

**A SUMMARY OF FIVE CATEGORIES OF GRANDFATHER RIGHTS IN  
MASSACHUSETTS ZONING STATUTES\***

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\*Originally published in Grandfather Rights and Chapter 40A, by the Massachusetts Bar Association, November, 2000

**Zoning Freeze due to Building Permits and Special Permits**

Cite	M.G.L. ch. 40A § 6, paras. 1 - 3.
Rule	A zoning ordinance or by-law does not apply to a building permit or a special permit issued before the first publication of notice of public hearing on a zoning change. The zoning <u>does</u> apply to a building permit or special permit issued after the notice of the hearing
Interpretation	
Application	Building permits or special permits <b>issued</b> before advertisement. Application is not enough
Scope of Protection	Limited to the scope of the activity authorized by the building permit or special permit.
Length of Time	Provides 6 months to commence construction and the construction must continue through to the completion as continuously and expeditiously as possible.
Procedure	Not a planning tool. Because the developer needs to have permit before the advertisement, the only way to use it as a planning tool would be based on insider information or a hunch.
Practitioner's Notes	Considerable ambiguity as applied to large scale projects authorized by special permit. <i>Quaere:</i> A special permit for a cluster is granted before the first publication. It provides for 100 clustered units. One unit is built and sold, the other 99 remain. Can the owner continue to build units after expiration of 6 months?

## Residential Lots: No Common Ownership

Cite	M.G.L. ch. 40A § 6, ¶ 4, sentence 1.
Rule	A zoning increase in the listed requirements does not apply to a lot for one or two-family residential use which, at the time of "recording/endorsement" – interpreted to mean the date of enactment of a zoning change -- A) was not held in common ownership with adjoining land, B) conformed to the then-existing requirements, and C) has at least 5000 sq.' of area and 50' of frontage.
Interpretation	1. Focus is on the "status of the lot immediately prior to the zoning change." <sup>1</sup> 2. The lot had to conform to the zoning requirements at the time it comes into separate ownership.
Application	Lots for single or two-family residential use <u>not</u> held in common ownership with any adjoining lots. <sup>2</sup> It applies only to vacant land, not to reconstruction. <sup>3</sup>
Scope of Protection	Protects from increases in area, frontage, width, yard and depth requirements. Freezes the status of the zoning of the lot as of the time immediately prior to the zoning amendments. <sup>4</sup>
Length of Time	Freeze lasts as long as the property remains in separate ownership. <sup>5</sup> Begins with recording the deed that conveys it to an owner with no interest in any contiguous land.
Procedure	Only recording a deed is effective. "Sham" conveyances may not be effective.
Practitioner's Notes	1. All single-family or two-family residential lots which meet the minimum frontage and area requirement, are not held in common ownership, and comply with zoning when created and conveyed enjoy protection from subsequently enacted dimensional zoning requirements.  2. For lots that come into common ownership post-freeze, courts have looked to the intent of the landowner to determine if they should be merged. If there is evidence that the landowner treated them as two lots, they may remain such. <sup>6</sup>

<sup>1</sup> Adamowicz v. Town of Ipswich, 395 Mass. 757, 762-763 (1985).

<sup>2</sup> The lots must be vacant. See Willard v. Board of Appeals of Orleans, 25 Mass. App. Ct. 15, 18 (1987).

<sup>3</sup> See Dial Away Co., Inc. v. Zoning Bd. of Appeals of Auburn, 41 Mass. App. Ct. 165 (1996); Willard v. Board of Appeals of Orleans, 25 Mass. App. Ct. 15 (1987).

<sup>4</sup> See Adamowicz.

<sup>5</sup> Whether it remains protected if it comes into common ownership after a zoning change is an open issue. See Carciofi v. Board of Appeals of Billerica, 22 Mass. App. Ct. 926 (1986). This point should be decided by a case now pending before the Appeals Court. See Preston v. Duffy, No. 97-1087B (Plymouth Sup. Ct. 1997).

<sup>6</sup> See *id* and accompanying text. See also Seltzer v. Board of Appeals of Orleans, 24 Mass. App. Ct. 521 (1987); Lindsay v. Board of Appeals of Milton, 362 Mass. 126 (1972); Heald v. Zoning Bd. of Appeals of Greenfield, 7 Mass. App. Ct. 286 (1979).

## Residential Lots: Common Ownership

Cite	M.G.L. ch. 40A § 6, para. 4, sentence 2.
Rule	A zoning increase in the listed requirements does not apply for a period of five years to a lot for one or two-family residential use which, at the time of recording/endorsement, A) was held in common ownership with an adjoining lot (only up to three lots), B) conformed to the then-existing requirements, and C) has at least 7500 sq.' of area and 75' frontage.
Interpretation	<ol style="list-style-type: none"> <li>1. The lots had to have been held in common ownership before the zoning change;</li> <li>2. The plan has to have been recorded or endorsed before the zoning change;<sup>7</sup></li> <li>3. The lots had to conform to the zoning requirements as of January 1, 1976.<sup>8</sup></li> </ol>
Application	Lots for single or two-family residential use held in common ownership with up to two other adjoining lots.
Scope of Protection	Protects from increases in area, frontage, width, yard, and depth requirements. Freezes the status of the zoning of the lot as of the time immediately prior to the zoning amendments.
Length of Time	The 5 year period begins from when the zoning is changed, not from when the plan is recorded. <sup>9</sup>
Procedure	Submit a plan to the planning board in time for endorsement before the Town Meeting or City Council Vote approving the zoning change.
Practitioner's Notes	<ol style="list-style-type: none"> <li>1) Because the freeze begins when the zoning is changed, rather than from when the plan is endorsed or recorded, recording or endorsing the plan guarantees an automatic future 5 year zoning exemption on any qualifying lot.</li> <li>2) Employed in conjunction with ANR - in addition to use protections gained through an ANR plan freeze (§ 6, ¶ 6) an additional freeze of these requirements can be gained if the lots are one or two-family residential.</li> <li>3) If a landowner owns more than 3 adjoining lots and wants to reap the benefit of the 5 year freeze, ownership of the lots must be split up prior to the zoning change.<sup>10</sup></li> <li>4) To get the 5 year protection, the plan has to be endorsed before the zoning change. Since the planning board has 21 days to act on it, to be certain, one should submit the plan to the planning board 21 days before the vote to change the zoning (at Town Meeting, for example).</li> </ol>

<sup>7</sup> See *Baldiga v. Board of Appeals of Uxbridge*, 395 Mass. 829 (1985).

<sup>8</sup> See *Baldiga; Ferzoco v. Board of Appeals of Falmouth*, 29 Mass. App. Ct. 986 (1990). This 1976 date is of little consequence. If the lot conforms to the zoning as of just prior to the zoning change, then it almost definitely will have conformed to the 1976 zoning.

<sup>9</sup> See *Baldiga* at 833.

<sup>10</sup> Gifting and selling the lot are the clearest options. The building inspector has the authority to look behind the conveyance to determine if the lots are in "common ownership." Sham conveyances and "checkerboarding" may not entitle the landowner to the freeze. See *Lee v. Board of Appeals of Harwich*, 11 Mass. App. Ct. 148 (1981); *Giovannucci v. Board of Appeals of Plainville*, 4 Mass. App. Ct. 239 (1976).

## Definitive Subdivision Plans

Cite	M.G.L. ch. 40A §6, para. 5.
Rule	If a definitive plan (or a preliminary plan, followed by a definitive plan within 7 months) is A) submitted to the planning board, and B) written notice is given to the clerk <u>before</u> the zoning change, then the land (use + dimensional requirements) is governed by the zoning in effect at time of submission while processed plus 8 years from endorsement.
Interpretation	The "land" is protected - this means the zoning, not the plan. Therefore, the plan can be changed any time within the 8 years, as long as it conforms to the provisions of the frozen zoning, and is done in accordance with the Subdivision Control Law. The original plan that is filed does not have to be followed. <sup>11</sup>
Application	Subdivision plans that require approval under the Subdivision Control Law.
Scope of Protection	Freezes <u>all</u> zoning requirements as of the time the plan is submitted or approved.
Length of Time	The 8 year period begins with the endorsement of the plan by the planning board.
Procedure	<ol style="list-style-type: none"> <li>1. File preliminary plan (or definitive plan if the preliminary plan not required);</li> <li>2. Give written notice to the city or town clerk (simultaneously or immediately after submission of the plan);</li> <li>3. If preliminary plan - file definitive plan within 7 months;</li> <li>4. Plan approved - freeze effected.</li> </ol>
Practitioner's Notes	<ol style="list-style-type: none"> <li>1. The plan must be approvable under the planning board's regulations. If it is necessary to change it, it must be amended within the seven month window, since an amended plan submitted after the seven months is not entitled to freeze protections.<sup>12</sup> Therefore, be cautious about submitting a plan that will require waivers for approval.</li> <li>2. To get the benefits of a definitive plan freeze on a plan that meets ANR criteria, add a new road of short length creating new frontage on certain lots and triggering the subdivision control law. Then, submitting the <u>entire</u> plan for endorsement as a definitive subdivision will freeze all zoning for the entire parcel for 8 years.</li> <li>3. Submission of a definitive plan or a preliminary plan followed within 7 months by a definitive plan, also "freezes" planning board regulations (M.G.L. ch. 41 § 81Q) until action on the definitive plan; as well as Board of Health regulations (M.G.L. ch. 111 § 127P) in effect at the time of plan submission for 3 years after endorsement.</li> </ol>

<sup>11</sup> See Massachusetts Broken Stone Co. v. Town of Weston, 430 Mass. 637 (2000).

<sup>12</sup> See Arenstam v. Planning Bd. of Tyngsborough, 29 Mass. App. Ct. 314 (1990).

## Approval Not Required Plans

Cite	M.G.L. ch. 40A § 6, para. 6.
Rule	If an ANR plan is A) submitted to the planning board for endorsement, and B) written notice is given to the city or town clerk, the use (use only) is governed by the zoning in effect at the time of submission while processed plus for 3 years from the date of endorsement.
Interpretation	See "Scope of Protection" for interpretation of "use." A developer may submit a plan solely to reap the benefit of obtaining a freeze, it is not necessary to submit the plan as a preliminary to a conveyance or recording. <sup>13</sup> The presence of a structure on the property does not prevent a freeze. <sup>14</sup>
Application	Subdivisions that do not require approval under the Subdivision Control Law (ANR plans).
Scope of Protection	The freeze protects only from a reduction in or elimination of kinds of uses. Use is governed by the applicable provisions of the zoning in effect, which may be read to include requirements other than traditional "uses." For example, density requirements (which is not a "use"), which have the effect of restricting uses, may not be enforceable when an ANR freeze has been attained. <sup>15</sup> One test is whether the restriction brings about a "practical prohibition of use." <sup>16</sup> "Applicable provisions of the zoning in effect" includes uses permitted by a special permit at the time of the freeze.
Length of Time	The 3 year freeze begins at the time of endorsement. <sup>17</sup>
Procedure	1. Submit an ANR plan to the planning board; 2. Give written notice to the city or town clerk (simultaneously or immediately after submission of the plan); 3. Endorsement by the planning board; Plan does not need to be recorded.
Practitioner's Notes	1. While the 3 year use freeze under ANR plans is not as attractive as the 8 year all-encompassing freeze for definitive subdivisions, the endorsement process involved in the ANR plan is far easier and quicker and may be attractive in certain cases.  2. There is no minimum lot size required under §§ 5 or 6, as there is under § 4.  3. See Practitioner's Note #2 under Residential Lots: Common Ownership.  4. Submitting the plan also freezes Board of Health regulations in effect at the time of endorsement (M.G.L. ch. 111 § 127P).

<sup>13</sup> See Long v. Board of Appeals of Falmouth, 32 Mass. App. Ct. 232 (1992).

<sup>14</sup> See *id.*

<sup>15</sup> Perry v. Building Inspector of Nantucket, 4 Mass. App. Ct. 469 (1976).

<sup>16</sup> Cape Ann Land Dev. Corp. v. City of Gloucester, 371 Mass. 19 (1976).

<sup>17</sup> It is also frozen during the time that the plan is being processed.