



Commonwealth of Massachusetts  
DEPARTMENT OF HOUSING &  
COMMUNITY DEVELOPMENT

Deval L. Patrick, Governor ♦ Timothy P. Murray, Lt. Governor ♦ Tina Brooks, Undersecretary

**GRANDFATHERED LOTS & PLAN PROTECTIONS**

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Prepared By Donald J. Schmidt

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This outline gives limited information relative to zoning protections for lots and subdivision plans and is intended only for informational and reference purposes. When a question of legal interpretation arises, local officials should always seek the advice of their municipal counsel.

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**I. LOT PROTECTION**

**A. SEPARATE LOTS**

Chapter 40A, Section 6. "Any increase in area, frontage, width, yard or depth requirements of a zoning ordinance or bylaw shall not apply to a lot for single and two-family residential use which at the time of recording or endorsement, whichever occurs sooner was not held in common ownership with any adjoining land, conformed to then existing requirements and had less than the proposed requirements but at least five thousand square feet of area and fifty feet of frontage."

1. Purpose is to protect a once valid lot from being rendered unbuildable for certain residential purposes assuming the lot meets modest area and frontage requirements. Sturges v. Chilmark, 380 Mass. 246 (1980).

2. Questions to ask in determining separate lot protection.

- a. Does the lot have at least 5,000 square feet and 50 feet of frontage?
- b. Is the lot located in an area zoned for single or two-family use?
- c. Did the lot conform to existing zoning when legally created?

- d. Was the lot separately described and separately held from any adjoining land at the time the more restrictive zoning requirement took effect?
3. The separate lot protection extends to increases in lot area, frontage, width, depth or yard requirements for single and two-family use. Sieber v. Zoning Board of Appeals of Wellfleet, 16 Mass. App. Ct. 985 (1983).
- a. An amendment requiring that land outside the municipality could not be used in determining minimum lot area was treated as an amendment increasing the minimum lot area requirement. Boulter Brothers Construction Company, Inc. v. Zoning Board of Appeals of Norfolk, 45 Mass. App. Ct. 283 (1998).
  - b. An amendment changing the definition of street or way can result in an increase in the minimum frontage requirement. Cotty v. Parks, 7 LCR 185 (1999).
  - c. An amendment increasing the minimum buildable area requirement for a lot was considered an amendment increasing the minimum lot area requirement. Schofield v. Tolosko, (Cauchon, J.) Essex, Misc. Case No. 153570, (April, 1992).
4. The separate lot protection only applies to vacant land. Willard v. Board of Appeals of Orleans, 25 Mass. App. Ct. 15 (1987).
- a. A lot was not eligible for separate lot protection where a single family structured had been demolished some twenty three years prior to the request for a building permit. Dial Away Co., Inc. v. Zoning Board of Appeals of Auburn, 41 Mass. App. Ct. 165 (1996).
  - b. A lot was entitled to separate lot protection where there was a structure on the lot prior to zoning but at the time zoning was enacted the lot was vacant. Aldrich v. Board of Appeals of Nahant, 6 LCR 3 (1998).
5. The Zoning Act does not expressly protect undersized non-residential lots. Defelice v. Scigliano, (Kilborn, J.) Middlesex, Misc. Case Nos. 147228 and 153998, (March, 1992).
6. A lot that was once buildable due to local bylaw exemption from minimum lot size requirements remained buildable after the repeal of that local exemption as it still qualified for the Section 6 separate lot protection. Rourke v. Rothman, 448 Mass. 190 (2007).
7. A lot shown on a plan recorded in the Land Court in 1925 with frontage on an unconstructed way was entitled to the separate lot protection of the Zoning Act where the landowner conceded that he must first construct the way before obtaining a building permit. The local zoning bylaw contained a definition of street that was similar to the types of ways noted in the definition of "Subdivision" found in mgl, c. 41, s. 81L. Since the plan had the status of an approved plan pursuant to mgl, c. 41, s. 81FF, the way shown on the plan was a way that had been previously approved under the Subdivision Control Law. LeBlanc v. Board of Appeals of Danvers, 32 Mass. App. Ct. 760 (1992).

8. A restriction imposed by a planning board, when approving a subdivision plan, prohibiting building on a lot for three years as permitted under c.41, s.81U of the Subdivision Control Law does not eliminate the separate lot zoning protection. Chamseddine v. Zoning Board of Appeal of Taunton, 70 Mass. App. Ct. 305 (2007).

## **B. MERGER THEORY**

Substandard building lots must be combined to form one lot that will meet or more closely approximate the minimum lot area and frontage requirements of a local zoning bylaw.

1. In the absence of specific zoning provisions defining a "lot" in terms of sources of title or assessors' plans, the Supreme Judicial Court has consistently held that adjoining parcels may and, indeed, in certain instances, must be considered one lot for zoning purposes. Heald v. Zoning Board of Appeals of Greenfield, 7 Mass. App. Ct. 286 (1979).

2. Landowner cannot combine four substandard lots to create two substandard lots meeting the minimum state requirements but below current zoning requirements. Landowner must combine all four lots to create one protected lot. Burke v. Zoning Board of Appeals of Harwich, 38 Mass. App. Ct. 957 (1995).

3. In determining separate ownership, the court will look to the most recent instrument of record prior to the effective date of the zoning change from which the exemption is sought. Adamowicz v. Ipswich, 395 Mass. 757 (1985); Carciofi v. Board of Appeals of Billerica, 22 Mass. App. Ct. 926 (1986).

a. A lot will not be considered separately held if the landowner has the power to sell, transfer or dispose of the adjoining lot. Conveyance may establish separate ownership but not separate dominion and control. Planning Board of Norwell v. Serena, 27 Mass. App. Ct. 689 (1989); Affirmed, 406 Mass. 1008 (1990); DiStefano v. Town of Stoughton, 36 Mass. App. Ct. 642 (1994).

b. "Checkerboarding" is a device whereby an owner conveys title to lots in a subdivision to related persons in such a manner so that no adjoining lots are owned by the same person. The purpose of this conveyancing maneuver is to make all the conveyed lots eligible for the separate lot protection. "It is highly doubtful that sham conveyances to relatives accomplish the desired result." Lee v. Board of Appeals of Harwich, 11 Mass. App. Ct. 148 (1981).

4. Two lots which come together only at a point are not adjoining lots for the purposes of the separate lot protection. Sturges v. Chilmark, 380 Mass. 246 (1980).

5. Two lots which adjoin each other for approximately 13 feet were considered adjoining lots. Clark v. Zoning Board of Appeals of Nahant, 338 Mass. 473 (1959).

6. A road is a substantial physical barrier which, for practical purposes, prevents use of the two parts of the property as a unit. Dowling v. Board of Health of Chilmark, 28 Mass. App. Ct. 547 (1990).

7. No merger where body of water separated lots. Heavey v. Board of Appeals of Chatham, 58 Mass. App. Ct. 401 (2003).

8. No merger of lots where a single-family structure exists on each lot at the time of the zoning change. Adams v. Peterson, 35 Mass. App. Ct. 782 (1994); Dykens v. Gordon, 6 LCR 342 (1998).

9. Lots that are separately held at the time of the zoning change merge when they came into common ownership after the zoning change.

a. Separately owned lots at the time of the zoning change merged into one lot under the merger doctrine when they were subsequently purchased by one owner. Preston v. Board of Appeals of Hull, 51 Mass. App. Ct. 236 (2001).

b. Even if a lot was created by variance and placed into separate ownership, the right to build on that lot will be lost if the lot is subsequently purchased by an adjacent landowner. Asack v. Board of Appeals of Westwood, 47 Mass. App. Ct. 733 (1999).

10. There appears to be no authority supporting the proposition that when an owner of a nonconforming lot entitled to grandfathered status acquires an adjacent nonconforming lot not entitled to such protection, and then merges the two lots, this merger somehow voids the protected status of the first lot. Learoyd v. Thurston, (Fenton, C.J.) Essex, Misc. Case No. 125271, (December, 1990).

11. Under the principle 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 bylaw, a landowner is not at liberty to separate them with the expectation that a building could then be constructed. Wells v. Zoning Board of Appeals of Billerica, 68 Mass. App. Ct. 726 (2007).

12. Case raises question but court did not decide whether back to back lots which do not meet frontage requirements merge where merger will not make locus less conforming because lot frontages are on two separate streets. Fitch v. Board of Appeals of Concord, 55 Mass. App. Ct. 748 (2002).

## **B. COMMON LOT PROTECTION**

Chapter 40A, Section 6. “Any increase in area, frontage, width, yard or depth requirements of a zoning ordinance or by-law shall not apply for a period of five years from its effective date or for five years after January first, nineteen hundred and seventy-six, whichever is later, to a lot for single or two-family residential use, provided the plan for such lot was recorded or endorsed and such lot was held in common ownership with any adjoining land and conformed to the existing zoning requirements as of January first, nineteen hundred and seventy-six, and had less area, frontage, width, yard or depth requirements than the newly effective zoning requirements but contained at least seven thousand five hundred square feet of area and seventy-five feet of frontage, and provided that said five year period does not commence prior to January first, nineteen hundred and seventy-six, and provided further that the provisions of this sentence shall not apply to more than three of such adjoining lots held in common ownership.”

1. The second sentence of the fourth paragraph of section 6 providing the common lot protection was inserted into the Zoning Act in 1979. See st. 1979, c. 106.

2. The limits of the common lot zoning protection are as follows:

a. The five year grandfather protection runs from the effective date of the increased zoning requirement.

b. The zoning protection extends only to increases in lot area, frontage, width, yard or depth requirements for single and two-family use.

c. The zoning protection is only applicable to not more than three adjoining lots.

3. The criteria that must be met to qualify for the common lot protection are as follows: Baldiga v. Zoning Board of Uxbridge, 395 Mass. 829 (1985).

a. The lot must be shown on a plan that is recorded or endorsed before the effective date of the increased zoning requirement.

b. The lot must have at least 7,500 square feet of area, and at least 75 feet of frontage.

c. The lot must meet the zoning requirements that were in effect as of January 1, 1976

d. The lot must have been held in common ownership with adjoining land at the time of the increased zoning requirements.

4. The grandfather protection applies to the first three lots for which protection is sought and lot does not have to be in common ownership at the time of the building permit application. Marinelli v. Board of Appeals of Stoughton, 440 Mass. 255 (2003).

5. Because the Zoning Act does not define frontage, the court will look to applicable town bylaw for a definition. Marinelli v. Board of Appeals of Stoughton, 440 Mass. 255 (2003).

## II. PLAN PROTECTION

### A. SUBDIVISION PLANS

Chapter 40A, Section 6. “If a definitive plan, or a preliminary plan followed within seven months by a definitive plan, is submitted ..., the land shown on such plan shall be governed by the applicable provisions of the zoning ... by-law ... in effect at the time of submission ... for eight years from the date of the endorsement of ... approval ... .”

1. The above provision is a direct and specific legislative statement that a subdivision plan is to be governed by the bylaw in effect when the plan is filed and being processed under the Subdivision Control Law. Doliner v. Planning Board of Millis, 349 Mass. 691 (1965).

2. By filing a preliminary or definitive subdivision plan even after the public hearing notice has been published in a newspaper, but before a town meeting vote, a landowner can protect his land from future zoning changes.

a. A proposed bylaw was not in effect when the applicant’s preliminary plan was submitted to the planning board since the bylaw had not been adopted by town meeting. Ward & Johnson v. Planning Board of Whitman, 343 Mass. 466 (1962)

b. A preliminary plan filed on the same day as town meeting vote protected the land shown on the plan from a zoning change. Robrik Associates v. Planning Board of the Town of Dartmouth, Bristol, Misc. Case No. 122049, (April, 1989); Santoro v. Duhan, Worcester, C.A. No. 87-2343, (November, 1987).

c. In determining what zoning will apply to a subdivision plan, the key date is the date the zoning proposal is adopted and not the date of the planning board’s public hearing notice on the proposed zoning change. Lavoie v. Building Inspector of Ludlow, 346 Mass. 274 (1963); Livoli v. Planning Board of Marlborough, 347 Mass. 330 (1964); Chira v. Planning Board of Tisbury, 3 Mass. App. Ct. 433 (1975).

3. A preliminary plan will protect the land shown on such plan from a future zoning change provided a definitive plan is submitted within seven months from the submission of the preliminary plan.

a. In order to qualify for zoning protection, a preliminary plan must be submitted which complies substantially with the definition of a preliminary plan defined in mgl, c. 41, s. 81L. Livolvi v. Planning Board of Marlborough, 347 Mass. 330 (1964).

4. There is nothing in the Subdivision Control Law requiring approval of a preliminary plan as a precondition to the approval of a definitive plan. Trimount v. City of Taunton, 8 LCR 439 (2000).
5. The freeze protection is not contingent on the approval of a subdivision plan or the success in the appeal of a disapproved subdivision plan and although this interpretation has the effect of rewarding sham submissions of plans solely submitted to secure a zoning freeze, the remedy is the Legislature. Kindercare Learning Centers, Inc. v. Town of Westford, 62 Mass. App. Ct. 924 (2004).
6. The subdivision plan protection is a build protection and protects the issuance of a building permit from all zoning changes for an eight year period.
  - a. Owner of a subdivision lot that is conveyed into separate ownership after the effective date of any increased zoning requirement must obtain the necessary building permit before the expiration of the eight year definitive plan protection period. Wright v. Board of Appeals of Falmouth, 24 Mass. App. Ct. 409 (1987); Tsagronis v. Board of Appeals of Wareham, 415 Mass. 329 (1993).
  - b. A lot area and frontage variance to allow construction of a single-family dwelling on a nonconforming lot after the expiration of the definitive plan protection period was not authorized by the Zoning Act. Hardship was solely due to the failure of the owner of the lot to construct the house on the undersized lot before the statutory protection from the zoning change ran out. Tsagronis v. Board of Appeals of Wareham, 415 Mass. 329 (1993).
7. If the land shown on a definitive plan is entitled to the eight year zoning freeze, then a planning board's subsequent rescission of its approval of the definitive plan by operation of an automatic rescission provision in a performance covenant executed by the developer will not terminate the eight year zoning protection. Heritage Park Development Corporation v. Town of Southbridge, 424 Mass. 71 (1997).
8. The land shown on the subdivision plan is protected for eight years and a landowner is entitled to submit a different plan for approval within the eight year period. Massachusetts Broken Stone Company v. Town of Weston, 430 Mass. 637 (2000).
9. If subdivision plan is disapproved and applicant submits an amended plan within a reasonable time period that addresses the reasons for disapproval then the zoning protection will continue to apply to the land that is the subject of the plan. Krafchuk v. Planning Board of Ipswich, 453 Mass. 517 (2009).
10. Certain moratoriums affecting subdivision plans will extend the zoning protection period.
  - a. Chapter 40A, Section 6. " ... [the zoning protection] ... shall be extended by a period equal to the time which a city or town imposes or has imposed upon it by a state, a

federal agency or a court, a moratorium on construction, the issuance of permits or utility connections.”

## **B. APPROVAL NOT REQUIRED PLANS**

Chapter 40A, Section 6. “ ... the use of the land shown on [an approval not required plan] ... shall be governed by the applicable provisions of the zoning ... for a period of three years from the date of endorsement ... that approval ... is not required ... ”

1. Protection afforded approval not required plans extends only to use and not to other applicable provisions of the zoning bylaw or ordinance.

a. Plan does not protect land from more stringent parking requirements, density regulations or requirements for site plan approval. Bellows Farms v. Building Inspector of Acton, 364 Mass. 253 (1973); Perry v. Building Inspector of Nantucket, 4 Mass. App. Ct. 467 (1976).

b. New regulations may be enforced which do not amount, individually or collectively, to a practical prohibition of the use. Cape Ann Land Development Corp. v. Gloucester, 371 Mass. 19 (1976); Cicatelli v. Board of Appeals of Wakefield, 57 Mass. App. Ct. 799 (2003).

c. Three year grandfather provision protects uses permitted as of right as well as uses permitted by special permit. Miller v. Board of Appeals of Canton, 8 Mass. App. Ct. 923 (1979); Samson v. San-Land Development Corp., 17 Mass. App. Ct. 977 (1984).

2. It is unclear whether a community can amend its zoning bylaw and require a landowner to obtain a special permit for a use that was permitted as a matter of right at the time of the submission of the approval not required plan.

a. In Cape Ann Land Development Corp. v. Gloucester, 371 Mass. 19 (1976), the court held that Cape Ann was required to obtain a special permit but warned the special permit granting authority that they could not decline to grant the special permit on the basis that the land would be used for the protected use but could impose through the special permit process reasonable conditions which would not amount to a practical prohibition of the use.

b. In Marashlian v. Zoning Board of Appeals of Newburyport, 421 Mass. 719 (1966), the court did not disturb a Superior Court judge’s finding that a landowner was not required to obtain a special permit.

3. The protection afforded an approval not required plan does not authorize combination zoning protections in a “piggy-back” fashion.

a. There is no basis in the language or history of the Zoning Act for permitting two zoning freezes. The filing of an approval not required plan does not allow a landowner to submit a definitive subdivision plan at a later date and still be governed by the zoning bylaw in effect at the time of the submission of the approval not required plan. Wolk v. Planning Board of Stoughton, 4 Mass. App. Ct. 812 (1976).

4. Although it is possible that the Legislature intended to afford freeze protection only to approval not required plans that are recorded in due course, nothing in the Zoning Act requires recording of a plan as a prerequisite for a zoning freeze. Long v. Board of Appeals of Falmouth, 32 Mass. App. Ct. 232 (1992).

5. Where a landowner files an approval not required plan identical to one previously endorsed, a planning board does not have to endorse the new plan while the three year freeze period remains in effect from the prior endorsement and any subsequent submission or endorsement of an identical approval not required plan does not extend the three year use protection. Kelly v. Uhlir, (Sullivan, J.) Middlesex, Misc. Case No. 162655, (July, 1993).

#### **C. PERIMETER PLANS**

A perimeter plan is a plan of land showing existing property lines, with no new lines drawn indicating a division of land and is usually filed so that the property owner can obtain the three year use freeze afforded approval not required plans.

1. Perimeter plans are entitled to ANR endorsement. Cumberland Farms, Inc. v. Planning Board of West Bridgewater, 64 Mass. App. CT. 902 (2005).

#### **D. SITE PLANS**

Site plan is a regulatory scheme whereby a mandatory review by a local board is required before the issuance of a building permit for a use that is permitted as a matter of right in the zoning bylaw.

1. The term "special permit" in mgl, c. 40A, s. 6, does not encompass the term "site plan approval" as used in a local zoning bylaw so that an approved site plan did not freeze the applicable provisions of the zoning bylaw. Towermarc Canton Limited Partnership v. Town of Canton, Norfolk, Misc. Case No. 131947, (November, 1989).

### **III. RULES AND REGULATIONS PROTECTION**

#### **A. BOARD OF HEALTH REGULATIONS**

Chapter 111, Section 127P. “Whenever a person has submitted a subdivision plan, or a preliminary subdivision plan which is followed within seven months by a definitive plan, or a plan referred to in section eighty-one P of chapter forty-one, the land shown on such plan shall be governed by provisions of the state environmental code, or of the provisions of local board of health regulations which differ from said code, which are in effect at the time of first submission of said plan. ... If such plan is approved, ... such provisions shall apply for a period of three years from the date of the endorsement of such approval or from the endorsement that approval under the subdivision control law is not required.”

1. The filing of a perimeter plan does not allow a developer to submit a subdivision plan at a later date and still be governed by the health regulations that were in effect at the time of submission of the perimeter plan. Independence Park, Inc. v. Board of Health of Barnstable, 25 Mass. App. Ct. 133 (1987).

## **B. SUBDIVISION REGULATIONS**

Chapter 41, Section 81Q. “Once a definitive plan has been submitted to a planning board, and written notice has been given to the city or town clerk ..., the rules and regulations governing such plan shall be those in effect relative to subdivision control at the time of the submission of such plan. When a preliminary plan ... has been submitted to a planning board, and written notice of the submission of such plan has been given to the city or town clerk, such preliminary plan and the definitive plan evolved therefrom shall be governed by the rules and regulations relative to subdivision control in effect at the time of the submission of the preliminary plan, provided that the definitive plan is duly submitted within seven months from the date on which the preliminary plan was submitted.