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November 30, 1999

MEMORANDUM TO MUNICIPAL CLIENTS

TO: BOARD OF SELECTMEN/MAYOR/TOWN AND CITY COUNCIL
TOWN MANAGER/TOWN ADMINISTRATOR/EXECUTIVE SECRETARY
PLANNING BOARD

Re: Approval Not Required Plans

A plan submitted to the Planning Board for the Board's endorsement that the plan does not require approval under G.L. c.41, §81L et. seq. (the Subdivision Control Law) ("ANR" plans) raises a number of important legal issues. This memorandum will discuss when a plan is entitled to ANR endorsement and when it is not. It will also briefly review the ANR zoning freeze protection. This memorandum incorporates and updates my 1988 and 1990 Memoranda To Municipal Clients on the subject of ANR plans.

A. WHAT IS A SUBDIVISION

As you may know, a plan submitted for ANR endorsement under G.L. c.41, §81P, must be endorsed by the Planning Board unless it shows a subdivision. A "subdivision" is generally defined by G.L. c.41, §81L as the division of a tract of land into two or more lots. Section 81L then goes on to describe exceptions to this general rule by defining when such a division shall not be treated as a subdivision of land.

The first major exception is for a plan that shows that every lot within the tract so divided has frontage of at least the distance required by the current zoning ordinance or by-law, or twenty feet if the zoning by-law or ordinance has no frontage requirement, on one of three types of ways. These ways are as follows:

(a) a public way or a way which the clerk of the city or town certifies is maintained as a public way; or

(b) a way shown on a plan theretofore approved and endorsed in accordance with the subdivision control law; or

(c) a way in existence when the subdivision control law became effective in the city or town in which the land lies, having, in the opinion of the planning board, sufficient width, suitable grades, and adequate construction to provide for the needs of vehicular traffic in relation to the proposed use of the land abutting thereon or served thereby, and for the installation of municipal services to serve such land and the buildings erected or to be erected thereon.

(There is a second exception for tracts of land with buildings that predate the Subdivision Control Law. That exception is defined at section C below.)

B. ADEQUACY OF ACCESS AND MEANINGFUL FRONTAGE.

In interpreting the definition of subdivision set forth under G.L. c.41, §81L for lots located on one of the three types of ways, the courts have held that a planning board's discretion under §81P is limited. Thus, the Board cannot withhold endorsement of an ANR plan merely because a lot or lots on the plan do not comply with all zoning requirements, so long as all of the lots shown on the plan have the required frontage. Smalley v. Planning Board of Harwich, 10 Mass. App. Ct. 599 (1980). A Board can, however, refuse to endorse an ANR plan if, despite technical compliance with the frontage requirements, access to the lots shown on the plan is nonexistent for the purposes set out in G.L. c.41, §81M (i.e. provision of adequate access, lessening congestion in public ways, etc.). See Perry v. Planning Board of Nantucket, 15 Mass. App. Ct. 144, 153 (1983). Thus, where the lots shown on an ANR plan had adequate frontage only on a limited access highway, the court held that an ANR endorsement was rightfully withheld. Hrenchuck v. Planning Board of Walpole, 8 Mass. App. Ct. 949 (1979). Similarly, where the lots on an ANR plan had frontage on a way shown on town plans but not actually constructed on the ground, ANR endorsement could be withheld. Perry v. Planning Board of Nantucket, 15 Mass. App. Ct. 144 (1983). Where an ANR plan showed adequate frontage for all lots on public ways, but the connection of many of the lots to the ways was by long, narrow necks which made access to many lots nearly impossible, ANR endorsement was properly withheld. Gifford v. Planning Board of Nantucket, 376 Mass. 801 (1978).

Exception (b) of c.41, §81L, which exempts lots with frontage on a way previously approved under the Subdivision Control Law, requires either that the approved ways shown on the subdivision plan have been built, or there is assurance by way of bond or other security as required by c.41, §81U that they will be built. Richard v. Planning Board of Acushnet, 10 Mass. App. Ct. 216, 219 (1980).

While the foregoing cases indicate that mere technical compliance with the frontage requirements of §81L does not entitle a plan to ANR endorsement where access to the lots in fact does not exist, the Board does not have the authority under §81P to withhold endorsement where it believes that vehicular access to the lots could be improved. Gallitano v. Board of Survey & Planning of Waltham, 10 Mass. App. Ct. 269, 273 (1980). The court in Gallitano stressed that the cases in which an ANR endorsement may be withheld where the lots on the plan meet the frontage requirements of §81L are exceptional cases; mere difficulty of access is not enough to justify withholding endorsement.

More recent cases emphasize this distinction. In Corcoran v. Planning Board of Sudbury, 406 Mass. 248 (1989), the Planning Board denied endorsement of an ANR plan because three of the lots shown on the plan had interior wetlands that were spread across the lots between the public way and the buildable portion of the lots. Nonetheless, the Supreme Judicial Court (SJC), ruled that the Planning Board must endorse the plan. The SJC emphasized that, where technical compliance with the requirements of c.41, §81L are met, it is only an "exceptional case where some of the lots are practically inaccessible from their borders on the public way" that ANR endorsement may be withheld. Id. at 250-251. In this case, it found that "there is no question that the frontage provides adequate vehicular access to the lots. The presence of wetlands on the lots does not raise a question of access from the public way, but rather the extent to which interior wetlands can be used in connection with structures to be built on the lots." Id. at 251.

The SJC emphasized in Corcoran that the wetlands at issue were interior wetlands, and thus did not prevent "threshold access" to the lots. The Corcoran decision leaves open the question as to whether wetlands that border directly along the frontage of a lot would be the type of distinct physical impediment to access which would allow a Planning Board to deny ANR endorsement.

Long Pond Estates, Ltd. v. Planning Board of Sturbridge, 406 Mass. 253 (1989), involved an ANR plan showing three lots, each of which had adequate frontage on a public way. A portion of that way, between the lots and Sturbridge Center, was subject to a flood easement held by the U.S. Army Corps of Engineers, and was periodically closed due to flooding. The Planning Board denied endorsement, arguing that the flood easement rendered the way inadequate to provide access for emergency vehicles, and that an alternate route through another town would involve excessive response time for emergency vehicles. The SJC overruled the Planning Board, finding that adequate access to the lots was available, via the alternate route through the neighboring town.

In Poulos v. Planning Board of Braintree, 413 Mass. 359 (1992), the Supreme Judicial Court did find the type of physical barrier which justified denial of an ANR endorsement. In this case, the lots had sufficient frontage on a public way, but access to the lots was blocked by a

gruardrail and a steep slope. The plaintiff argued that he could simply fill the land and than ask the state to remove the guardrail. The court ruled, however, that the Planning Board correctly denied endorsement, based upon the current conditions, rather than speculation as to whether access would be provided in the future.

In summary, an ANR plan which shows sufficient frontage on one of three types of ways outlined in c.41, §81L should be endorsed by the Board unless one or more of the lots has no practical access to the way.

C. TWO OR MORE BUILDINGS ON A LOT.

Another exception to the definition of what constitutes a "subdivision" is set forth in the last sentence of G.L. c.41, §81L, which provides:

> 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 such building remains standing, shall not constitute a subdivision.

This provision has raised several questions, including whether the issues of frontage or adequate access discussed above are relevant in determining whether a plan must be endorsed under this exception. In Citgo Petroleum Corp. v. Planning Board of Braintree, 24 Mass. App. Ct. 425, 426 (1987), the Appeals Court ruled that frontage and access requirements do not apply to this exemption. So long as each lot on the plan has a building on it which predated the Subdivision Control Law, the plan does not show a subdivision.

One question unanswered by the Citgo case, and which is sure to lead to further litigation, is what constitutes a "building." There is scant guidance on this issue in the Citgo case. The Planning Board of Braintree argued that a literal reading of the section could result in allowing any garage, shed or outbuilding to divide and develop backland. The court noted, however, that all of the buildings relied upon by Citgo to divide the property were substantial buildings, and that "a claim that a detached garage or a chicken house or a woodshed qualifies under this exception might present a different case." Id. at 427.

Cases defining "building" for other purposes have defined the term broadly to include a shop, barn or shed, Norwell v. Boston Academy of Notre Dame, 130 Mass. 209, 210 (1881) and a stable. Peck v. Hartshorn, 189 Mass. 110 (1905). It remains to be seen if the courts will follow these cases when interpreting §81L. Since ANR endorsement is distinct from a lot's zoning status, the courts may well determine the nature of the building on an ANR lot is irrelevant, since

lot buildability for various purposes, as well as building occupancy, will always be decided according to local zoning requirements.

D. ANR FREEZES

When the Planning Board endorses an ANR plan, the use of land shown on the plan shall be governed by the then applicable zoning provisions for a period of three years from the date of endorsement. This zoning freeze applies only to zoning amendments which change the allowed uses of the land. The freeze does not protect a lot from amendments to dimensional requirements. The freeze protects uses permitted by special permit as well as uses permitted by right. Miller v. Board of Appeals of Canton, 8 Mass. App. Ct. 923 (1979).

An ANR endorsement also protects the land shown on the plan from changes in Title 5 or Board of Health regulations thereunder for a period of three years. G.L. c.111, §127P. In Independence Park, Inc. v. Board of Health of Barnstable, 28 Mass. App. Ct. 133 (1987), the developer filed an ANR plan prior to a change in the Board of Health's regulations. After the regulations changed, the developer filed a subdivision plan which was materially different from the ANR plan. The developer argued that under G.L. c.111, §127P, the filing of the ANR plan permitted the development of the land under the Board of Health's prior regulations for a period of three years. The Appeals Court disagreed, however, and ruled that the protection afforded by §127P applies only to the actual plan that had been submitted before the regulations changed. Where a plan is superseded by a new plan, the new plan is not afforded any grandfather protection from Board of Health regulations by §127P.

E. PROCEDURES

The Planning Board has 21 days from the date an ANR plan is submitted to the Board to either endorse it or vote to deny endorsement. Any denial must be filed with the Town Clerk, and the applicant must be notified, within 21 days. If not, the plan could be deemed constructively endorsed. Please note that the applicant must file notice with the Town Clerk of the ANR plan application in order to take advantage of the constructive approval provisions.

Very truly yours,

Barbara J. Saint André

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