COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

NO. 2007-P-1255

PETER K. FREI,
Plaintiff/Appellant

VS.

PLANNING BOARD OF HOLLAND et al.,
Defendants/Appellees

ON APPEAL FROM A DECISION OF THE
OF THE HAMPDEN SUPERIOR COURT

DEFENDANTS'/APPELLEES' BRIEF

Nancy Frankel Pelletier, Esq., and
David S. Lawless, Esq., both of
Robinson Donovan, P.C.
1500 Main Street, Suite 1600
Springfield, Massachusetts 01115
Phone (413) 732-2301 Fax (413) 785-4658
NFP BBO NO. 544402
DSL BBO NO. 664754

TABLE OF CONTENTS

I. STATEMENT OF THE CASE 1

II. STATEMENT OF THE FACTS 2

III. ARGUMENT 4

A. THE SUPREME JUDICIAL COURT HAS AVOIDED THE NEGATIVE CONSEQUENCES OF AUTOMATICALLY ALLOWING MANDAMUS RELIEF IN THE CONTEXT OF THE SUBDIVISION CONTROL LAW.................................. 8

B. THE SUPREME JUDICIAL COURT HAS REPEATEDLY APPLIED THE PRINCIPLE THAT ALLOWANCE OF MANDAMUS RELIEF IS NOT A PURELY MINISTERIAL EXERCISE ON THE PART OF A COURT IN OTHER CONTEXTS........ 10

C. THE SUPERIOR COURT PROPERLY INVOKED ITS DISCRETION IN THAT PLAINTIFF HAS AN ALTERNATE REMEDY AND THE RELIEF SOUGHT WOULD BE DETRIMENTAL TO THE PUBLIC INTEREST.......................... 14

1. Plaintiff Has the Alternative Remedy of Submitting Another Plan for Endorsement ANR. 14

2. The Relief Sought is Against the Public Interest and Contrary to the Intent of the Statute. 15

3. There is No Ambiguity in the Superior Court's Ruling as Alleged. 17

IV. CONCLUSION 17

485313

CASES

Ball v. Planning Bd. of Leverett, 58 Mass. App. Ct. 513 (2003) 16

Clark v. Board of Water & Commissioners of Norwood, 353 Mass. 708 (1968) 13, 14

Corcoran v. Planning Board of Sudbury, 406 Mass. 248, 250 (1989) 16

Cullen v. The Building Inspector of North Attleboro, 353 Mass. 671 (1968) 12, 13, 14

Elmer v. Comm'r of Insurance, 304 Mass. 194, 199 (1939) 5, 6, 7

Hallenborg v. Town Clerk of Billerica, 360 Mass. 513 (1971) 10, 11, 12

Hrenchuk v. Planning Bd. of Walpole, 8 Mass. App. Ct. 949 (1979) 16

Kay-Vee Realty Co. v. Town Clerk of Ludlow, 355 Mass. 165 (1969) 7, 8, 9

Kupperstein v. Planning Bd. of Cohasset, 66 Mass. App. Ct. 905 (2006) 4, 5

Mass. Soc. of Graduate Physical Therapists, Inc. v. Board of Registration in Medicine, 330 Mass. 601, 605 (1953) 5, 6, 7, 12

STATUTES

M.G.L. c. 40A, § 6 .... 11, 12

M.G.L. c. 41, § 81BB 15

M.G.L. c. 41, § 81M 16

M.G.L. c. 41, § 81P 9, 10, 15, 16

M.G.L. c. 41, § 81V 9, 10

M.G.L. c. 41, § 81W 9

ADDENDA

Memorandum of Decision and Order on Plaintiff's Petition for a Writ of Mandamus 1

M.G.L. c. 40A, § 6 8

M.G.L. c. 41, § 81BB 10

M.G.L. c. 41, § 81M 11

M.G.L. c. 41, § 81P 12

M.G.L. c. 41, § 81V 13

M.G.L. c. 41, § 81W 14

I. STATEMENT OF THE CASE

The plaintiff/appellant, Peter K. Frei (hereinafter "plaintiff"), initiated the instant action on November 20, 2002. Appendix 4, 10 (hereinafter "A. ___"). Through this action, the plaintiff seeks a writ of mandamus ordering the defendant/appellee, Planning Board of Holland (hereinafter "Planning Board"), to endorse a plan of land submitted to the Planning Board on October 15, 2002, "approval under subdivision law not required" (hereinafter "ANR"). A. 10-12. A jury-waived trial was held in this matter on September 9, 2004. A. 41.

The Superior Court found that the plaintiff is entitled to an endorsement of his plan by virtue of the Planning Board's failure to notify plaintiff of its decision that the plan did not qualify as an ANR plan in writing within 21 days of its determination. Addenda 5-6 (hereinafter "Add. ___"). However, the Superior Court exercised its discretion to deny the mandamus relief sought. Add. 6-7.

The Superior Court found that the relief sought would require the Planning Board to act contrary to its own intent in that the Planning Board did not believe that the plaintiff's plan insured proper

vehicular access to the lot shown on the plan and had no intention of endorsing the plaintiff's plan ANR. Add. 7. The Superior Court also found that the relief sought would be contrary to the purposes of the subdivision control law and further determined that the plaintiff had an alternative remedy in that he could submit another ANR request to the Planning Board. Add. 7.

On March 2, 2005, the Superior Court denied the plaintiff's Motion for a New Trial and the plaintiff timely appealed. A. 188-190; Add. 7, 191.

II. STATEMENT OF THE FACTS

The plaintiff is the owner of a peninsula in the Town of Holland, Massachusetts, which juts into Hamilton Reservoir. A. 13, 116, 119. On May 7, 2002, and May 21, 2002, plaintiff attended meetings of the Planning Board to discuss, informally, his desire for ANR endorsement for a contemplated division of his property. A. 125-126. At the May 7, 2002, meeting concerns were raised that one contemplated lot would not have adequate frontage. A. 125. On May 21, 2002, concerns were raised regarding access from the public road. A. 126.

On June 18, 2002, the plaintiff submitted his first request for an ANR to the Planning Board. Add. 2. The Planning Board denied the plaintiff's first application because:

1) We believe that the division would make a non-conforming lot more non-conforming.

2) What Mr. Frei refers to as a private road appears on visual inspection to be more of a very long and poorly maintained driveway. This is the only access to the public way, Maybrook Road.

3) At points, the property measures approximately 10 feet wide with steep drop offs to Hamilton Reservoir which we consider to be an extreme topographical condition impeding access to the buildable portion of one of the lots.

4) The buildable portion of the rear lot consists of several acres and the Board was concerned that if an ANR were approved, more development would occur which would further impede access to the public way.

A. 129; See also, Add. 2.

On October 15, 2002, the plaintiff submitted a second ANR request to the Planning Board, which indicated that the same issues applied to the second request as had applied to the first and that it would deny the application. A. 131-132. Plaintiff returned to the Planning Board on November 19, 2002. A. 133.

According to the minutes of the Planning Board's November 19, 2002 meeting:

> Peter Frei brought us a topographical map of Holland to show us that there is something he called a road where he is requesting his ANR. We reiterated to him that what he keeps referring to as a road is, in our determination, a driveway. He then requested to see the denial of the ANR application which Deb showed him. He did not believe Deb when she informed him that she had filed it with the Town Clerk even though the Town Clerk's signature and date stamp were on the form. He insisted that she follow him to the Town Clerk's office where he requested to see the denial as filed with the Town Clerk. He was shown the form by the Town Clerk.

A. 133; See A. 113.

The plaintiff was not notified of the Planning Board's decision in writing until November 21, 2002.

III. **ARGUMENT**

The plaintiff's appeal rests on *Kupperstein v. Planning Bd. of Cohasset*, 66 Mass. App. Ct. 905 (2006) (rescript). While the plaintiff's brief accurately reflects this Court's opinion in *Kupperstein*, the plaintiff has failed to recognize the full analysis applicable to an action for mandamus relief. The defendants submit that mandamus is always a discretionary remedy but that the discretion at issue

may not be exercised arbitrarily. *Elmer v. Comm'r of Insurance*, 304 Mass. 194, 199 (1939). The defendant further submits that a full application of the appropriate analysis to the case at bar supports the Superior Court's denial of Plaintiff's petition for a writ of mandamus.

This Court, in *Kupperstein*, held "the plaintiffs are entitled, forthwith, to endorsement of the plan or to a certificate from the clerk. There is no other available or adequate remedy. The appellees repeated insistence that mandamus is a discretionary remedy is misplaced in these circumstances." *Id.* at 905-906. The defendants submit that the plaintiff's reliance on this statement, without more, is misplaced.

Defendants recognize that a court may, under certain circumstances, abuse its discretion in denying mandamus relief:

> It has often been said that the issuance of the writ of mandamus is discretionary. It has also been recognized that the writ ought not to be refused if the petitioner shows an absolute right *and* is without other remedy *and* where no reason exists for refusing the writ. To deny the writ in such a case is to quarrel with the policy of the law which creates the right.

Mass. Soc. of Graduate Physical Therapists, Inc. v. Board of Registration in Medicine, 330 Mass. 601, 605

(1953) (emphasis added), *quoting, Elmer v. Comm'r of Insurance*, 304 Mass. 194, 199 (1939) (further citations omitted; internal quotation marks omitted).

Defendants submit, however, that where, as here, a plaintiff has an alternate remedy and good reason exists for refusing the relief sought, a court does not abuse its discretion in denying mandamus relief.

> Some of the reasons which have been held here and elsewhere to justify a discretionary refusal of the writ where the petitioner has otherwise made out a legal right or that to grant it would cause peculiar hardship or injustice; that it would be detrimental to the public interest; that it would violate the spirit of the law; that it would operate disastrously upon the rights of third parties; that it would be ineffective; and that there has been unreasonable delay. No attempt is made to exhaust the list.

Elmer, 304 Mass. at 199 (emphasis added).

Both *Elmer* and *Mass. Soc. of Graduate Physical Therapists* presume the existence of an "absolute" "legal" right to relief. Contrary to the plaintiff's position, however, the analysis does not end there. Rather, two additional factors need to be considered. It is upon consideration of these factors that the Superior Court properly exercised its discretion in denying the relief requested.

In many cases, including *Kay-Vee Realty Co. v. Town Clerk of Ludlow*, 355 Mass. 165 (1969), the Supreme Judicial Court has recognized that although a petitioner has made out a legal right, the mandamus relief sought would operate to the detriment of the public interest. In these cases, the Supreme Judicial Court has gone out of its way to avoid the mandatory application of the rule stated in *Massachusetts Society of Graduate Physical Therapists, Inc.*, *supra*, crafting remedies by which to avoid an inequitable result.

Such mechanisms are arguably not necessary because the rule as stated in *Elmer* and *Massachusetts Society of Graduate Physical Therapists, Inc.* provides for denial of mandamus relief even where a petitioner shows an absolute right in that the rule also provides that mandamus relief may be denied where plaintiff has resort to an alternate remedy and/or where reason exists for refusing the writ. *Massachusetts Society of Graduate Physical Therapists, Inc.*, 330 Mass. at 605; *Elmer*, 304 Mass. at 199.

A. THE SUPREME JUDICIAL COURT HAS AVOIDED THE NEGATIVE CONSEQUENCES OF AUTOMATICALLY ALLOWING MANDAMUS RELIEF IN THE CONTEXT OF THE SUBDIVISION CONTROL LAW.

In *Kay-Vee Realty Co., Inc. v. Ludlow*, 355 Mass. 165 (1969), the Supreme Judicial Court held that the Superior Court Judge properly ordered a writ of mandamus to issue directing the Town Clerk of Ludlow to issue a certificate of constructive approval of a definitive subdivision plan. *Id.* at 169.

It was clear in *Kay-Vee Realty*, as here, that the Planning Board intended to disapprove the plan. *Id.* The Court noted, however, that the Board's disapproval was ineffectual because the board had "blunder[ed] its way into a position where the plan became constructively approved." *Id.* at 169-170 (internal quotation marks omitted; citation omitted). The court was quick to note, however, that "it does not follow that the town and the planning board are without means of relief." *Id.* at 170. In *Kay-Vee*, there existed a statutory mechanism for correcting the "blunder". *Id.* The Supreme Judicial Court ordered that judgment was not to enter until 60 days from the date of the rescript so that the Planning Board could modify, amend or rescind the constructive approval in

accordance with M.G.L. c. 41, § 81W, rather than follow the direct mandate of the statute that the certificate issue. *Id.*

The unavailability of § 81W militates in favor of upholding the Superior Court's judgment in the instant case. Other than the availability of rescission of a constructive approval under § 81W, there does not seem to be a functional distinction to be made between constructive approval under § 81W and failure to timely act on an ANR application pursuant to § 81P. M.G.L. c. 41, § 81V provides:

> In case of the approval of a plan by reason of the failure of the Planning Board to act within the time prescribed, the city or town clerk shall, after the expiration of 20 days without notice of appeal to the superior court or the land court . . . issue a certificate stating the date of the submission of the plan for approval, the fact that the planning board failed to take final action and that the approval resulting from such failure has become final.

M.G.L. c. 41, § 81V (emphasis added). M.G.L. c. 41, § 81W reflects a legislative intent which recognizes that it is in the public interest to provide a means to correct error. No logical distinction between the sections can be drawn to justify a supposed legislative intent to provide a mechanism to correct a "blunder" in the context

of M.G.L. c. 41, § 81V and at the same to tie a court's hands when faced with a similar or identical "blunder" in the context of M.G.L. c. 41, § 81P. Absent an affirmative expression of intent on the part of the legislature, the distinction between M.G.L. c. 41, § 81V and § 81P (the availability of rescission) should not be allowed to operate to strip a court of its proper discretion where mechanical allowance of mandamus relief may, as here, operate to the detriment of the public interest.

B. THE SUPREME JUDICIAL COURT HAS REPEATEDLY APPLIED THE PRINCIPLE THAT ALLOWANCE OF MANDAMUS RELIEF IS NOT A PURELY MINISTERIAL EXERCISE ON THE PART OF A COURT IN OTHER CONTEXTS.

In *Hallenborg v. Town Clerk of Billerica*, 360 Mass. 513 (1971), resident taxpayers of Billerica petitioned for a writ of mandamus compelling the town clerk to strike from the Town's zoning by-law an amendment which allowed apartment houses and ordering the Town's Inspector of Buildings to enforce the zoning by-law as it existed prior to the amendment by revoking building permits for apartment buildings which were issued under the challenged by-law. *Id.* at 514. The petitioners contended that the by-law

amendment was invalid because notice of the Planning Board hearing at which the amendment was considered was made 13 days before the hearing rather than the 14 days provided for by M.G.L. c. 40A, § 6. *Id.* at 515-516.

Following the defectively noticed hearing, the Planning Board recommended that the amendment be adopted and the amendment was adopted at the Annual Town Meeting. *Id.* at 515. The Court noted that petitioners had not been prejudiced by the defective notice and that:

> Every equitable consideration requires treating the by-law amendment as valid, at least as applied to the intervenors, permit holders who have changed position in reliance upon the by-law as having been properly adopted, particularly where the record, as already noted, gives not the slightest indication of prejudice to any petitioner or to any other person arising from the minor defect in publishing this statutory notice.

Id. at 519. Notwithstanding the equitable considerations at play, the Supreme Judicial Court stated "There are limits, however, upon the extent to which there is discretion completely to deny relief by mandamus, where the petitioner attempts to assert a public right . . . and is without other remedy." *Id.* at 519 (citations omitted). The Court resolved this

apparent dilemma by ordering that mandamus relief be delayed to permit either adoption of the by-law amendment in compliance with M.G.L. c. 40A, § 6 or for adoption of an amendment which would protect those who had relied on the improperly adopted amendment. *Id.* at 520.

Similarly, in *Cullen v. The Building Inspector of North Attleboro*, 353 Mass. 671 (1968), the Supreme Judicial Court held that petitioners were entitled to a writ of mandamus ordering the enforcement of North Attleboro's zoning by-law through the removal of buildings constructed at a dairy in violation of the zoning by-law. *Id.* at 678. The petitioners in *Cullen* specifically challenged the issuance of two building permits which authorized the construction of a barn. *Id.* at 677.

> It has often been said that the issuance of the writ of mandamus is discretionary. But it has also been recognized that the discretion cannot be arbitrarily exercised and that the writ ought not to be refused if the petitioner shows an absolute right and is without other remedy, and where no reason exists for refusing the writ."

Id. at 678 (emphasis added), *quoting, Mass. Society of Graduate Physical Therapists, Inc. v. Board of Registration in Medicine*, 330 Mass. 601, 605.

Again, the Supreme Judicial Court alleviated what it felt to be the proper application of this rule by ordering that issuance of the writ be stayed "in order to allow [the dairy farm] an opportunity to seek approval from the board for the new construction and expansion carried out on the premises." *Id.* at 678-679.

In *Clark v. Board of Water & Commissioners of Norwood*, 353 Mass. 708 (1968), the Supreme Judicial Court held that a writ of mandamus could not have been refused as a matter of discretion where petitioners sought a sewer connection, the applicable statute provided that the connection "shall" be made, and the reason given for the denial, that petitioners planned apartment complex would overload the sewer line, was not supported by the record. *Id.* at 709-710. However, the Court noted "doubtless, if the connection would at once overload the sewer and risk serious flooding in danger of injury to persons or property, immediate compliance with the mandate of this statute would not be required." *Id.* at 710. The Court remanded the case to the Superior Court with instructions that judgment was to enter for the petitioner with the caveat that if the Superior Court

were to determine that the connection would risk flooding and danger to persons or property, the effective date of the mandate could be delayed in order to allow for the construction of additional facilities. *Id.* at 711.

Thus, in each of the cases cited above, the Supreme Judicial Court avoided an inequitable result even where it found that petitioner had stated an absolute right and was without other remedy. In the case at bar the only way an inequitable result which is contrary to the public interest can be avoided is through the proper application of judicial discretion pursuant to long established jurisprudence in the area of mandamus law.

C. THE SUPERIOR COURT PROPERLY INVOKED ITS DISCRETION IN THAT PLAINTIFF HAS AN ALTERNATE REMEDY AND THE RELIEF SOUGHT WOULD BE DETRIMENTAL TO THE PUBLIC INTEREST.

Applying the foregoing analysis to the facts herein, the defendants submit that the Superior Court properly exercised its discretion in concluding that the writ should not issue.

1. Plaintiff Has the Alternative Remedy of Submitting Another Plan for Endorsement ANR.

The Superior Court held and the defendants submit that the plaintiff is not without an alternative

remedy. The plaintiff may submit a new ANR request to the Board. Assuming that any such third ANR request is denied, the plaintiff can seek review pursuant to M.G.L. c. 41, § 81BB. This would allow for the proper substantive analysis to be employed and, the defendants submit, is preferable to the mechanical application of the incomplete rule advanced by plaintiff, which could potentially endanger the health, safety and welfare of the citizens of the Town of Holland.

2. The Relief Sought is Against the Public Interest and Contrary to the Intent of the Statute.

Following informal discussions at which the Planning Board voiced its skepticism, the plaintiff has applied twice for an approval not required ("ANR") endorsement under M.G.L. c. 41, § 81P. The Town of Holland's Planning Board ("Board") voted unanimously on July 2, 2002 to deny the plaintiff an ANR endorsement, providing four reasons for its denial consistent with its statutory mandate. A. 129-130.

On October 15, 2002, the Board verbally rejected the plaintiff's second ANR request for the same reasons it had denied the first request.

In denying the plaintiff's request for relief, the Superior Court found:

> First, the issuance of a writ of mandamus would require the Board to act not only contrary to its own intent but contrary to the purposes of the statute. *Corcoran v. Planning Board of Sudbury*, 406 Mass. 248, 250 (1989) ("a principle objective of the subdivision control law is to ensure sufficient vehicular access to each lot in the subdivision"). The Board did not believe that Frei's private way in any way ensured proper vehicular access to the lots in his division plan.

Add. 7.

The defendants respectfully submit that the Superior Court did not abuse its discretion in that it had good reason to refuse the relief sought. It would be contrary to the purposes of the subdivision control law. See M.G.L. c. 41, § 81P; *Hrenchuk v. Planning Bd. of Walpole*, 8 Mass. App. Ct. 949 (1979); see also, M.G.L. c. 41, § 81M, *Ball v. Planning Bd. of Leverett*, 58 Mass. App. Ct. 513 (2003).

Based on the Planning Board's findings, the defendants submit that to grant the relief sought would endanger the health, safety and welfare of any individual who purchased a lot or lots from the plaintiff based on inadequate access and could potentially endanger rescue, fire or other personnel

called upon to make use of an inadequate private way bounded by water on two sides. The defendants submit that any access provided by the plaintiff's private way is illusionary and that considerations of public health, safety and welfare provide just cause for denying the relief sought. To require approval under such circumstances based solely upon a ministerial blunder could not possibly comport with the intent of the legislature. Nor, the defendant submits, could equity require such an unjust result.

3. There is No Ambiguity in the Superior Court's Ruling as Alleged.

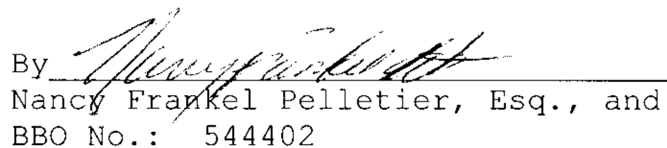
The plaintiff's reference to the "loose procedural matter" is inappropriate. As the plaintiff noted, he filed the subject motion before trial and the same was ruled on and partially denied. The aspect of the case which remained live should have been raised and resolved at trial. The plaintiff's effort to circumvent the trial process by appealing this aspect of the case directly to this Court should not be sanctioned.

IV. CONCLUSION

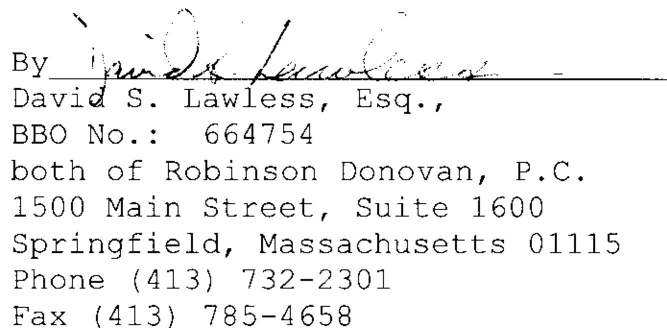
WHEREFORE, for the foregoing reasons, the judgment of the Superior Court should be upheld. The

plaintiff's request for an order specifying that dismissal of Count II incorporated the plaintiff's prayer for damages should be denied because the plaintiff has waived his claim for monetary damages.

THE DEFENDANTS/APPELLEES
PLANNING BOARD OF HOLLAND et al.



By ______________________
Nancy Frankel Pelletier, Esq., and
BBO No.: 544402



By ______________________
David S. Lawless, Esq.,
BBO No.: 664754
both of Robinson Donovan, P.C.
1500 Main Street, Suite 1600
Springfield, Massachusetts 01115
Phone (413) 732-2301
Fax (413) 785-4658

AFFIDAVIT PURSUANT TO MASS. R. APP. P. 13(a)

I, Nancy Frankel Pelletier, Esq., hereby attest that the day of mailing is within the time fixed for filing by the Court.

Subscribed under the penalties of perjury.

____
Nancy Frankel Pelletier, Esq.

CERTIFICATE OF COMPLIANCE PURSUANT
TO MASS. R. APP. P. 16(k)

The defendants/appellants certify that this brief complies with all the rules of this Court that pertain to the filing of briefs, in compliance with Mass. R. App. P. 16(k).

Nancy Frankel Pelletier, Esq.

CERTIFICATE OF SERVICE

I, Nancy Frankel Pelletier, Esq., hereby certify that on this 13th day of November, 2007, served a copy of the above upon the parties in the action by mailing, postage prepaid, to counsel, Wendy Sibbison, Esq., 26 Beech Street, Greenfield, MA 01301-2308.

Subscribed under the penalties of perjury.

Nancy Frankel Pelletier, Esq.

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 02-1196

HAMPDEN COUNTY SUPERIOR COURT FILED DEC 10 2004

PETER K. FREI

vs.

PLANNING BOARD OF HOLLAND, and one other[1]

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S PETITION FOR A WRIT OF MANDAMUS

INTRODUCTION

This case arises from a prolonged and acrimonious dispute between the plaintiff and the defendant regarding whether the plaintiff is entitled to an Approval Not Required ("ANR") endorsement under § 81P of the Massachusetts subdivision control law. G.L. c. 41, §§ 81K – 81GG. After the denial of one ANR request, and the failure to act in a timely manner upon a second, the plaintiff brought the present action in Superior Court requesting the court issue a writ of mandamus pursuant to G.L. c. 249, § 5 ordering the Board to endorse his ANR application.[2] For the reasons outlined below, the plaintiff's petition for a writ of mandamus is **DENIED**.

FACTUAL BACKGROUND

The plaintiff, Peter Frei ("Frei") owns a house and property overlooking Hamilton Reservoir in Holland. In 2002, Frei began planning a division of his property into two or

[1] The Town of Holland

[2] Frei originally complained that the Board's failure to act violated his due process rights and constituted a constructive taking of his property. Frei later voluntarily dismissed these claims, so the court will only address the mandamus request.

three additional lots in order to build and sell single family homes. As part of his plan, in May, 2002, Frei began attending meetings of the Town of Holland Planning Board ("Board") to discuss his desire to apply for an ANR.

On June 18, 2002, Frei presented his first formal request for an ANR to the Board. Frei's plan showed a division of his property into two other lots, the rear lot of which would be connected to the main public road by the current private way[3] leading to Frei's house. At that meeting the Board's preliminary discussions suggested the members' belief that the division presented by Frei did not meet the criteria necessary for the grant of an ANR. The Board told Frei to return to the next scheduled meeting in July, when they would give him their formal decision.

At their July 2, 2002 meeting, the Board informed Frei of its unanimous decision to deny his ANR. The Board gave Frei four reasons for its denial: 1) that the division would make a non-conforming lot more non-conforming; 2) the "private road" indicated by Frei on his site plan appeared to be "more of a very long and poorly maintained driveway;" 3) "At points, the property measures approximately ten feet wide with steep drop offs to Hamilton Reservoir which [the Board} consider[ed] to be an extreme topographical condition impeding access to the buildable portion of one of the lots;" and 4) the size of the rear lot would allow more building in the future, thus further impeding access to the public way.

[3] For the record, the Board consistently characterized Frei's private way as little more than a driveway. Frei adamantly insists it is a "statutory" private way. The characterization of the way as statutory or not makes no difference to the outcome of this case. Casagrande v. Town Clerk of Harvard, 377 Mass. 703, 707 (1979) (statutory private ways are not included within the terms of § 81L). For convenience's sake, the Court will use the terms "private way" when referring to the way on Frei's property..

On October 15, 2002, Frei submitted a second ANR request to a regular meeting of the Board. The new plan divided the property into three new lots, and widened the private way to eighteen feet. The Board responded that even were the way widened "the same issues apply," and they would deny the application.[4] Frei left a map with the Board and asked them to consider the new application. The Board indicated it would speak with the town Building Inspector and submit its decision within twenty-one days, as required by G.L. c. 41, § 81P. However, the Board did not notify Frei in writing of its decision until November 21, 2002.

DISCUSSION

When a property owner brings a plan of the kind Frei brought to the Board and requests an ANR endorsement, "a board is bound to make such an endorsement unless the plan presented shows a subdivision." Gates v. Planning Board of Dighton, 48 Mass. App. Ct. 394, 395 (2000); Smalley v. Planning Bd. of Harwich, 10 Mass. App. Ct. 599, 604 (1980) ("In acting under § 81P, a planning Board's judgment is confined to determining whether a plan shows a subdivision"). The statute defines a subdivision "in part by what it is not." Gates, 48 Mass. App. Ct. at 395, citing G.L. c. 41, § 81L. For purposes of the case at hand, a subdivision is not:

> "a the division of a tract of land into two or more lots ... if every lot within the tract so divided has ... 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."

---

[4] The minutes of the meeting have been altered by hand. The original phrase "we will deny this application" has been changed to "we voted to deny this application." In his complaint, Frei alleges this change indicates an effort by the Board and its president to deceive him and this Court. Previous minutes of the Board's meetings indicate similar hand-written changes. Because there is no evidence for Frei's charge, and because the change to the minutes does not affect the resolution of this case, the Court will not address Frei's allegation.

G.L. c. 41, § 81L.

Frei contends that the private way on his land fulfills the requirements of § 81L because it existed at the time the subdivision control law became effective in Holland. Frei then cites Gates, 48 Mass. App. Ct. at 399, to the effect that that the Board may not consider the nature or quality of his private way in determining whether his plan shows a subdivision, but only whether the access provided by his private way is best characterized as "could be better but manageable," in which case the plan is entitled to an ANR endorsement, or "illusory," in which case it is not. According to Frei, his private way falls into the first category and is therefore entitled to an ANR endorsement.

However, Frei has misread the applicable case law. Gates and like cases refer to whether access from the *public way* is illusory. Gates, 48 Mass. App. Ct. at 396; Poulos v. Planning Bd. of Braintree, 413 Mass. 359, 362 (1992) ("c. 41, §§ 81L & 81M, read together, do not permit [an] endorsement ... in the absence of present adequate access from *the public way* to each of the plaintiff's lots"); Sturdy v. Planning Bd. of Hingham, 32 Mass. App. Ct. 72, 76 (1992) ("Deficiencies in *a public way* are insufficient ground for denying [an] endorsement") (emphases added). This is because "where there is access that a public way normally provides ...the goal of access [contained in the subdivision control law] ... is satisfied, and an [§] 81P endorsement is required." Ball v. Town of Leverett, 58 Mass. App. Ct. 513, 517 (2003).

In a case like the one under consideration, planning boards are granted specific discretion by the plain terms of the statute to determine whether a private way, such as the one Frei says exists on his land, has "in the opinion of the planning board, sufficient width, suitable grades and adequate construction to provide for the needs of vehicular

traffic." G.L. c. 41, § 81P. See Hrenchuk v. Planning Bd. of Walpole, 8 Mass. App. Ct. 949 (1979) (planning board's refusal to endorse ANR proper where access to lots available only through "thirty-foot wide private way leading to a full-access public way"). In refusing to endorse Frei's initial ANR request, the Board specifically mentioned the poor maintenance and extreme narrowness of the private way. Frei's second request, in which he proposed widening the private way, did not assuage the Board's concerns over access to the buildable portions of the land from the public road. The Board clearly was not satisfied with the access provided to the rear portions of Frei's land by the existing private way. Under the statute, Frei was not entitled to an endorsement of his ANR request.

However, G.L. c. 41, § 81P requires the Board to have provided the town clerk and Frei with written notice of its denial by November 6, 2002, at the very latest.[5] The Board's failure to adhere to the requirements of § 81P by providing notice of its decision within the time period established by the statute requires that this Court deem Frei's ANR application approved. G.L. c. 41, § 81P ("If the board fails ... to notify the clerk of the city or town and the person submitting the plan of its action within twenty-one days after its submission, it shall be deemed to have determined that approval under the subdivision control law is not required"); see Kay-Vee Realty Co. v. Town Clerk of Ludlow, 355 Mass. 165, 168 (1969) ("the board ha[s] blunder[ed] its way into a position where the plan became constructively approved").

When a board fails to act within the time period set out in § 81P, "the person who submitted the plan is thereafter entitled, as of right, to an endorsement by or on behalf of

[5] The board contends that Frei had actual notice of the decision because he filed the present complaint on November 20, 2002. However, even assuming Frei had actual notice as of November 20, this is still a full fortnight after the date the law required the Board to have informed him in writing of its decision.

the planning board so stating." Cassani v. Planning Bd. of Hull, 1 Mass. App. Ct. 451, 457 (1973); see also Lynch v. Planning Bd. of Groton, 4 Mass. App. Ct. 781 (1976) (A board's showing that a plan was not entitled to a § 81P endorsement did not merit consideration because "the board's failure to act [within the required time limits] entitled the plaintiff to such an endorsement"); Devine v. Town Clerk of Pymouth, 3 Mass. App. Ct. 747, 748 (1975). Because the Board failed to notify Frei of its decision not to endorse his ANR submission within twenty-one days as required by § 81P, Frei is entitled to an endorsement of his plan.

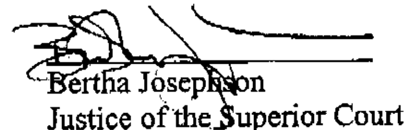
In his complaint, Frei argues that the Board had a "non-discretionary duty" to endorse his plan under § 81P. In that case, a petition for a writ of mandamus is an appropriate course of action. See J & R Investment v. City Clerk of New Bedford, 28 Mass. App. Ct. 1, 7 (1989) ("a civil action in the nature of mandamus is appropriate to compel a public official to perform an act she is legally obligated to perform"). However, Frei is not entitled to the issuance of a writ of mandamus unless he has no other available remedy. Commonwealth v. Forte, 429 Mass. 1019, 1020 (1999); Iverson v. Building Inspector of Dedham, 354 Mass. 688, 690 (1968); Woods v. Newton, 349 Mass. 373, 379 (1965); Lynch v. Police Commissioner of Boston, 43 Mass. App. Ct. 107, 112 (1997) ("relief in the nature of mandamus is extraordinary and may not be granted except to prevent a failure of justice ... where there is no other adequate remedy"), quoting Lutheran Services Association of New England, Inc. v. Metropolitan District Commission, 397 Mass. 341, 344 (1986). The issuance of writ of mandamus is not a matter of right but of sound judicial discretion, Coach & Six Restaurant v. Public Works

Commission, 363 Mass. 643, 645 (1973), and is "a remedy that is to be used only as a last resort, when nothing else will work." Lynch, 43 Mass. App. Ct. at 112;

This Court, in the exercise of its sound discretion, Long v. George, 296 Mass. 574, 578 (1937) ("[d]iscretion means what is just and proper under the circumstances"), concludes that, in the circumstances of this case, the writ should not issue. First, the issuance of a writ of mandamus would require the Board to act not only contrary to its own intent but contrary to the purposes of the statute. Corcoran v. Planning Bd. of Sudbury, 406 Mass. 248, 250 (1989) ("a principal object of the [subdivision control law] is to ensure efficient vehicular access to each lot in a subdivision"). The Board did not believe that Frei's private way in any way ensured proper vehicular access to the lots in his division plan. Further, the Board had no intention of endorsing Frei's ANR request, even after he expressed his intention to widen the private way. Finally, the denial of a petition for a writ of mandamus does not leave Frei without remedy. He has already submitted two ANR requests to the Board for their consideration. There is nothing in the statute which prevents him from resubmitting his proposal to the Board for their further consideration.

ORDER

For the foregoing reasons, the plaintiff's petition for a writ of mandamus is **DENIED**.



Bertha Josephson
Justice of the Superior Court

DATED: December 10, 2004

The General Laws of Massachusetts

PART I. ADMINISTRATION OF THE GOVERNMENT

TITLE VII. CITIES, TOWNS AND DISTRICTS

CHAPTER 40A. ZONING

Chapter 40A: Section 6. Existing structures, uses, or permits; certain subdivision plans; application of chapter

Section 6. Except as hereinafter provided, a zoning ordinance or by-law shall not apply to structures or uses lawfully in existence or lawfully begun, or to a building or special permit issued before the first publication of notice of the public hearing on such ordinance or by-law required by section five, but shall apply to any change or substantial extension of such use, to a building or special permit issued after the first notice of said public hearing, 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 except where alteration, reconstruction, extension or structural change to a single or two-family residential structure does not increase the nonconforming nature of said structure. 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. 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.

A zoning ordinance or by-law shall provide that construction or operations under a building or special permit shall conform to any subsequent amendment of the ordinance or by-law unless the use or construction is commenced within a period of not more than six 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.

A zoning ordinance or by-law may define and regulate nonconforming uses and structures abandoned or not used for a period of two years or more.

Any increase in area, frontage, width, yard, or depth requirements of a zoning ordinance or by-law 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 requirement but at least five thousand square feet of area and fifty feet of frontage. Any increase in area, frontage, width, yard or depth requirement 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 and 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. The provisions of this paragraph shall not be construed to prohibit a lot being built upon, if at the time of the building, building upon such lot is not prohibited by the zoning ordinances or by-laws in effect in a city or town.

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, except in the case where such plan was submitted or submitted and approved before January first, nineteen hundred and seventy-six, for seven years from the date of the endorsement of such approval. Whether such period is eight years or seven years, it 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.

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.

Disapproval of a plan shall not serve to terminate any rights which shall have accrued under the provisions of this section, provided an appeal from the decision disapproving said plan is made under applicable provisions of law. Such appeal shall stay, pending either (1) the conclusion of voluntary mediation proceedings and the filing of a written agreement for judgment or stipulation of dismissal, or (2) the entry of an order or decree of a court of final jurisdiction, the applicability to land shown on said plan of the provisions of any zoning ordinance or by-law which became effective after the date of submission of the plan first submitted, together with time required to comply with any such agreement or with the terms of any order or decree of the court.

In the event that any lot shown on a plan endorsed by the planning board is the subject matter of any appeal or any litigation, the exemptive provisions of this section shall be extended for a period equal to that from the date of filing of said appeal or the commencement of litigation, whichever is earlier, to the date of final disposition thereof, provided final adjudication is in favor of the owner of said lot.

The record owner of the land shall have the right, at any time, by an instrument duly recorded in the registry of deeds for the district in which the land lies, to waive the provisions of this section, in which case the ordinance or by-law then or thereafter in effect shall apply. The submission of an amended plan or of a further subdivision of all or part of the land shall not constitute such a waiver, nor shall it have the effect of further extending the applicability of the ordinance or by-law that was extended by the original submission, but, if accompanied by the waiver described above, shall have the effect of extending, but only to extent aforesaid, the ordinance or by-law made then applicable by such waiver.

The General Laws of Massachusetts

Search the Laws

Go To:
Next Section
Previous Section
Chapter Table of Contents
MGL Search Page
General Court Home
Mass.gov

PART I. ADMINISTRATION OF THE GOVERNMENT

TITLE VII. CITIES, TOWNS AND DISTRICTS

CHAPTER 41. OFFICERS AND EMPLOYEES OF CITIES, TOWNS AND DISTRICTS

SUBDIVISION CONTROL

Chapter 41: Section 81BB. Appeal to superior court; counsel; costs; surety or bond; speedy trial

Section 81BB. Any person, whether or not previously a party to the proceedings, or any municipal officer or board, aggrieved by a decision of a board of appeals under section eighty-one Y, or by any decision of a planning board concerning a plan of a subdivision of land, or by the failure of such a board to take final action concerning such a plan within the required time, may appeal to the superior court for the county in which said land is situated or to the land court; provided, that such appeal is entered within twenty days after such decision has been recorded in the office of the city or town clerk or within twenty days after the expiration of the required time as aforesaid, as the case may be, and notice of such appeal is given to such city or town clerk so as to be received within such twenty days. The court shall hear all pertinent evidence and determine the facts, and upon the facts so determined, shall annul such decision if found to exceed the authority of such board, or make such other decree 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.

A city or town may provide any municipal officer or board with legal counsel for appealing, as provided in this section, a decision of a board of appeals or a planning board and for taking such other subsequent action as parties in other equity cases are permitted to take.

Costs shall not be allowed against the planning board or board of appeals unless it shall appear that such board acted with gross negligence or in bad faith.

The court shall require nonmunicipal appellants to post a surety or cash bond in a sum of not less than two thousand nor more than fifteen thousand dollars to secure the payment of any costs incurred by the appellee as a result of the appeal of a decision approving a subdivision plan if it appears to the court that said appellant or appellants acted in bad faith or with malice in making the appeal to the court.

All issues in any proceeding under this section may be advanced for speedy trial over other civil actions and proceedings.

The General Laws of Massachusetts

PART I. ADMINISTRATION OF THE GOVERNMENT

TITLE VII. CITIES, TOWNS AND DISTRICTS

CHAPTER 41. OFFICERS AND EMPLOYEES OF CITIES, TOWNS AND DISTRICTS

SUBDIVISION CONTROL

Chapter 41: Section 81M. Purpose of law

Section 81M. 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. The powers of a planning board and of a board of appeal under the subdivision control law shall be exercised with due regard for the provision of adequate access to all of the lots in a subdivision by ways that will be safe and convenient for travel; for lessening congestion in such ways and in the adjacent public ways; for reducing danger to life and limb in the operation of motor vehicles; for securing safety in the case of fire, flood, panic and other emergencies; for insuring compliance with the applicable zoning ordinances or by-laws; for securing adequate provision for water, sewerage, drainage, underground utility services, fire, police, and other similar municipal equipment, and street lighting and other requirements where necessary in a subdivision; and for coordinating 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. Such powers may also be exercised with due regard for the policy of the commonwealth to encourage the use of solar energy and protect the access to direct sunlight of solar energy systems. 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 said plan conforms to the recommendation of the board of health and to the reasonable rules and regulations of the planning board pertaining to subdivisions of land; provided, however, that such board may, when appropriate, waive, as provided for in section eighty-one R, such portions of the rules and regulations as is deemed advisable.

The General Laws of Massachusetts

Search the Laws

Go To:
Next Section
Previous Section
Chapter Table of Contents
MGL Search Page
General Court Home
Mass.gov

PART I. ADMINISTRATION OF THE GOVERNMENT

TITLE VII. CITIES, TOWNS AND DISTRICTS

CHAPTER 41. OFFICERS AND EMPLOYEES OF CITIES, TOWNS AND DISTRICTS

SUBDIVISION CONTROL

Chapter 41: Section 81P. Approval of plans not subject to control law; procedure

Section 81P. Any person wishing to cause to be recorded a plan of land situated in a city or town in which the subdivision control law is in effect, who believes that his plan does not require approval under the subdivision control law, may submit his plan to the planning board of such city or town in the manner prescribed in section eighty-one T, and, if the board finds that the plan does not require such approval, it shall forthwith, without a public hearing, endorse thereon or cause to be endorsed thereon by a person authorized by it the words "approval under the subdivision control law not required" or words of similar import with appropriate name or names signed thereto, and such endorsement shall be conclusive on all persons. Such endorsement shall not be withheld unless such plan shows a subdivision. If the board shall determine that in its opinion the plan requires approval, it shall within twenty-one days of such submittal, give written notice of its determination to the clerk of the city or town and the person submitting the plan, and such person may submit his plan for approval as provided by law and the rules and regulations of the board, or he may appeal from the determination of the board in the manner provided in section eighty-one BB. If the board fails to act upon a plan submitted under this section or fails to notify the clerk of the city or town and the person submitting the plan of its action within twenty-one days after its submission, it shall be deemed to have determined that approval under the subdivision control law is not required, and it shall forthwith make such endorsement on said plan, and on its failure to do so forthwith the city or town clerk shall issue a certificate to the same effect. The plan bearing such endorsement or the plan and such certificate, as the case may be, shall be delivered by the planning board, or in case of the certificate, by the city or town clerk, to the person submitting such plan. The planning board of a city or town which has authorized any person, other than a 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 board, giving the name of the person so authorized.

The endorsement under this section may include a statement of the reason approval is not required.

The General Laws of Massachusetts

Search the Laws

Go To:
Next Section
Previous Section
Chapter Table of Contents
MGL Search Page
General Court Home
Mass.gov

PART I. ADMINISTRATION OF THE GOVERNMENT

TITLE VII. CITIES, TOWNS AND DISTRICTS

CHAPTER 41. OFFICERS AND EMPLOYEES OF CITIES, TOWNS AND DISTRICTS

SUBDIVISION CONTROL

Chapter 41: Section 81V. Final approval of plan; endorsements; certificate

Section 81V. In case of approval of a plan by action of the planning board, after the expiration of twenty days without notice of appeal to the superior court or the land court, or if appeal has been taken after the entry of a final decree of the court sustaining the approval of such plan, the planning board shall cause to be made upon the plan a written endorsement of its approval. In case of the approval of a plan by reason of the failure of the planning board to act within the time prescribed, the city or town clerk shall, after the expiration of twenty days without notice of appeal to the superior court or the land court, or, if appeal has been taken, after receipt of certified records of the superior court or the land court indicating that such approval has become final, issue a certificate stating the date of the submission of the plan for approval, the fact that the planning board failed to take final action and that the approval resulting from such failure has become final. The plan bearing such endorsement or the plan and such certificate, as the case may be, shall be delivered by the planning board, or, in the case of the certificate, by the city or town clerk, to the person who submitted such plan. Except as provided in section eighty-one E, the existence of an official map in a city or town shall not affect the operation of the subdivision control law therein.

The General Laws of Massachusetts

Search the Laws

Go To:
Next Section
Previous Section
Chapter Table of Contents
MGL Search Page
General Court Home
Mass.gov

PART I. ADMINISTRATION OF THE GOVERNMENT

TITLE VII. CITIES, TOWNS AND DISTRICTS

CHAPTER 41. OFFICERS AND EMPLOYEES OF CITIES, TOWNS AND DISTRICTS

SUBDIVISION CONTROL

Chapter 41: Section 81W. Modification, amendment or rescission of approval of plan; conditions

Section 81W. A planning board, on its own motion or on the petition of any person interested, shall have power to modify, amend or rescind its approval of a plan of a subdivision, or to require a change in a plan as a condition of its retaining the status of an approved plan. All of the provisions of the subdivision control law relating to the submission and approval of a plan of a subdivision shall, so far as apt, be applicable to the approval of the modification, amendment or rescission of such approval and to a plan which has been changed under this section.

No modification, amendment or rescission of the approval of a plan of a subdivision or changes in such plan shall affect the lots in such subdivision which have been sold or mortgaged in good faith and for a valuable consideration subsequent to the approval of the plan, or any rights appurtenant thereto, without the consent of the owner of such lots, and of the holder of the mortgage or mortgages, if any, thereon; provided, however, that nothing herein shall be deemed to prohibit such modification, amendment or rescission when there has been a sale to a single grantee of either the entire parcel of land shown on the subdivision plan or of all the lots not previously released by the planning board.

So far as unregistered land is affected, no modification, amendment or rescission of the approval of a plan nor change in a plan under this section shall take effect until (1) the plan as originally approved, or a copy thereof, and a certified copy of the vote of the planning board making such modification, amendment, rescission or change, and any additional plan referred to in such vote, have been recorded, (2) an endorsement has been made on the plan originally approved as recorded referring to such vote and where it is recorded, and (3) such vote is indexed in the grantor index under the names of the owners of record of the land affected. So far as registered land is affected, no modification, amendment or rescission of the approval of a plan nor change in a plan under this section shall take effect, until such modification, amendment or change has been verified by the land court pursuant to chapter one hundred and eighty-five, and in case of rescission, or modification, amendment or change not so verified, until ordered by the court pursuant to section one hundred and fourteen of said chapter one hundred and eighty-five.

ADDENDUM 14