THE BASICS OF SUBDIVISION CONTROL LAW

AN OVERVIEW

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I. The Statute

The Massachusetts Subdivision Control Law is codified at Massachusetts General Laws chapter 41, sections 81K through 81GG. The statute only becomes effective in a given municipality upon acceptance, and does not apply within the City of Boston. See section 81N. Acceptance has become nearly universal. The Town of Gosnold (which consists of the Elizabeth Islands, and may or may not have any public ways) has not accepted the statute; the author is unaware of any other exceptions.

II. The Structure of the Law

The Subdivision Control Law empowers municipal planning boards (or their predecessors, "boards of survey") to regulate "subdivisions." The statutory definition in section 81L is a term warranting attention and has important exceptions. The statute does not regulate every transaction that creates new property lines. It only applies to the creation of new "lots," which are defined by section L as "an area of land in one ownership, with definite boundaries used, or available for use, as the site of one or more buildings."

Generally, the definition of "subdivision" excludes from planning board regulation any division of land that creates new lots if every lot has adequate frontage (that is, the frontage required by the Zoning By Law, or if there is no requirement, at least 20 feet) on either of the following three types of "ways": (a) a public way, or (b) a way shown on a plan previously approved by the planning board under the Subdivision Control Law, or (c) a way in existence when the Subdivision Control Law became effective in the city or town where 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 served thereby, and for the installation of municipal services to serve such lands and the buildings erected or to be erected therein.

Thus, the Massachusetts Subdivision Control Law limits the regulatory power of planning boards, as a matter of statutory jurisdiction, **to new roads that provide zoning frontage**. If a landowner can find adequate frontage on a "way" that qualifies for one of the exceptions, the planning board has no jurisdiction.

If a landowner wishes to make a statutory subdivision he must prepare a plan that contains data and shows proposed improvements as required by the planning board. The planning board's requirements must be codified in their **regulations**, which the board must

promulgate in accordance with statutory procedures that are set forth in chapter 41, section 81Q.[1] The planning board's power is constrained by its own regulations. The board **must approve** a plan that conforms to the board's regulations unless it does not comply with recommendations of the board of health, or violates the Zoning By Law. Further, regulations must be "reasonable" and "not inconsistent with the Subdivision Control Law or any other provision of a statute or of any valid ordinance or by law of the city or town." Section 81Q.

III. Recording Plans That Do Not Show Subdivisions.

Although the Subdivision Control Law is enforced by the building inspector and others, its most effective enforcement mechanism is the mandate contained in chapter 41, section 81X, that registries not accept for recording plans that do not comply with the statute's requirements.[2] There are two exceptions to the requirement that a plan of land be approved by the planning board under the Subdivision Control Law before being accepted for recording.

First, chapter 41, section 81P, requires the planning board to endorse "forthwith" a plan with the notation "approval under the subdivision control law not required" if the plan does not show a statutory "subdivision". These plans are often referred to as "ANR" plans or "Form A" plans (the latter reference is to the initial form in most planning board regulations). There is no notice, advertising or public hearing requirement for this endorsement. The statute provides that such endorsement is "conclusive on all persons," and the Appeals Court has held that, once given, the endorsement cannot be rescinded. Cassani v. Planning Board of Hull, 1 Mass. App. Ct. 451 (1973). Such plans may be recorded at the Registry of Deeds. Failure of the board to act on a plan within twenty-one days of receipt results in constructive determination that approval is not required and an applicant is entitled to a certification from the municipal clerk as to that failure to act, which in turn entitles the applicant to record the plan. See Section 81P.

Second, chapter 41, section 81X, provides that a surveyor may certify that the property lines shown on a plan are the lines dividing existing ownerships, and the lines of streets and ways shown are those of public or private streets or ways already established, and such plan shall be accepted for recording by registers of deed.

IV. The Approval Process.

A. Preliminary Plans. Section 81S.

Chapter 41, section 81S, gives an applicant the option, if it is a residential subdivision, and requires the applicant, if it is a "nonresidential subdivision", to file a preliminary plan. A board's requirements for content of a preliminary plan are set forth in its regulations. Generally, they require considerably less detail concerning topography, drainage and details for utility services than the final "definitive" plan. The board is required to take action on a plan--approve, disapprove or approve with modifications--within forty-five days.

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[1] Generally, section 81Q requires public hearings with advertising before promulgation, as well as recording with the appropriate Registry of Deeds.

[2] It is unlawful to create a "subdivision by deed" alone. Any description of land that describes new boundaries must refer to a plan. See M.G.L. c. 183, § 6A.

The preliminary plan process, as a practical matter, has little legal consequences. It is an opportunity for discussion and preliminary negotiation and airing of concerns and issues before detail drawings are prepared and filed. There is no public hearing or notice to abutters, and approval or disapproval by the board does not foreclose different action in the future. A preliminary plan cannot be recorded.

Filing a preliminary plan can be the basis for zoning freezes, if a definitive plan is filed within seven months. See M.G.L. chapter 40A, section 6.

B. Filing the Definitive Plan. Sections 81O, 81T and 81U.

A plan is filed by delivery to the planning board at a regular meeting, or by mailing certified mail to the planning board. Filing is effective upon receipt. Section 81O. When the plan is filed, written notice must be given to the municipal clerk. Section 81T. A copy must also be submitted to the board of health. Section 81O. The number of copies and other requirements concerning submission, including a form (Form C) that requires the owner's signature, are customarily set forth in the planning board's regulations, which should be carefully reviewed.

C. The Board of Health.

The board of health's powers in the subdivision process, as established by case law, are extremely broad. Indeed, if the board disapproves the plan or the applicant does not agree to modify the plan to conform to its modifications, then the planning board has no choice but to disapprove the plan. The statute does not call for any procedural requirements in connection with the board of health action. However, in Fairbairn v. Planning Board of Barnstable, 5 Mass. App. Ct. 171 (1977), the Appeals Court established procedural safeguards for negative action by the board of health. Fairbairn requires the applicant to request a hearing at the time he files a plan, so practitioners are well advised to make such a request at the time of filing.

The concerns that the board can address are broad but not limited. Section 81M states that one purpose of the law is to ensure "sanitary conditions in subdivisions," and courts have sustained board of health decisions regulating drainage and sewage disposal. The board cannot, however, disapprove a plan because of concerns regarding the presence of hazardous waste on the property. Independence Park v. Board of Health of Barnstable, 25 Mass. App. Ct. 489 (1988). Generally, the board of health's concerns are centered on septic systems, and, to a lesser extent, surface and drinking water issues. Sometimes boards make no comment on plans. If the board of health fails to comment on a plan within forty-five days after filing, such failure is deemed to be approval. Section 81O.

D. The Public Hearing.

Section 81T requires that the planning board conduct a public hearing on the subdivision after advertising twice in a local newspaper, and mailing a copy of the advertisement

to all abutters of the property. The public hearing is an opportunity for all persons interested to state their views. There is no suggestion in the case law that the hearing is adjudicatory, or that the planning board record is limited to information that it receives during the public hearing, as is the case, for example, for a zoning board of appeals.

E. Waiver.

As a practical matter, almost no subdivision complies with all the regulations of a planning board. Section 81W permits the planning board to waive strict compliance with its rules and regulations where such action is (1) "in the public interest" and (2) "not inconsistent with the intent and purpose of the subdivision control law." Further, the board, may, where circumstances warrant, impose conditions limiting the number of lots, buildings and limiting the time "for which particular buildings may be maintained." The waiver process allows for frank negotiation and swapping between applicant and planning board.

The board has considerable discretion in granting waivers. It is practically impossible to reverse a decision of the planning board based on the public interest standard; "if in a given case [the decision] is one as to which reasonable minds [may] differ, . . . [the decision of] the planning board should be sustained on judicial review." Arrigo v. Planning Board of Franklin, 12 Mass. App. Ct. 802, 809 (1981). Decisions have suggested that there is more judicial oversight warranted as to the second factor, consistency with the intent and purpose of the Subdivision Control Law, Arrigo, supra at 804, although at the same time courts have stated that reversal based on that standard would have to be based on "substantial" grounds. Id.[3] The burden of proof on a frustrated applicant who has not received a waiver seems equally high. See Canter v. Planning Board of Westborough, 7 Mass. App. Ct. 805 (1979).

The procedural requirements for a waiver are not exacting. Unlike zoning decisions, no findings of fact are required to support waiver. Arrigo, supra, 12 Mass. App. Ct. at 808. Indeed, the board decision does not need to list the waivers granted, as long as the record as a whole discloses evidence of a conscious decision to grant the waiver. Meyer v. Planning Board of Westport, 29 Mass. App. Ct. 167 (1990). (The prudent practitioner should not rely on Meyer and should give the board a clear list of waivers requested.)

F. Security.

Section 81U obligates the planning board to obtain security that the roads and municipal services required by the plans will be constructed before it endorses a definitive plan after approval. Generally, this security falls into two categories: (a) financial security, which can include a surety bond, passbook or deposit of monies with the Town Clerk, letter of credit or similar arrangement whereby the board can have access to funds to pay for construction of improvements after a default, or (b) a "covenant" executed by the applicant, the owner and any mortgagees of record, and recorded with the Registry of Deeds, as well as noted on the plan,

[3] A case finding that the burden was met was Wheatley v. Planning Board of Hingham, 7 Mass. App. Ct. 435 (1979), where the Court found that the approved plan made inadequate provision for securing installation of certain indispensable services.

whereby the applicant undertakes not to sell any lot or construct any building until the roads and municipal services necessary to serve that lot have been constructed.

Security is often used in combination; a developer will give financial security to permit sale of one phase of the project that will be built out first, and leave the remainder of the subdivision burdened by the covenant.

Approval of a plan does not expire. (Although zoning protection does, eight years after endorsement. See M.G.L. c. 40A, § 6.) Some boards insert in their regulations covenants requiring construction within a stated period of time unless extended by the planning board.

G. Approval. Section 81U.

The planning board has three statutory options: it may approve the plan, it may approve the plan with modifications, or it may disapprove the plan. Section 81U. The board must take final action on the plan within ninety days if there has been a preliminary plan, or one hundred thirty-five days if there has been no preliminary plan. Failure to take action (or to file a certificate of such action with the municipal clerk) within such time results in constructive approval.

Approval must be evidenced by a certificate of the planning board action filed with the city or town clerk. This act starts the twenty day appeal period running under M.G.L. c. 41, section 81BB. (The appeal period also starts when there has been constructive approval by failure to act.)

After the appeal period has run, and after the planning board has approved the security of the applicant, the board endorses its approval of the plan, (which may have been redrawn by the applicant to reflect modifications required) and note on the plan any conditions of approval, as well as any covenant to be recorded with the plan.[4] That endorsement entitles the applicant to record the plan.

The planning board is required to release the security given by the applicant upon satisfactory completion of the construction of the roads and installation of municipal services. Section 81U specifies the procedures for applying for such release, and creates a "default release" provision if the board fails to act on a request within forty-five days.

V. Modification and Rescission. Section 81W.

Planning boards have broad powers to modify, amend or rescind their approval of plans, either at the request of the applicant or at their own initiative. Section 81W specifies that the provisions for submission and approval of a plan shall apply to modification, amendment or rescission, "so far as apt." This requires submission to the board of health, a public hearing with

[4] The board only endorses the sheets of the definitive plan that show lot layout for title description purposes. The submission includes many sheets depicting design detail of roads, drainage, utilities, etc., that do not get endorsed or recorded.

notice and advertising, filing a certificate of approval and rights of appeal. The planning board may rely on the record previously made in the original approval proceedings.

Section 81W protects good faith purchasers, and provides that rescission cannot affect lots that have been sold or mortgaged in good faith after approval, but this prohibition does not apply to sale or mortgage of all the land shown on the plan or all land not previously released.

Rescission is a remedy that affords continuing power to a planning board that has slipped up and missed deadlines.[5] Thus, applicants should bear in mind when they have a default approval, that they may need to continue negotiations with the board in a rescission setting. The power of the board to rescind cannot be exercised without good reason, but failure of a constructively approved plan to comply with the rules and regulations of the board is a proper reason. Pierce v. Town Clerk of Rochester, 3 Mass. App. Ct. 728 (1975).

Formal modification of a plan is required any time the physical layout of roads is changed. However, a reconfiguration of lot lines without changing road layout on an approved plan does not require amendment of a plan (Section 81O), and can be accomplished by submitting an "approval not required plan" under M.G.L. c. 41, section 81P.

[5] The Appeals Court has noted that exercise of this power "is a well worn, although a rather circuitous, way out of the blunder." Windsor v. Planning Board of Wayland, 26 Mass. App. Ct. 650, 656 (1988).