006) Albahari v. Zoning Board of Appeals of Brewster , 76 Mass. App. Ct. 245 (2010) Alexander v. Building Inspector of Provincetown , 350 Mass. 370, 375 (1966)

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[*APT Pittsburgh Ltd. Partnership v. Penn Township Butler County*](#), 196 F 3rd 469 (3rd Cir. 1999)
[*Arenstam v. Planning Board of Tyngsborough*](#), 29 Mass. App. Ct. 314, 317 (1990)
[*Arleen Martin vs. The Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*](#), 434 Mass. 141 (2001)
[*Arrigo v. Planning Board of Franklin*](#), 12 Mass. App. Ct. 802 (1981)
[*Attorney General v. Dover*](#), 395 Mass. 829 (1985)
[*Auburn v. Planning Bd. of Dover*](#), 12 Mass. App. Ct. 998 (1981)

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[*Bartlett v. Bd. of Appeals of Lakeville*](#), 23 Mass. App. Ct. 664 (1987)
[*Barvenik v. Board of Aldermen of Newton*](#), 33 Mass. App. Ct. 129 (1992)
[*Batchelder v. Planning Bd. of Yarmouth*](#), 31 Mass. App. Ct. 104(1991)
[*Beale v. Planning Board of Rockland*](#), 423 Mass. 690 (1996)
[*Becket v. Building Inspector of Marblehead*](#), 6 Mass. App. Ct. 96, 104 (1978)
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[*Bellows Farms Inc. v. Building Inspector of Acton*](#), 364 Mass. 253, 257-260 (1973)
[*Bible Speaks v. Board of Appeals of Lenox*](#), 8 Mass. App. Ct. 19 (1979)
[*Bingham v. City Council of Fitchburg*](#), 52 Mass. App. Ct. 566 (2001)
[*Bisson v. Planning Board of Dover*](#), 43 Mass. App. Ct. 504 (1997)
[*Bjorklund v. Zoning Board of Appeals of Norwood*](#), 450 Mass. 357 (2008)
[*Blackman v. Board of Appeals of Barnstable*](#), 334 Mass. 446 (1956)
[*Blasco v. Board of Appeals of Winchendon*](#), 31 Mass. App. Ct. 32 (1991)
[*Board of Aldermen of Newton v. Maniace*](#), 429 Mass. 726 (1999)
[*Board of Appeals of Hanover v. Housing Appeals Committee*](#), 363 Mass. 339 (1973)
[*Board of Selectmen of Pembroke v. R. & P. Realty Corp.*](#), 348 Mass. 120 (1964)
[*Board of Selectmen of Stockbridge v. Monument Inn, Inc.*](#), 8 Mass. App. Ct. 158 (1979)
[*Boothroyd v. Zoning Board of Amherst*](#), 449 Mass. 333, 341 (2007)
[*Bowen v. Board of Appeals of Franklin*](#), 36 Mass. App. Ct. 954, 955 (1994)
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[*Branagan v. Zoning Board of Appeals of Falmouth*](#), 75 Mass. App. Ct. 1107 (2009)
[*Bransford v. Zoning Board of Appeals of Edgartown*](#), 444 Mass. 852 (2005)
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[*Calnan v Planning Board of Lynn*](#), 63 Mass. App. Ct. 384 (2005)
[*Campanelli v. Planning Board of Ipswich*](#), 358 Mass. 798 (1970)
[*Canter v. Planning Bd. of Westborough*](#), 7 Mass. App. Ct. 805 (1979)

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[*Cape Resort Hotels v. Alcoholic Licensing Board of Falmouth*](#), 385 Mass. 205 (1982)
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[*Chilson v. Zoning Bd. of Appeal of Attleboro*](#), 344 Mass. 406 (1962)
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[*City of Ladue v. Gilleo*](#), 512 U.S. 43 (1994)
[*Clark v. Zoning Board of Appeals of Nahant*](#), 338 Mass. 473 (1959)
[*Clows v. Planning Bd. of Middleton*](#), 12 Mass. App. Ct. 129, (1981)
[*Coco Bella, LLC v. Town of Hopkinton Board of Appeals*](#), et. al. (Land Court) Case 13 Misc. 480509 (2014)
[*Collins v. Historic District Commission of Carver*](#), 73 Mass. App. Ct. 388 (2008)
[*Collura v. Arlington*](#), 367 Mass. 881 (1975)
[*Comstock, Jr., Trustee v. Zoning Board of Gloucester*](#), 98 Mass. App. Ct. 168 (2020)
[*Connors v. Annino*](#), 460 Mass. 790 (2011)
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[Dial Away Co. v. Zoning Bd. of Appeals of Auburn](#), 41 Mass. App. Ct. 165, 170-171 (1996)
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[Euclid v. Ambler Realty Co.](#), 272 U.S. 365 (1926)

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[Hunters Brook Realty Corporation v. Zoning Board of Appeals of Bourne](#), 14 Mass. App. Ct. 76 (1982)
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[Johnson v. Edgartown](#), 425 Mass. 117, 121 (1997)
[Josephs v. Bd. of Appeals of Brookline](#), 362 Mass. 290, 293 (1972)

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[Karet v. Zoning Bd. of Appeals of Worcester](#), 527 Mass. App. Ct. 439 (1989)
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[Kenner v. Zoning Bd. of Appeals of Chatham](#), 459 Mass. 115 (2011)
[Kenrick v. Board of Appeals of Wakefield](#), 27 Mass. App. Ct. 774, 776 (1989)
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[KinderCare Learning Centers, Inc. & another vs. Town of Westford & another](#), 62 Mass. App. Ct. 924
[Kitras v. Zoning Adm'r of Aquinnah](#), 453 Mass. 245 (2009)
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[Korkuch v. Planning Bd. of Eastham](#), 26 Mass. App. Ct. 307 (1988)
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Regional Planning Commissions/Agencies

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BERKSHIRE REGIONAL PLANNING COMMISSION
1 Fenn Street, Suite 201
Pittsfield MA 01201-6629
(413) 442-1521
www.berkshireplanning.org

CAPE COD COMMISSION
3225 Main Street
Barnstable MA 02630
(508) 362-3828
www.capecodcommission.org

CENTRAL MASS. REGIONAL PLANNING COMMISSION
One Mercantile Street, Suite 520
Worcester, MA 01608
(508) 756-7717
www.cmrpc.org

FRANKLIN REGIONAL COUNCIL OF GOVERNMENTS
12 Olive Street, Suite 2
Greenfield, MA 01301-3313
(413) 774-3167
www.frcog.org

MARTHA'S VINEYARD PLANNING COMMISSION
P.O. Box 1447, 33 New York Avenue
Oak Bluffs, MA 02557
(508) 693-3453
www.mvcommission.org

MERRIMACK VALLEY PLANNING COMMISSION
160 Main Street
Haverhill, MA 01830
(978) 374-0519
www.mvpc.org

METROPOLITAN AREA PLANNING COMMISSION
60 Temple Place, 6th Floor, Boston, MA 02111
(617) 933-0700
www.mapc.org

MONTACHUSETT REGIONAL PLANNING COMMISSION
464 Abbot Street, Leominster, MA 01453
(978) 348-2490
www.mrpc.org

NANTUCKET PLANNING & ECONOMIC DEVELOPMENT
COMMISSION
2 Fairgrounds Road
Nantucket, MA 02554
(508) 225-7587
www.nantucket-ma.gov/306/Planning-Economic-Development-Commission

NORTHERN MIDDLESEX COUNCIL OF GOVERNMENTS
40 Church Street, Suite 200
Lowell, MA 01852
(978) 454-8021
www.nmcog.org

OLD COLONY PLANNING COUNCIL
70 School Street, Brockton, MA 02301-4097
(508) 583-1833
www.ocpcrpa.org

PIONEER VALLEY PLANNING COMMISSION
60 Congress Street, Springfield, MA 01104
(413) 781-6045
www.pvpc.org

SOUTHEASTERN REGIONAL PLANNING &
ECONOMIC DEVELOPMENT DISTRICT
88 Broadway, Taunton, MA 02780
(508) 814-1367 www.srpedd.org