

**SITE PLAN REVIEW IN THE COMMONWEALTH OF MASSACHUSETTS:
AUTHORITATIVE ABUSE OR ADMINISTRATIVE METHOD FOR
REGULATION**

BY

CHARLES FREDERICK LEATHERBEE

Bachelor of Science in Engineering with concentration
in Mechanical Engineering
Trinity College – Hartford, CT 1998

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Signature of Author _____
Department of Architecture
August 6, 2004

Certified by _____
William Wheaton
Professor of Economics
Thesis Supervisor

Accepted by _____
David Geltner
Chairman, Interdepartmental
Degree Program in Real Estate
Development

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ABSTRACT

Site Plan review has been accepted by the judicial system in the Commonwealth of Massachusetts as a means for regulating land use. However, it is often mistaken as a mechanism provided by statutory law and therefore used by many communities to reject and/or impose unreasonable conditions on proposed projects. This thesis will argue that the site plan review process is strictly an administrative tool when used alone; merely to offer suggestions by regulating authorities for proposed developments. Furthermore, it will be argued that this process is often misused by municipalities. The history of zoning within the Commonwealth will be provided in order to establish the constitutionality of zoning as it relates to regulatory measures. Additionally cases where the courts have attempted to reconcile the administrative method that is site plan review with the actual authority vested to municipalities under the Zoning Act will be discussed to support this argument.

The Special Permit process will also be closely analyzed as it is often associated and confused with the site plan review process in order to conclude that the site plan review process is a distinct regulatory measure unto itself. Additionally, sections from zoning by-laws from a few communities will be discussed to prove that site plan review under particular zoning by-laws is not supported by statutory law when used alone primarily because the site plan review process is not recognized by Chapter 40A.

Thesis Supervisor: William Wheaton

Title: Professor of Economics

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CHAPTER 1

BACKGROUND

INTRODUCTION AND CONTEXT

All 351 cities and towns of the Commonwealth of Massachusetts have adopted Zoning By-Laws that attempt to regulate the form of real estate development in their respective communities. Under Chapter 40A of the Massachusetts General Laws, (M.G.L.), each community has the ability to establish regulations for development by employing various statutory laws to promote the general welfare of all present and future inhabitants. Because each city and town has distinct circumstances and therefore different zoning by-laws, Chapter 40A remains flexible in order to leave the establishment of development regulations up to the city or town pursuant to the Home Rule Amendment which provides municipalities to self-govern with respect to local matters. However, each by-law must be approved by the Attorney General to ensure that such ordinances are not repugnant to Statutory Law or the Constitution of the Commonwealth of Massachusetts.

While Chapter 40A sets forth a standard for what and how local zoning authorities can regulate development, it leaves the authority of regulation to the local governing authority and, consequently, many appealed decisions are brought to the regional courts to reconcile local by-laws with M.G.L. Chapter 40A to determine if the municipality is in fact operating under statutory law, or if the

municipality is abusing their authority. More specifically, the process of site plan review, as an administrative process, has been considered a statutory tool used by municipalities in an attempt to make conditional approvals and or disapprovals to prospective developers in the Commonwealth. However, site plan review, while considered acceptable by courts in certain cases, is not at all referenced in Mass. General Laws. Irrespective of the fact that many courts have accepted the site plan review process, the silence of Mass. General Laws with respect to Site Plan Review indicates that site plan review (when utilized under an as-of-right application) is a practice of authoritative abuse by a municipality. Frequently, municipalities have exceeded their authority when granting site plan approval if unreasonable conditions are imposed, if imposed conditions have no relation to the subject project, or if the municipality attempts to regulate the development by means of commenting on items outside of their authoritative jurisdiction.

This Thesis will argue that pursuant to Mass. General Laws, the site plan review process *is* a discretionary tool, but is often misconstrued by local zoning authorities as a **statutory** method for making conditional approvals. Furthermore, this Thesis will look at instances where municipalities have forced conditions upon developers that are considered outside of their legal authority in accordance with Mass. General Laws. Additionally, projects that have been approved through the site plan review process where the municipality was charged with authoritative abuse will be provided in an attempt to reconcile the general court's acceptance of site plan review with its understanding of the authority granted to municipalities pursuant to M.G.L. 40A. Lastly, excerpts from

by-laws from a few communities within the Commonwealth will be analyzed to further prove that municipalities are not well versed with the authority granted to them by Massachusetts General Laws and misuse the site plan review process.

In order to prove the legal authority municipalities do in fact possess, a background must be provided in order to give the reader an understanding of Massachusetts General Laws and the powers that have been granted to local government with respect to land use. Therefore, this thesis will also provide the historical development of Massachusetts Zoning Law to demonstrate how today's Chapter 40A came to be and current municipal authority under the modern Chapter 40A. (It is important to note, that this thesis was not prepared by an attorney or legal entity. Therefore, this paper will attempt to prove municipalities misunderstanding of the power over conditional approval from an academic perspective. Lastly, the City of Boston will be excluded from this paper as Boston has a significantly unique process which will not be discussed.)

PURPOSE AND CONSTITUTIONALLITY OF ZONING RUGULATIONS

The definition of zoning pursuant to Section 1A of Chapter 40A is:

“ordinances and by-laws, adopted by cities and towns to regulate the use of land, buildings and structures to the full extent of the independent constitutional powers of cities and towns to protect the health, safety and general welfare of their present and future inhabitants.”

While this defines zoning, it is vague in the sense that it does not include the actual reasons for zoning regulations. The purposes for zoning include, but are not limited to:

- To lessen congestion in streets
- To conserve health
- To secure safety from fire, flood, panic, and other dangers
- To provide adequate light and air
- To prevent overcrowding of land
- To avoid undue concentration of population
- To encourage housing for persons of all income levels
- To facilitate the adequate provision of transportation, water, water supply, drainage, sewerage, schools, parks, open space and other public requirements
- To conserve the value of land and buildings
- To encourage the most appropriate use of land throughout the city or town
- To preserve and increase amenities by the promulgation of regulations

The validity of zoning is predicated on police power – the power to regulate for the advancement and protection of the health, morals, safety or general welfare of the community.¹ Therefore, the justification of a zoning ordinance or by-law is predicated on whether it generally exercises police power. If the ordinance or by-law is considered unreasonable, arbitrary, or capricious, it does not exercise proper police power and will therefore be ruled invalid in a court of law. Similarly, if it deprives the property owner or applicant of all reasonable economic use without detrimentally affecting the community, it may be considered a taking of property without justification.

Before comprehensive zoning was introduced, the police power was only a simple regulatory measure associated with fire, building controls, and

¹ Robert R. Wright and Morton Gitelman, Land Use, 4th Edition (Minnesota: West Group, 2000), p. 180.

limitations on certain uses considered a nuisance. Uses considered a nuisance initially included livery stables and noxious manufacturing industries. Once comprehensive zoning became a common tool for land use regulation, different states treated it differently. In the early twentieth century it was upheld in New York City and in then in Wisconsin shortly thereafter. However, Maryland didn't accept the Baltimore zoning ordinance as it was considered an encroachment upon constitutionally protected property rights. Of course comprehensive zoning was upheld by the Supreme Court in the landmark case of Euclid vs. Amber Realty Co. (1926) which proved the validity of certain ordinances under the police power. Since then, zoning has been adopted by most municipalities across the US and modern day zoning is commonly referred to as Euclidian zoning as a result of this landmark case. The Supreme Court in this case ruled:

“As to the wisdom of [the policy of the zoning ordinance] there may be differing opinion. But the fact that the question is debatable does not empower a court to substitute its judgment for that of the legislative body...Zoning has always been treated as a local matter and much weight must be accorded to the judgment of the local legislative body, since it is familiar with local conditions.”²

Since Euclid, courts have generally supported zoning ordinances if the municipality supports the ordinance or by-law by citing existing conditions within its boundaries that necessitate the regulation. Moreover, the municipality is expected to prove that the regulations cause a tangible benefit to the community when challenged.

² Mark Bobrowski, Handbook of Massachusetts Land Use Planning Law, (New York: Aspen, 2002), p. 39.

HISTORY OF ZONING REGULATIONS IN MASSACHUSETTS

In order to understand the authority vested to communities with respect to zoning regulations, the historical development of zoning within Massachusetts must be discussed. Land use regulations have existed in the United States since the seventeenth century when Common law principles were used by individuals to prohibit “unreasonable uses of land.”³ Adjacent property owners often regulated land use by entering into restrictive covenants prohibiting certain uses. The nineteenth century brought general welfare concerns to the forefront when laws were established to preclude certain activities within certain communities such as the slaughtering of animals or the manufacturing of bricks. By the twentieth century the need for a comprehensive set of regulations was paramount. New York City was among the first to establish regulations to protect portions of Manhattan from overcrowding anticipated as a result of transportation improvements.

It wasn't until the early 1900's that the City of Boston established regulations for restricting certain uses within certain communities. These regulations established limits on heights and building lines, and provided that the city councils were the authority to enforce same. However, not until 1918 did the Commonwealth mandate that a comprehensive zoning control process for all municipalities be established. It adopted an article that established a provision which gave the general court the ability to limit structures according to their use

³ Martin R. Healy, Massachusetts Zoning Manual. (Massachusetts: Massachusetts Continuing Legal Education, 2002), Chapter 1, p. 1-2.

in certain districts. This article, Article LX of the Amendments to the Constitution of the Commonwealth, was adopted on November 5, 1918⁴. This first attempt to regulate development was primarily intended on preventing residential communities from detrimental structures not conforming to the local environment.

This Article reads:

“The General Court shall have power to limit buildings according to their use or construction to specified districts or cities and towns”.

This Article clearly only had jurisdiction over regulating *buildings*. Shortly after the adoption of Article LX, Massachusetts adopted Chapter 601 of the Acts of 1920 which was entitled “An Act to Authorize Cities and Towns to Limit Buildings According to Their Use or Construction in Specified Districts”. Albeit simple, this was the *first Zoning Enabling Act* and contained many of the features of today’s Zoning Act; most notably:

- Delegation of power to cities and towns to restrict, by ordinance or by-law, the use, location, or construction of buildings, including the power to divide the municipality into districts:
- a purpose clause;
- the requirement of a public hearing prior to any zoning enactment;
- the authority to withhold permits where structures would be in violation of local regulations;
- an administrative appeal process to withhold permits;
- availability of judicial review;
- exemptions for existing nonconforming structures and the existing or proposed structures of a public service corporation; and
- procedures for the repeal or modification of ordinances or by-laws.⁵

⁴ Fred W. Fisher, Boston University Law Review, “Trends in Zoning in Massachusetts”, (Boston: The Boston University School of Law, 1956), p. 347.

⁵ Bobrowski, *op. cit.*, p. 35.

The Mass. Acts 601 delegated authority to municipalities to regulate only buildings, like that of its predecessor, Article LX. The regulation of actual land remained ignored until 1925 when the 1925 Mass. Acts 116 were adopted. This particular legislature expanded upon earlier governance to restrict “buildings, structures, and premises” to be used for industrial, commercial, or manufacturing purposes.

Since, the initial Zoning Enabling Act, passed in 1920, there have been many revisions. One major revision came in 1933, when the 1933 Mass. Acts 269, a result of the Standard Zoning Enabling Act drafted by the US Department of Commerce in 1921 and passed in 1926, was enacted. The section of the 1933 Mass. Acts 269 that delegates regulation to municipalities reads:

“For the purpose of promoting the health, safety, convenience, morals or welfare of its inhabitants, any city except Boston, and any town, may by ordinance or by-law regulate and restrict the height, number of stories, and size of buildings and structures, the size and width of lots, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry or other purposes.”⁶

Additionally, the 1933 Mass. Acts 269 included many familiar zoning provisions including the special permit mechanism (which will be discussed later in this paper), the variance mechanism, the powers of the board of appeals, the procedures for appeal, and the protection from zoning changes for approvals secured prior to amendments. Following the adoption of the 1933 Mass. Acts 269, the legislature made many revisions until in 1954 the Commonwealth overhauled the statute. Important introductions included the preclusion of

⁶ *Ibid.*, p. 37.

reconsidering rejected approvals for 2 years, the exemption of regulation for religious and educational uses, and the authorization to regulate land subject to flooding. Prior to this revision the Zoning Enabling Act was referenced in M.G.L. Chapter 40. The 1954 revision resulted in the establishment of a new Chapter, known as M.G.L. Chapter 40A, but still titled *The Zoning Enabling Act*.

The adoption of Chapter 40A was mainly an effort to perfect the Zoning Enabling Act. It attempted to provide communities with a framework for enforcing land development and ensured communities that completed projects were in accordance with the originally approved plans. Prior to 40A, communities were forced to develop extremely restrictive by-laws and/or place a moratorium on construction in order to preserve the welfare of their respective communities. With the enactment of Chapter 40A, communities were provided with the statutory rigidity of an “enabling” act.⁷ Unfortunately, the act lacked flexibility and disallowed communities to employ versatile and controllable zoning tools. From 1954 until the early 1970's, Chapter 40A experienced a number of piecemeal changes that resulted in an inadequate, contradictory instrument. In 1973, the Joint Committee on Urban Affairs decided to rewrite Chapter 40A in its entirety. The purpose of rewriting the Chapter was to clarify the ambiguous language and to establish a necessary “link” to the Home Rule Amendment adopted by the Legislature in 1966.

The Home Rule Amendment is arguably the most significant piece of legislature with respect to local zoning, albeit very relevant to other aspects of

⁷Robert M. August and Susan Mitchell, *A Guide to Massachusetts' New Zoning Act-Chapter 808 of the Acts of 1975*, (Massachusetts, University of Massachusetts, United States Department of Agriculture, and County Extension Services, 1977), p. 1.

local government. In essence, the Home Rule Amendment, specifically Sections 1 and 6, provide cities and towns the abilities of self-government on all local matters including zoning. Following this enactment, the redrafting of Chapter 40A was only more imperative. From 1973 through 1974, the legislature drafted and redrafted the new proposed Chapter 40A. Accompanied by the adoption of the Home Rule Amendment, Chapter 40A was now titled “The Zoning Act”, dropping “Enabling” as the Home Rule Amendment had explicitly granted *enabling* authority to local government. On December 22 1975, Governor Michael Dukakis signed into law Chapter 40A, The Zoning Act.

MASSACHUSETTS GENERAL LAW: CHAPTER 40A – THE ZONING ACT

The modern Zoning Act, adopted in 1975, facilitates, encourages, and fosters the adoption of zoning ordinances and by-laws by municipal governments in accordance with the Constitution of the Commonwealth. Its sole purpose is to provide ***standardized*** procedures for the administration and promulgation of municipal zoning laws. Chapter 40A includes seventeen sections that indicate the statutory requirements and responsibilities of cities and towns with respect to zoning regulations. Accompanied by the Home Rule Amendment, Chapter 40A provides municipalities with the authority to adopt zoning regulations. Moreover, Chapter 40A indicates what cities and towns can and cannot regulate and how their responsibilities shall be carried out. For instance, a city or town has the authority to make such ordinances and by-laws as they may judge conducive to

its welfare, but there are uses which are exempt from regulation. Chapter 40A indicates that a town's ordinances or by-laws can define districts by allowable uses and places requirements which proposed developments must meet. Furthermore, it clearly states that districts shall be uniform within the district for each class or kind of structures or uses permitted. In other words, the local governance over proposed development must be standard from one proposal to the next within the same district.

Following a title and purpose section, Chapter 40A includes relevant information that needs to be referenced in order to facilitate the reader in understanding the site plan review authority of municipalities and the uncertainty that Chapter 40A creates when determining in which cases site plan review is merely a discretionary tool not to be misconstrued as a prohibiting mechanism. Hence, the Chapter goes on to define subjects that zoning cannot regulate. In addition to the zoning exemptions for such uses as agriculture, horticulture, floriculture, viticulture, education, religion, child care (however subject to certain dimensional regulations), Section 3 clearly reads: "No zoning ordinance or by-law shall regulate or restrict the use of materials, or methods of construction of structures regulated by the state building code..."⁸ Additionally, Section 3 also dictates that no ordinances or by-laws shall be valid which sets apart districts by any boundary lines that can be changed without adoption or amendment. Of less importance is the statutory language that precludes any ordinance from prohibiting any solar energy systems or antenna structures by a federally licensed amateur radio operator.

⁸ (M.G.L., Ch. 40A, Section 3).

As referenced earlier, it is clearly stated that zoning districts be uniform with respect to permissible uses as discussed in Section 4. This subject will be discussed later in this paper. Section 5 indicates the procedures required for adoption or change of zoning ordinances or by-laws. In addition to the timing of public notice, this section also indicates the method required for towns or cities to adopt or amend zoning regulations. It also clearly indicates that the attorney general must approve all zoning ordinances or by-laws, adoptions, and amendments and the timing of approval for such adoptions or amendments. It states that the attorney general's sole purpose is to assure that the proposed adoption or amendment is not repugnant to the constitution or statutory laws of the Commonwealth of Massachusetts.

Section 6 of Chapter 40A discusses the rights of existing structures, uses, or permits with respect to municipality's zoning regulations. According to Section 6, no zoning regulation shall apply to structures or uses lawfully in existence or lawfully begun – meaning construction has commenced and/or permits have been received for approval – if the first notice of a subsequent zoning change or adoption has been made after said structure or use has begun. Essentially, this section describes what is considered a “zoning freeze” and how it may affect a project that has been approved prior to zoning revisions.

Sections 7 and 8 describe the methods for enforcement of zoning regulations and the justification of the appeals process within a city or town. These sections state that the building inspector or other designated by local ordinance or by-law shall be charged with the enforcement of the zoning

ordinance or by-law. Moreover, they indicate that an aggrieved party due to a decision made by the building inspector or other (whether project proponent or opponent) may file an appeal with the Permit Granting Authority.

Section 9, Special Permits, is one of the more important sections to be discussed as it closely relates to the site plan review process. This section affords municipalities with the lawful right of requesting site plan review in order to insure that certain conditions are met in accordance with the special permit requirements. This topic will be discussed in great detail in the next section.

Section 17 clearly indicates the methods for appealing adverse decisions by project proponents. Any party aggrieved by a decision of the board of appeals or special permit granting authority (as discussed later) may appeal to a court of superior jurisdiction. However, a party aggrieved by a zoning administrator for a permit (special or otherwise) must first file its appeal with the board of appeals. These statutory procedures are scrutinized when reviewing cases in which site plan review becomes a question of municipal authority as will be discussed later.

CHAPTER 2

SITE PLAN REVIEW

SPECIAL PERMITS

Because Special Permits are often confused with site plan review it is important to distinguish between the two processes. First, an explanation of Special Permits must be provided and then comparisons can be made. Section 9 of Chapter 40A provides town's with the authority to make conditions on approvals if and only if the project proponents receive approval by means of a special permit. Special Permits may be used in order to approve higher densities or approve different dimensional requirements than those accepted as of right.

Section 9, in part reads:

“Special Permits may be issued only for uses which are in harmony with the general purpose and intent of the ordinance or by-law, and shall be subject to general or specific provisions set forth therein; and such permits may also impose conditions, safeguards and limitations on time and use.”

As mentioned previously, it is not uncommon for towns to require site plan review in order to set conditions when receiving special permit applications. However, these conditions *must* be stated in the zoning regulations pursuant to the above reference. Section 9 goes on to state that”zoning ordinances or by-laws shall state the specific improvements or amenities for which the special

permits shall be granted,”⁹ This language, accompanied by Section 4 as mentioned earlier – which states that districts shall be uniform within themselves – indicates that zoning ordinances allowing Special Permits shall clearly state the conditions required when filing a Special Permit in order to insure that equal treatment is given to all applicants within a specified district. However, many municipal zoning regulations remain ambiguous with respect to the conditions set by local authorities when Special Permits are applied for and therefore special permits are often the subject of many court rulings.

While Section 9 doesn’t indicate that the Site Plan Review process is technically afforded to municipalities by statutory law, it has continuously been considered by the court an acceptable procedure, but only when under the special permit process. This is largely because the courts have ruled that Site Plan Review is a good method for insuring that the conditions imposed are met. Furthermore, Chapter 40A provides procedures (for towns and proponents engaged in the special permit process) including, but not limited to; the process for application, duration of decision, procedure for making public notice, and methods for appealing adverse decisions. Section 9 is of great importance when determining the legality of towns utilizing the Site Plan Review Process in isolated cases where Special Permits are not applicable; i.e. as-of-right applications. There have been numerous cases brought to the courts where the courts’ decision, with respect to site plan review authority, is ultimately based upon whether the Special Permit process is relevant or not because as mentioned earlier, the Site Plan Review process is not recognized by

⁹ (M.G.L. Ch. 40A, Section 9).

Massachusetts General Laws. Since it is not at all referenced, there are no directions for procedural requirements relating to site plan review.

Special Permits must not be confused with variances. In fact, the two mechanisms are quite different. A variance is used to authorize an otherwise prohibited use or to loosen dimensional requirements.¹⁰ Special Permits are issued to allow itemized uses after carefully weighing the benefits and detriments of a particular use and conditions are set in advance (within the by-laws). For instance, a density bonus may be granted by way of special permit if a greater amount of open space is provided. Generally, courts have ruled that the Special Permit process is far less stringent than that of a variance. Additionally, a Special Permit must not be confused with a building permit. A building permit is an authorization to commence construction while a Special Permit is an authorization allowing a proposed development to proceed irrespective of subsequent building code requirements. Section 9, provides standardized procedures for the special permit process including how municipalities shall handle applications, how they should be reviewed, and how special permit decisions may be appealed.

THE SITE PLAN REVIEW PROCESS

The Site Plan Review process essentially is the practice of reviewing plans showing site conditions and proposed developments. It has become a common planning tool employed in most jurisdictions in the Commonwealth and

¹⁰ Brobowski, *op. cit.*, p. 268.

throughout the United States. While this Site Plan review procedure is not recognized by Mass. General Laws, it is an attempt by communities to control the aesthetics and environmental impacts of land use. There is a wide variation of practices used by municipalities and therefore it is not standardized like that of the special permit process because of the lack of guidance with respect to this tool in statutory law. *[When referring to Site Plan Review it is not intended to mean the process in which building inspectors review site plans to enforce zoning regulations before issuance of building permits. The Site Plan Review process, as discussed in this paper, is the process by which the appropriate authority within a town reviews site plans, preliminary in nature, to approve or disapprove a proposed project.]*

SPECIAL PERMITS VS. SITE PLAN REVIEW

Because Special Permits are often confused and/or associated with Site Plan Review, it is not always easy to distinguish between the two tools. While one is covered under statutory law, the other is accepted by the courts in certain cases. The Supreme Judicial Court defined its understanding of the site plan review process as “regulation of a use rather than its prohibition...contemplating primarily the imposition for the public protection of reasonable terms and conditions.”¹¹ Much attention has been given to establish a difference between the site plan review process and the Special Permit process. According to V.S.H. Realty Inc. vs. Zoning Bd. of Appeals of Plymouth (1991) special permits

¹¹ *Ibid.*, p. 281.

and site plan approval were acknowledged as distinct. Site Plan review can only be used to slightly shape a project while the full range of discretion is available to the special permit granting authority under the special permit process. According to Mass. General Laws, uses or structures are only approved by means of receiving a building permit or special permit. Therefore it is of paramount importance to identify a link between one of these two mechanisms and the site plan review process; not only to understand the legal justification for using the site plan review process, but also for determining the procedures for appealing adverse decisions.

Often, the granting of a special permit is followed by the approval of a site plan. Traditionally, the courts have held that the “requirement that a site plan be approved before the issuance of a special permit does not impose impermissible restrictions on the allowed use.”¹² Therefore, when used in conjunction with a Special Permit application, the site plan review process has been declared valid. However, this site plan is typically used to only insure the municipality that the conditions of the special permit have been met. When the site plan review process is associated with proposed as-of-right developments, it is clear that the process is an administrative tool to regulate rather than a statutory method for prohibiting a proposed development.

In the landmark Case between Y. D. Dugout vs. Board of Appeals of Canton (1970) the project proponents, Y.D. Dugout, Inc., proposed to develop a restaurant within a district slated for business use. Pursuant to Canton’s by-laws, restaurants were permissible as-of-right within business districts. However,

¹² *Ibid.*, p. 282.

under Canton's prescribed site plan review process, the project was rejected primarily due to traffic concerns. Once appealed, the Supreme Judicial Court concluded that because the zoning by-laws didn't require that a restaurant proposed to be within a business need a special permit, the Board of Appeals (as special permit granting authority) exceeded its authority in disapproving the restaurant. The final order goes on and limits site plan review to regulation of a use rather than its prohibition.¹³ The court ruled that, "if the specific area and use criteria stated in the by-law were satisfied, the board did not have discretionary power to deny a permit, but instead was limited to imposing reasonable terms and conditions on the proposed use."¹⁴ This final order has been repeated over and over in subsequent cases. Essentially the court ruled that the Town only has the power to impose reasonable conditions and cannot reject a site plan outright because the proposed use was permissible without a Special Permit. There have been numerous cases since Y. D. Dugout vs. Board of Appeals of Canton that have attempted to reconcile the statutory directives explained in Chapter 40A with the adopted discretionary tool of site plan review. In the Case between Prudential Insurance Co. of America vs. Board of Appeals of Westwood (1986), Prudential proposed a two-building, four-story office complex consisting of approximately 285,000sf of space on 4.2% of the 39.5 acre parcel. The use was permitted as-of-right, but the Town of Westwood rejected the proposed site plan.

¹³ 357 Mass. 25 (1970).

¹⁴ 19 Mass. App. Ct. 101 (1984).

The court ruled that the Town “may impose reasonable terms and conditions on the proposed use, but it does not have discretionary power to deny the use”.¹⁵

In the Case between Richard P. Quincy vs. The Planning Board of Tewksbury (1995), Richard P. Quincy proposed expanding a shopping center as an allowable use under the zoning by-laws. The Planning Board as the special permit granting authority allegedly assumed the use required a special permit but approved the submitted site plan originally without requesting an application for a special permit. However, when Quincy secured an anchor tenant and submitted a revised site plan with minor modifications, the planning board again approved the site plan but imposed conditions for improving offsite traffic concerns. Quincy appealed the decision to Land Court stating that the proposed use did not constitute the need for a Special Permit. The Land Court’s decision held that the planning board exceeded its authority under site plan review and also held "those portions of the by-law require the discretionary special permit standards to be applied to the proposed shopping center . . . are void." The matter was remanded to the planning board with the suggestion that site plan review "should probably be limited" to the minor on-site changes already proposed in the previously approved site plan.¹⁶ This case is interesting because the planning board of Westwood when reviewing the site plan again for the third time denied site plan approval despite the land court’s suggestion and without indicating reasons for such denial. Moreover, it made no attempt to impose reasonable and appropriate conditions on the permitted use. With Quincy’s second appeal to

¹⁵ 23 Mass. App. Ct. 278 (1986).

¹⁶ 39 Mass. App. Ct. 17; 652 (1995).

Land Court, the judge ruled that in lieu of remanding the case back to the planning board, the judge approved the site plan without any conditions. An appeal by the planning board soon followed to the Appeals Court where the land court's decision was affirmed. This particular project took over six years to secure final approval. This case clearly demonstrates that towns often confuse their responsibilities and jurisdiction of site plan review with that of the Special Permit Process.

LEGAL RAMIFICATIONS ASSOCIATED WITH SITE PLAN REVIEW

The site plan review process has caused uncertainty with respect to applicants' and municipal boards' obligations and responsibilities because there is absolutely no reference to this mechanism within the Zoning Act. As a result, and unlike the special permit process which is described in great length in M.G.L. Chapter 40A Section 9, there is no direction given for site plan review and a host of questions arise with respect to its procedural requirements. Municipalities using site plan review to shape as-of-right, permissible uses, have relied on informal practice to insure control and/or deny proposed developments. Because Chapter 40A remains silent on this creature of planning departments and it is not discussed elsewhere within Massachusetts General Laws, the practice is inconsistent and leaves the interpretation of legal authority up to the courts if and only if it is challenged by project proponents or opposing municipalities. However, this confusion was reconciled in part by certain past cases. In both

Prudential vs. Town of Westwood, and Y.D. Dugout vs. Canton the courts' orders were consistent – that site plan review is a regulation of a use rather than a prohibition. Therefore, it has been found that the site plan review board only has limited authority and should not present significant risks to property rights of owners or applicants.

Even if site plan review is used in conjunction with a special permit, uncertainty often arises. For instance, if used under the special permit process, but the special permit granting authority is a different entity from that which grants site plan approval or disapproval, how can the courts reconcile the conditions set forth by each entity if set differently? Similarly, because certain special permits can be reviewed by one authority and others by a different authority, how can the courts reconcile which authority is more relevant?

Also, does a site plan approval remain static after subsequent zoning amendments have been adopted? Under Section 6, granted special permits remain in effect as long as the structure or use has obtained a building permit and construction has commenced within 6 months from issuance of said building permit. But because site plan review is ignored by Chapter 40A, does zoning freezes described in Section 6 apply to site plan review? In Towermarc Canton Limited Partnership vs. Town of Canton (1989), a height restriction as amended in the zoning regulations subsequent to receipt of site plan approval drastically and adversely affected the proponent's project. The land court ruled that the zoning freeze of Section 6 does not apply to site plan approval.¹⁷ If the approval

¹⁷ Misc. Case No. 131947 (1986).

was given in the form of a Special Permit, Section 6 would have applied and the court's decision likely would have supported Towermarc.

Lastly, and arguably of most importance, is the lack of discussion of appealing adverse decisions with respect to site plan review. Section 17 of Chapter 40A clearly indicates the methods for appealing variances or special permits. Essentially, adverse decisions should be appealed to a high court with respect to variances or special permits. But there is no clear avenue discussed in Chapter 40A when appealing site plan review decisions. In Y.D. Dugout vs. Canton and in Prudential vs. Westwood appeals were heard by the Supreme and Appeals court respectively. However, in the case between McDonald's Corp vs. Town of Seekonk (1981), where McDonald's was denied site plan approval by the planning board for a restaurant despite that the restaurant was allowed as-of-right, McDonald's appealed the planning board's decision directly to the appeals court. The court stated that the planning board did not have authority to enforce zoning regulations, but rather, the building inspector, as zoning administrator was the only person to enforce zoning regulations. Consequently, because party's aggrieved by a zoning administrator's decision must appeal the decision to the board of appeals before filing with a high court, the case was dismissed with the court citing that "it lacked jurisdiction."¹⁸ This in effect requires a ridiculous process mandating that a project proponent must file for a building permit (notwithstanding that it is known that the building permit will not be granted) once the "site plan approval authority" has denied approval only in order to appeal to the board of appeals which inevitably will then require that the proponent appeal

¹⁸ 12 Mass. App. Ct. 351 (1981).

the decision to a high court. This clearly is an agonizing and expensive practice in frustration. However, because site plan is unrecognized by Mass. General Laws, there is no direction given for appealing site plan review decisions and therefore, the courts have attempted to provide direction without a benchmark.

CHAPTER 3

STATUTORY METHODS FOR REGULATION

While there are more than a few methods that towns and cities can use in order to truly control development within their communities pursuant to Massachusetts General Laws, only the well versed planning department or city council exercises methods that are governed by statutory law. All too often, because the powers that be are unfamiliar with the Zoning Act, the methods for regulating land use is left up to those that are unfamiliar with the rights afforded to municipalities.

LIMITED DISTRICT LAND USE

Because Chapter 40A remains silent on the appropriation of land use within a municipality it is considered legal for a town to reserve as much or as little land zoned for a specific use. In other words, if a town is reluctant to permit conventional office buildings within its boundaries, the town can legally zone only a small portion of its land for light commercial use. It can establish maximum lot sizes for its commercial use that preclude the viability of conventional office buildings. Likewise, a town can legally establish ordinances or by-laws that establish minimum lot sizes and density regulations for residential use making it difficult for proposed multifamily residential uses unless Chapter 40B applies to the town in which the approval process is simplified underneath one

comprehensive permit that essentially overrides local zoning by-laws. (Chapter 40B will not be discussed in the paper as its significance and purpose is another topic unto itself and has been analyzed, supported, and criticized by many since its adoption in 1969 and amended in 1989.)

Many communities that consider themselves “bedroom” communities have limited the land within their respective city or town zoned for commercial use. Moreover, these communities that are reluctant to approve commercial development, have often established zoning ordinances requiring that site plan approval be secured for commercial uses that consist of dimensions that exceed an established benchmark. For instance, the Town of Milton, requires site plan approval for all commercial uses in excess of 800 square feet. This requires that virtually all commercial proposals must procure approval under the site plan review process.

STRICT ZONING REGULATIONS

Of course, one method for truly regulating land use, is thorough, strict zoning ordinances and by-laws adopted by cities and towns. Certain restrictions can be, and have been, made that preclude the acceptance of certain proposals. The best example of such strict regulations, have been commonly used by many communities within the Commonwealth for regulating the establishment of adult establishments. Often, entire chapters within municipal zoning by-laws are dedicated to prohibit or strictly regulate these establishments. From restricting

the district(s) from allowing adult use to implementing limitations for the goods sold, adult establishments are considered one of the most highly regulated type of use in most cities and towns. Many cities and towns have adopted such ordinances and by-laws that regulate, by the same method, other less bothersome uses. While care must be taken when adopting or amending ordinances and by-laws so as to not be construed as a taking without justification under the US Constitution, municipalities that are thought of as being against development have established regulations that restrict everything from architectural aesthetics down to interior lighting. While Section 3, of Chapter 40A clearly demonstrates that towns may not regulate the use or materials of construction if it is governed under the State Building Code, most cities and towns include language that attempts to ensure that proposed developments “aesthetically fit the surrounding environment”. Their defense is that certain developments when considered unique to its surrounds are considered noxious to the neighborhood.

REZONING REQUIRMENTS

A very sophisticated method for regulating development that both insures control by a municipality and affords project proponents flexibility is by establishing ordinances and by-laws that require rezoning for each development. Notwithstanding, smaller scale developments such as a single, one dwelling-homes; larger developments can be subject to amending current regulations if

the city or town is willing and able to adopt such procedures that are consistent with the amendment clauses of Chapter 40A. Essentially, it is considered legal under statutory law to limit certain types of uses, and furthermore, it is certainly legal for a town to amend the regulations from time to time. Therefore, a town can include language in its by-laws that requires rezoning to allow certain developments when the actual practice of rezoning is considered the approval process. In other words, by establishing a new zoning district for each proposed development, the city and town can truly shape the proposed structure by establishing particular dimensional, environmental, and density requirements for a use considered as it applies to circumstantial conditions of the site and its use. The Town of Lexington practices this strategy and while it often lengthens the approval process, it is a very intelligent method for regulating land use. Lexington's procedure will be discussed in detail in the next Chapter of this paper. Requiring a site plan review no longer becomes a question of legality when using this process because it is an entirely new zoning district – one in which limitations and restrictions are established by the site plan review process as a result of the actual proposed development. However, requiring districts to be rezoned which initially have no zoning standards gives rise to other legal questions as will be discussed in the next chapter.

SPECIAL PERMIT REQUIREMENTS

Another method for regulating development as allowed by statutory law is to provide that all proposed developments be subject to a special permit. However, the courts have reiterated time and time again since SCIT vs. Planning Board of Braintree (1984) that at least one use must be allowed as-of-right in each district. Chapter 40A clearly states what uses cannot be regulated as discussed earlier, but it is not illegal to require that all residential, commercial, industrial, and the like uses; need to secure a special permit for approval provided that at least one specific use is permissible. Regulations that mandate special permits for all development is certainly not uncommon practice, but it certainly does impose conditions on proposed developments and typically requires that a site plan be provided for approval.

CHAPTER 4

SITE PLAN REVIEW IN THE COMMONWEALTH

Cities and towns can employ various statutory tools to enforce their ability to regulate the development within their boundaries. However, often municipalities adopt zoning ordinances and by-laws that conflict with the standardized procedures set forth in Chapter 40A. Furthermore, cities and towns use the site plan review process as mechanism for prohibiting uses or for regulating proposals when the authority to regulate certain elements is not valid under statutory law. This Chapter will focus on five municipalities with the Commonwealth of Massachusetts, analyze their respective zoning by-law language with respect to commercial development, and determine if the site plan review ordinances are in accordance with statutory law or are considered invalid pursuant to the courts' interpretation of Chapter 40A.

TOWN OF MILTON

The Town of Milton regulates land legally by protecting the vacant land from certain proposed development. Utilizing zoning in compliance with Chapter 40A, a city or town can technically place regulations on land that only permits less dense development thereby prohibiting developments that would be considered noxious to inhabitants. The Town of Milton, which considers itself a bedroom community, has only one defined district permitting commercial use as-

of right. Moreover it has limited the land for commercial use to only 0.065 square miles of the town's entire area – 13.1 square miles. Clearly, Milton is reluctant to approve commercial development unless it is of the community service nature. According to Section III.C of the by-laws the uses permitted as-of-right within the business district include all residential uses. However, the only commercial uses allowed include small offices, banks, or places of assembly as long as the particular structure does not exceed 3 stories or 45 feet (whichever is less). Additionally, the particular land dedicated to business use is limited to two general areas – one of which includes the town center catering to service type commercial use and its dimensions preclude the viability of conventional office development and the other area is currently under control slated for a condominium project. Clearly, the zoning by-laws were written to discourage the development for commercial use.

The Zoning By-laws of the Town of Milton, as initially adopted, discusses the requirement for Site Plan Review, but only for multi-family structures. Commercial development is allowed, but securing its approval is difficult due to the limited land reserved for its use. Moreover, the boundaries of business districts..."shall continue to be as existing immediately prior to the adoption of the [Town of Milton's] by-law."¹⁹ It is interesting to note that these by-laws were adopted on February 10, 1938! According to Chapter 40A and the Home Rule Amendment, this is considered a valid exercise in police power and therefore allowed under statutory law.

¹⁹ Town of Milton, *General Zoning Bylaws and Wetlands Bylaws of the Town of Milton*, (Milton, 1938), p. 3.

Special Permits are required for many uses and the special permit granting authority “may make appropriate conditions and limitations necessary in its opinion to safeguard the legitimate use of the property in the neighborhood and the health and safety of the public,…”²⁰ This is extremely vague and would inevitably lead the courts to determine if the Town of Milton exceeded its authority if challenged by a project applicant aggrieved by an adverse decision from the special permit granting authority. This determination of whether the Town exceeds its authority becomes relevant because the conditions that an applicant must meet when applying for a special permit are not clearly indicated in the by-laws which leads to the question of whether this Section of Milton’s by-laws truly refers to a Special Permit or a site plan review process. Furthermore, this gives rise to violating Section 4 of Chapter 40A: “...districts shall be uniform within the district for each class or kind of structures or uses permitted.” Because the conditions are not set within the by-laws, it is unlikely that set conditions will be consistent from one project to the next within the same district.

Once the by-laws were amended by town meeting in 2002, the Town of Milton required that any proposed commercial development consisting of over 800sf be subject to the town’s site plan review process pursuant to the process established for multifamily structures.²¹ According to the by-laws the Town has the authority:

“to reject any [site] plan which fails to meet standards for health, safety, welfare and amenities appropriate to the special needs of the person by whom such buildings are intended to be occupied and appropriate to the maintenance and preservation of health, safety, welfare and

²⁰ *Ibid.*, p. 52.

²¹ *Ibid.*, Amendment, May 2, 2002.

amenities in relation to adjacent and other properties in the neighborhood.”²²

If a contemplated project is permissible as-of-right, this section of the by-law is clearly invalid and is an exercise of authoritative abuse in accordance with the ruling of Y.D. Dugout vs. Town of Canton where site plan review was defined as a practice that shall be used as a regulation rather than a prohibition of use.

Furthermore, while the by-laws briefly describe the procedure for approval of site plan review, it doesn't state what occurs if the Planning Board (designated as the site plan review authority) fails to render a decision after 100 days from receipt of application. According to the by-laws, the planning board has 65 days from receipt of application to hold a public hearing. Following the hearing, it has 35 days to render the decision. Does failure to act by the planning board after this period constitute a constructive grant of approval as would a special permit application under Section 9 of Chapter 40A? There is no statutory direction given to answer this question.

TOWN OF FRAMINGHAM

The Town of Framingham's Zoning By-Laws are much more sophisticated than that of the Town of Milton. Framingham consists of seven districts allowing commercial use. However, any proposed use over 6000 or 8000 square feet (subject to the particular district) within five of these districts is subject to receiving a special permit. The other two districts allow a few uses as of right,

²² *Ibid.*, p. 52.

but most require a special permit regardless of the proposed square area but in no instance may they exceed 8000 square feet in gross floor area. This method for regulation requires that a site plan be provided from the applicant and is covered under statutory law. Moreover, because there is at least one use permissible in each district, Framingham's by-laws do not violate Section 4 of Chapter 40A.

Chapter IV of the Town of Framingham's By-Laws has an entire section dedicated to the site plan review process. The section clearly indicates what uses are subject to the review process and what information shall be provided when filing for site plan review. According to Section IV.I.2.b:

“any new structure, or group of structures under the same ownership on the same lot or contiguous lots, or any substantial improvement, substantial alteration, or change in use of an existing structure or group of structures, which results in the development of, redevelopment of, reuse of, change in use of, or an increase of at least 8,000 square feet of gross floor area.....”²³ requires site plan approval.

Therefore, virtually all conventional commercial use is subject to site plan review.

Like the Town of Milton, Framingham's by-laws include language specifying the nature of site plan rejection. Section I of Chapter IV, indicates that a site plan review application must include, among other things:

“Building elevation plans at a scale of one-quarter inch equals one foot (1/4"=1'-0") or one-half inch equals one foot (1/2"=1'-0") or such other scale as may be approved by the Planning Board, showing all elevations of all proposed buildings and structures and indicating the type and color of materials to be used on all facades.”²⁴

²³ Framingham, *Town of Framingham Zoning By-Laws*, (Framingham, 2003), Section IV.I.2.b.

²⁴ *Ibid.*, Section IV, Section 1.5.e.

Additionally, it also clearly states that developments' design elements shall be compatible with the character and scale of neighboring properties and structures. Therefore Framingham makes the incorrect assumption that it has the right to reject site plan review based on aesthetics; again against the courts ruling in Y.D. Dugout vs. Canton. And again, according to M.G.L. 40A-Section 3, no ordinance or by-law shall regulate or restrict the use of materials... regulated by the state building code.

TOWN OF NATICK

The Town of Natick's by-laws is another example of sophisticated zoning regulations. Under its zoning by-laws, site plan review is discussed and is meant to protect the welfare of its inhabitants by providing a comprehensive review of uses and structures that have significant impact upon the character of the Town. Interestingly, the nature of the language within the by-laws offers the prospective applicant with a sense that the Town is eager to work with the applicant rather than against it. The by-laws state:

"It [Site Plan Review] is also intended hereby to assist those wishing to build projects within the Town by providing them with the necessary information about all of the Town's requirements affecting their project prior to the start of any construction or the issuance of the permits."²⁵

²⁵ Natick, *Town of Natick ByLaws*, (Natick, 2004), Section VI-DD.3.

However, there are still ambiguities in the general framework of the site plan review prerequisite for special permits. According to the by-laws, the Special Permit Granting Authority is the planning board while the site plan review authority is slated as the Board of Appeals for commercial and industrial uses consisting of under 150,000 square feet of floor area. While the courts will likely consider site plan review as an acceptable prerequisite when securing a special permit, this opens the door for confusion when one board makes different conditions than that of the other board. If challenged, the courts will have to decide which authority carries greater jurisdiction. Wishful thinking causes the layperson to believe that the board of appeals and planning boards in towns always agree with each other and set forth consistent conditions. However, this is rarely the case as members of most local zoning regulatory boards often have different interests and concerns as to the future development of the community. Similar to Milton and Framingham, hen uses are permitted as-of-right, Natick's by-law site plan review language violates Section 3 of Chapter 40A, by assuming the authority to regulate the use of materials proposed according to Section VI-DD.3:

“similar submittals and materials regarding design features intended to integrate the proposed new development into the existing landscape, to enhance aesthetic assets...shall also be provided.”²⁶...for site plan review.

Additionally, Natick's by-laws permit uses as of right, but then also states that many of these uses are subject to site plan review. For instance, retail stores are a permissible use (as-of-right) in the Commercial Two (CII) district.

²⁶ *Ibid.*, Section VI-DD.3.

However, according to Section VI-DD of Natick's by-laws this particular use in this particular district is subject to site plan review. This language within the By-laws accompanied by Section VI-DD.4.b which states site plan disapproval may be given to project applicants clearly violates the court's interpretation of site plan review authority. If a project is proposed that complies with all ordinances, site plan review can only be used as an administrative tool to insure the project does meet all stated requirements in the zoning by-laws. It cannot be used to deny a project outright.

TOWN OF LEXINGTON

Among the 351 municipalities of the Commonwealth, excluding the City of Boston, Lexington arguably has one of the most sophisticated zoning by-laws to regulate land use. Not only does it cover almost all contemplated uses, it provides a method that affords Lexington the ability to reject proposed developments for virtually any reason that would be considered invalid otherwise. Lexington's zoning avoids the uncertainty and authoritative ambiguity of site plan review but still heavily relies on this mechanism. However, in doing so it opens the door for questioning if its procedure is considered spot zoning and if it violates the court's ruling of mandating that at least one specific use be permissible in each district.

Lexington's zoning by-laws include thirteen zoning districts ranging from one-family dwelling districts to planned commercial development districts. Of most interest, is Lexington's mechanism for regulating conventional commercial development. It is intended to provide flexibility for proposed developments. While it does in fact offer flexibility to towns and applicants, it is also is a timely and difficult process and its use of site plan review results in a violation of Section 4 of Chapter 40A. There are no set standards or regulations for development within a planned commercial district (or planned residential district for that matter). However, the standards are established as the project is proposed and the district is rezoned in accordance with the particular site, its use, and the town's conditions. Essentially, Lexington has zoned its land such that where conventional office buildings should be located, along or nearby major transportation arteries, the only district allowing conventional commercial use is the planned commercial district. Under the zoning by-laws, each petition for a commercial project must be presented to the town meeting and then the particular site in question is *entirely rezoned* and standards for the district are established at that time. The presentation consists of a Preliminary Site Development and Use Plan (i.e. a Site Plan intended for Site Plan Review).

While this site plan review process is sophisticated and is pursuant to statutory law because the by-laws require rezoning the parcel and the site plan is used to establish the standards for the rezoning amendment, it requires that the applicant must first file for a site plan review in order to request a zoning change (amendment), then the rezoning must be approved by town meeting, and then

confirmed by the attorney general in accordance with Massachusetts General Laws. This may be considered spot zoning by some. Moreover, according to SCIT, Inc. vs. The Planning Board of Braintree (1984), Section 4 of Chapter 40A is interpreted by the courts to mean:

"...certain uses are permitted as of right within each district, without the need for a landowner or developer first to seek permission which depends upon the discretion of local zoning authorities. The uniformity requirement is based upon principles of equal treatment: all land in similar circumstances should be treated alike, so that "if anyone can go ahead with a certain development [in a district], then so can everybody else."²⁷

Furthermore, Lexington's By-laws state:

"The Planned Commercial District (CD) does not have predetermined standards for developments..."²⁸

Therefore, Lexington's attempt at using site plan review to strictly regulate development has resulted in a violation of Section 4 of Chapter 40A because it doesn't allow one distinct use with the Planned Commercial District. This is not to say that the site plan review process employed in Lexington is invalid, but rather, the reason for such a process is invalid. Site Plan Review may be acceptable if used to establish zoning amendments as the courts would likely agree. However, if the district intended to be rezoned does not have at least one permissible use, than the process which requires site plan review is invalid according to SCIT, Inc. vs. Planning Board of Braintree (1984).

²⁷ 19 Mass. App. Ct 101(1984).

²⁸Lexington, *Lexington By-Laws*, (Lexington, 2003), Section 135-42.B.

Lastly, Lexington's rezoning process certainly is an agonizing process and one which can lengthen the approval process. According to Section 32 of M.G.L. Chapter 40, the Attorney General has ninety days to confirm such zoning amendment, thereby prolonging the approval process for the project applicant. The Town of Lexington offers that this method for allowing certain uses provides much flexibility to the applicant in proposing projects that are more marketable and economical than those that would have been permissible as-of-right. However, in planned commercial districts, there are no uses permitted as-of-right. Additionally, it seems that this procedure is primarily used to "strictly shape or control" real estate developments by the Town of Lexington.

CITY OF WALTHAM

The City of Waltham, in my opinion, has established by-laws that are consistent with statutory law and that provide clear direction to project applicants when contemplating proposed developments. While a procedure exists for site plan review, it is only referenced when special permits applications apply. According to Section 3.6 of Waltham's Zoning Code, which describes what criteria must be met for specific uses permissible only by special permit, site plan review is only required for auto recycling centers, junkyards, and for uses within the Riverfront Overlay District. While the criteria for site plan review is not

provided for junkyards and auto recycling centers, it is described in detail for the overlay district. The description of the criteria for acceptance and for the information that must be provided relates to location of buildings, setbacks, uses, mix of uses, open space, and other community interests. Interestingly, Section VIII.8.48.a reads:

“...the applicable site plan objectives of Sections 8.481 through 8.48 shall be addressed by the City Council during the special permit review process.”²⁹

Evidently, Waltham is familiar with the statutory authority it has according to Massachusetts General Laws and is has established zoning by-laws that are consistent with Chapter 40A. According to the courts, Site Plan Review is considered a valid exercise in police power when it is intended on being used to ensure that the conditions required for securing a special permit are met by a project applicant pursuant to the courts ruling in Auburn vs. Planning Board of Dover (1981). In this case, the court ruled that “requirement that a site plan be approved before the issuance of a special permit does not impose impermissible restrictions on the allowed use.”³⁰ The Waltham by-laws are written well in that they clearly indicate the mechanics required for securing approvals for all projects – whether they are permissible as-of-right or by way of special permit.

²⁹ Waltham, *Town of Waltham Zoning Code*, (Waltham, 2002), p. Z-114.

³⁰ 12 Mass. App. Ct. 998 (1981).

CHAPTER 5

CONCLUSION

SITE PLAN REVIEW: ADMINISTRATIVE TOOL FOR LAND USE REGULATION

I have attempted to prove that the site plan review is merely an administrative tool for land use regulation when applied to projects permissible as-of-right. As mentioned with reference to Y.D. Dugout vs. Town of Canton, the site plan review process is considered by the courts as a method for regulation and not an exercise in prohibition of use. Furthermore, many towns' misconception of the authority of site plan review has been provided in the previous Chapter. Due to the confusion that has come about with respect to the difference between site plan approval and special permits, there is a current trend in the courts stating that these processes are in fact different in accordance with V.S.H. Realty Realty vs. Zoning Bd. of Appeals of Plymouth (1991). This case is important to note as are the cases of Prudential vs. Westwood and SCIT, Inc. vs. Planning Board of Braintree which both consider site plan approval distinct from a Section 9 (M.G.L. 40A) special permit.³¹ If these rulings are consistently held in the future, the question of what authority a municipality has with respect to site plan review does not arise. However, until site plan review is recognized by the Zoning Act, court rulings have no direction and must rely on

³¹ Martin R. Healy, Massachusetts Zoning Manual, (Boston: Massachusetts Continuing Education Legal Education, 2002), p. 8-35.

previous cases and the circumstances of the particular case to reconcile the ambiguity that still exists.

In Osberg vs. Planning Board of Sturbridge(1997), Osberg proposed a development permissible as-of-right and received site plan approval by the planning board. The board's decision was challenged by project opponents on the count that the site plan approval was invalid because the proper procedure for accepting the approval was not executed under the Special Permit Process. The court concluded that "a planning board conducting a site plan review in connection with a use permitted as of right is not a special permit granting authority within the meaning of M.G.L. 40A".³²

Does failure to act upon a site plan review by the site plan review entity constitute a constructive grant as is the case in a special permit? Does the granting of site plan approval prior to a subsequent zoning amendment give rise to a zoning freeze as does a special permit? Can an applicant appeal an adverse decision under site plan review to a high court? If site plan approvals and special permits are granted by two distinct authorities, which authority has superior jurisdiction? What is the standard procedure for reviewing site plans? In light of these unanswered questions due to the failure of Chapter 40A to provide guidance on site plan review, site plan review can only be considered an administrative tool employed by municipalities when a special permit does not exist.

³² 44 Mass. App. Ct. 56 (1997).

MASSACHUSETTS LAND USE REFORM ACT

Since it has been known for some time that the site plan review process is not recognized by statutory law and this leaves the courts to reconcile the difference between site plan review as an administrative tool or an authoritative exercise in police power, the legislature should address the site plan review process and include directions for municipalities within the Zoning Act.

Coincidentally, the Massachusetts Land Use Reform Act addresses the site plan review process. (See Appendix for entire Act.) This particular act clears up some of the deficiencies by defining the site plan review process as:

“is a submission made to a municipality that includes documents and drawings required by an ordinance or by-law and used by the municipality to determine whether a proposed use of land or structures is in compliance with applicable local ordinances or by-laws, to evaluate the effects of the proposed use of land or structures on the neighborhood and/or community, and to evaluate and propose site design modifications that will lessen those impacts.”³³

At a minimum the act includes the site plan review process in the Zoning Act and provides general framework for cities and towns to use when practicing the site plan review process. It also includes language for establishing what a city or town should consider subject to site plan review, procedures for site plan review, the appeals process, and procedures for enforcing approvals. If passed, this revision to the Zoning Act will eliminate much confusion that has come about

³³ (Massachusetts Land Use Reform Act), 2002.

over the last few decades. However, the legislature has been consumed with other more prominent acts with respect to real estate that have been considered more important to address in the meantime. Therefore, it is unlikely that this act will be passed in the foreseeable future.

Therefore, it is my opinion that municipalities should review their zoning by-laws and revise or entirely rewrite such sections pertaining to the site plan review process with the support of a real estate attorney who is familiar with Chapter 40A. As indicated in this paper, the misconception shared by many municipalities – that site plan review is a statutory method for approving permissible uses – must be addressed by each municipality that has chosen to employ this administrative tool. Of course, most communities have no reason to investigate the question of site plan review’s legal jurisdiction as communities know that it behooves an applicant to challenge the municipalities’ decisions with respect to site plan review in light of the forthcoming legal expense and timely process required. Similarly, municipalities often impose or exact unreasonable conditions to site plan approval with the knowledge that applicants will not challenge the decisions due to the economics and timing of the proposed development.

Many developers understand the authority of cities or towns better than the actual city or town does due to the fact that developers typically have better legal resources than that of the city or town. However, these same developers are cognoscente of the expenses incurred in litigation. Therefore, it is often better for an applicant to accept conditional approval, irrespective of the

conditions as long as they don't preclude the economic viability of a project, rather than bringing suit against the municipality or its zoning enforcement department.

RECOMMENDATIONS

In order for the discrepancies associated with the authoritative legal jurisdiction over site plan review to be resolved, it is imperative that something be done under statutory law. Site Plan review should be recognized by Chapter 40A and defined as an administrative tool for regulation, but not a prohibition of use pursuant to Y.D. Dugout vs. Town of Canton. Furthermore, municipalities must review their respective zoning by-laws and amend such by-laws in order to insure the site plan review process clearly demonstrates that when not used in conjunction with the special permit process, it only is a tool for municipalities to look at a picture of the project's completion rather than a method to preclude a proposed development if permissible as-of-right. While certain conditions must be made on certain approvals, they must be reasonable and relate to the project's impact on the surrounding community.

Moreover, until the legislature includes such acknowledgment of the site plan review process, municipalities should amend their by-laws in an attempt to eliminate the ambiguity in seeking approval that does not detrimentally affect the community. If communities support imposing conditional approvals under site plan review for proposed projects, they should certainly not reject projects when

permissible as-of-right. In turn, they should provide clearer (and stricter limitations if necessary) guidance for prospective developers. After all, it is the municipality's responsibility to regulate land use and that should be done in accordance with the same legislature that granted them the authority to do so.

APPENDIX: Massachusetts Land USE REFORM ACT

The Commonwealth of Massachusetts

In the Year Two Thousand and Three

An Act to Promote Land Use Reform in Massachusetts.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Chapter 40A of the General Laws is hereby amended by inserting after section 1 the following section:-

40A:2. General Purposes of Zoning Ordinances and By-laws

- (a) The purpose of this Zoning Act is to provide guidance to municipalities in their regulation of land use, growth, and development through the exercise of home rule powers conferred by article 89 of the Massachusetts constitution. Except as hereinafter provided, cities and towns may adopt zoning ordinances and by-laws in furtherance of the purposes contained in this section for the benefit of their present and future inhabitants to the full extent of the powers of such cities and towns, whether such power is independently authorized by the constitution of the Commonwealth or here by the general court incident to power granted to it by the constitution. The Commonwealth shall limit these powers only where necessary to ensure consistency in zoning and promote regional and statewide interests as specifically provided herein.
- (b) This Zoning Act is intended to encourage zoning ordinances and by-laws that advance the following public purposes of the Commonwealth, each with equal priority and numbered for reference purposes only. The general court recognizes that cities and towns may advance some or all of the purposes listed below or may advance other purposes not listed below as they deem appropriate.
- (1) Implementation of a plan adopted by the city or town under section eighty-one D of chapter forty-one.
 - (2) Achievement of a balance of housing choices, types and opportunities for all income levels and groups, to assure the health, safety and welfare of all citizens and their rights to affordable, accessible, safe, and sanitary housing.
 - (3) Orderly and sustainable growth and development which recognizes:
 - (i) the goals and patterns of land use contained in a plan adopted by the city or town under section eighty-one D of chapter forty-one;
 - (ii) the natural characteristics of the land, including its suitability for use based on soil characteristics, topography, and susceptibility to surface or groundwater pollution;
 - (iii) the values and dynamic nature of watersheds, coastal and freshwater ponds, the shoreline, and freshwater and coastal wetlands;
 - (iv) the values of unique or valuable natural resources and features;
 - (v) the availability and capacity of existing and planned public and/or private services and facilities;

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- (vi) the need to balance the “built” environment with the “natural” environment; and
- (vii) the use of innovative development regulations and techniques such as development agreements, impact fees, inter-municipal transfers of development rights, agricultural zoning, inclusionary zoning, mediation and dispute resolution, and urban growth boundaries.
- (4) Control, protection or abatement of air, water, groundwater, noise and light pollution, and soil erosion and sedimentation.
- (5) Protection of the natural, historic, cultural, aesthetic, and scenic character of the city or town or areas therein.
- (6) Preservation and promotion of agricultural production, forestry, aquaculture, and open space.
- (7) Protection of the environment and natural resources, including but not limited to farmland, forestland, water quality and quantity, shore lands, ridgelines, recreational resources, open spaces, special habitats and ecosystems and other qualities of the environment and natural resources set forth in article 97 of the Massachusetts constitution.
- (8) Protection of public investment in transportation, water, storm water management systems, sewage treatment and disposal, solid waste treatment and disposal, schools, recreation, public facilities, open space, and other public requirements.
- (9) Improvement and expansion of existing infrastructure and construction of new infrastructure in support of a plan adopted by the city or town under section eighty-one D of chapter forty-one and the purposes listed herein.
- (10) An energy efficient, convenient and safe transportation infrastructure with as wide a choice of modes as practical, including, wherever possible, maximal access to public transit systems.

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- (11) Sustained or enhanced economic viability of the community and the region.
- (12) Coordination of land uses with contiguous municipalities, other municipalities, the state, and other agencies, as appropriate, especially with regard to resources and facilities that extend beyond municipal boundaries or have a direct impact on that municipality.
- (13) Accommodation of regional growth in a fair and equitable, but sustainable manner among municipalities.
- (14) Efficient, fair and timely review of development proposals, to clarify and expedite the zoning approval process.
- (15) Effective procedures for the administration of the zoning ordinance or by-law, including, but not limited to, variances, special permits, other locally-adopted zoning permits, reviews or procedures, and, where adopted, procedures for modification.
- (16) Protection of the public health, safety, and general welfare.
- (17) A range of uses and intensities of use appropriate to the character of the city or town and reflecting current and expected sustainable future needs.
- (18) Safety from fire, flood, and other natural or man-made disasters.

- (19) High level of quality in the design and development of private and public facilities.
- (20) Conservation of the value of land and buildings.
- (21) Conservation and enhancement of community amenities.
- (22) Efficiency in energy usage and the reduction of pollution from energy generation, including the promotion of renewable energy sources and associated technologies.

SECTION 2. Section 3 of chapter 40A of the General Laws, as appearing in the 2000 Official Edition, is hereby amended by inserting, after the word “the”, in line 25, the following word:- minimum.

SECTION 3. Said section 3 of said chapter 40A, as so appearing, is hereby further amended by striking out, in lines 26-34 inclusive, the words "nor shall any such ordinance or by-law prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by the commonwealth or any of its agencies, subdivisions or bodies politic, or by a religious sect or denomination, or by a nonprofit educational corporation; provided, however, that such land or structures may be subject to reasonable regulations

Massachusetts Land Use Reform Act – 12/3/02 (final as submitted by ZRWG) 3 concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements."

SECTION 4. Said section 3 of said chapter 40A, as so appearing, is hereby further amended by striking out the third paragraph and inserting in place thereof the following paragraph:-

Zoning ordinances or by-laws shall not prohibit the use of land or structures thereon for:

a) educational purposes on land owned or leased by the Commonwealth or any of its agencies, subdivisions or bodies politic or by a nonprofit educational corporation; b) religious purposes by a religious sect or denomination; c) the purposes of operating a child care facility or d) the purposes of operating a community residential program. As used in this section the following words shall have the following meanings: a)

"educational purposes" means public and nonprofit private primary, secondary and higher educational purposes; b) "child care facility" means a day care center or school age child care program, as those terms are defined in section 9 of chapter twenty-eight A; c)

“community residential program” means a residential facility licensed by the Commonwealth to provide care or shelter or supervision or education to a maximum of eight (8) individuals with a mental or physical disability or to victims of crime, of physical or mental abuse, or of neglect in a small-scale residential setting with on-site or off-site supervision. The land or structures used for such purposes may, however, be subject to reasonable regulations regarding the bulk and height of structures, yard sizes, frontage, lot area, building coverage requirements, setbacks, floor area ratio, parking, access and egress, lighting, drainage, landscaping, buffering and open space, and similar matters. Compliance with such regulations may be determined as provided by ordinance or by-law in each city or town, including through site plan review under which reasonable conditions, safeguards, and limitations to mitigate the impact of a specific use of land or structures on the neighborhood may be imposed pursuant to section seven A of this chapter. In addition, the application of such regulations to particular land or

structures used for such purposes may be waived in whole or in part by special permit, and reasonable conditions may be imposed as part of the special permit. The waiver may be granted if the special permit granting authority finds, based upon the evidence presented by the person seeking the waiver, that the waiver will not result in substantially more detriment to the neighborhood than the use of the particular land or structures for such purposes without the waiver.”

SECTION 5. Section 5 of said chapter 40A, as so appearing, is hereby amended by inserting, after the tenth paragraph, the following paragraph:-

A zoning ordinance or by-law adopted or amended under this chapter shall not be inconsistent with a plan prepared by the city or town under section eighty-one D of chapter forty-one. Said ordinances or by-laws shall provide that in the instance of uncertainty in the construction or application of any section therein, the ordinance or by-law shall be construed in a manner that will further the implementation of, and not be contrary to, the goals, policies and applicable elements of said plan. This paragraph shall not become effective until five years after it is enacted in the General Laws.

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SECTION 6. Chapter 40A of the General Laws is hereby amended by striking out section 6 and inserting in place thereof the following section:-

40A:6. Applicability of Zoning Ordinances and By-laws

40A:6A. Nonconforming Lots, Structures and Uses

(a) Residential Lot Exemption

Increases in lot area, frontage, width or depth, or building setback requirements of a zoning ordinance or by-law shall not apply to a lot for single- or two-family residential use which immediately prior to the effective date of the zoning amendment that rendered the lot nonconforming:

- (1) was shown or described as a separate lot on a recorded plan or deed or on an assessors map or plat and has access to and frontage on an existing public way, or if not, to a way of sufficient width, grade and construction to provide safe access to such lot as the planning board or its designee may determine; and
- (2) conformed to the then existing lot area, frontage and lot width or depth requirements; and
- (3) had at least five thousand square feet of area and fifty feet of frontage in the case of a single-family residential use and at least seventy-five thousand square feet of area and seventy-five feet of frontage in the case of two-family residential use; and
- (4) was not held in common ownership with any adjoining land. For the purposes of this section, common ownership shall include lots held by separate legal entities, persons or trusts under common control or with common beneficial interests.

(b) Lawfully Nonconforming Structures and Uses

- (1) For the purposes of this section, a lawfully nonconforming structure or use shall be a structure or use lawfully in existence at the time of the effective date of the zoning amendment rendering such structure or use nonconforming.

- (2) Adoption or amendment of a zoning ordinance or by-law shall not apply to lawfully nonconforming structures or uses and shall not apply to structures and uses lawfully begun prior to the first publication of notice of the public hearing on the adoption or amendment of the relevant zoning ordinance or by-law required by section five.
- (3) A zoning ordinance or by-law may provide that, if a nonconforming use or structure is abandoned for a period of two years or more, it may not be reestablished. Abandonment shall consist of some overt act, or failure to act,

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 which would lead one to believe that the owner neither claims or retains any interest in continuing the nonconforming structure or use, unless the owner can demonstrate an intent not to abandon it. An involuntary interruption of a nonconforming structure or use, such as by fire and natural catastrophe, does not establish the intent to abandon. However, if a nonconforming structure or use is halted, unused or vacated for a period of two years, the owner shall be presumed to have abandoned it.

- (4) This subsection 6A(b) 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.

(c) Alteration, Reconstruction, Extension or Structural Change of Lawfully Nonconforming Structures and Uses

- (1) A zoning ordinance or by-law shall not prohibit the alteration, reconstruction, extension, or structural change to a lawfully nonconforming single- or two-family residential structure, provided there is no increase in the degree of nonconformity of the structure.
- (2) A zoning ordinance or by-law may permit, as of right or by special permit, lawfully nonconforming structures or uses to be altered, reconstructed, extended or structurally changed provided that such actions shall not increase the degree of nonconformity of the structure or use.
- (3) A zoning ordinance or by-law may permit, by special permit, lawfully nonconforming structures or uses to be altered, reconstructed, extended or structurally changed in a manner that increases the degree of nonconformity of the structure or use, provided that the permit granting authority finds that such actions shall not be substantially more detrimental to the neighborhood than the lawfully nonconforming structure or use.
- (4) A zoning ordinance or by-law may regulate nonconforming structures differently than nonconforming uses.
- (5) A zoning ordinance or by-law may vary by zoning district(s) the requirements for the alteration, reconstruction, extension or structural change for all lawfully nonconforming structures and uses, except single- and two-family residential structures.

40A:6B. Vested Rights: Effective Date of Zoning Amendments

(a) Building Permits and Special Permits

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- (1) Adoption or amendment of a zoning ordinance or by-law shall not apply to a building permit issued or special permit granted prior to the first publication of notice of the public hearing on the adoption or amendment of the relevant zoning ordinance or by-law required by section five.
 - (2) The provisions of subsection 6B(a)(1) shall not apply to building permits unless construction under the permit is commenced within six months after issuance and is carried through to completion as continuously and expeditiously as is reasonable.
 - (3) The provisions of subsection 6B (a)(1) shall not apply to special permits unless the use or construction authorized under such permit is commenced within two years.
- (b) Subdivision Plans
- (1) Adoption or amendment of a zoning ordinance or by-law shall not apply to a definitive subdivision plan approved prior to the first publication of notice of the public hearing on the adoption or amendment of the relevant zoning ordinance or by-law required by section five.
 - (2) The provisions of subsection 6B(b)(1) shall apply for a period of three years.
- (c) General Provisions
- (1) The time requirements of this section 6B shall be extended for a period of time equal to the duration of:
 - (i) any extensions granted by the applicable local board or authority;
 - (ii) the period of an appeal from the decision of any applicable local board or authority taken under applicable provisions of law on a building permit, special permit or definitive subdivision plan; and
 - (iii) any moratoria upon permitting or construction imposed by any government entity.
 - (2) 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, a copy of which shall be filed with the building inspector and town clerk, to waive the provisions of this section 6B, in which case the zoning ordinance or by-law then or thereafter in effect shall apply.

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SECTION 7. Chapter 40A of the General Laws is hereby amended by inserting after section 7 the following section:-

40A:7A. Site Plan Review

- (a) As used in this section, a "site plan" is a submission made to a municipality that includes documents and drawings required by an ordinance or by-law and used by the municipality to determine whether a proposed use of land or structures is in compliance with applicable local ordinances or by-laws, to evaluate the effects of the proposed use of land or structures on the neighborhood and/or community, and to evaluate and propose site design modifications that will lessen those impacts.
- (b) A city or town may adopt a local ordinance or by-law requiring the submission, review and approval of a site plan before authorization is granted for the use of land or structures governed by a zoning ordinance or by-law.
- (c) Such ordinance or by-law for site plan review shall:

- (1) establish which uses of land or structures are subject to site plan review;
 - (2) specify the local board or official charged with reviewing and approving site plans, which may differ for different types, scales, or categories of uses of land or structures;
 - (3) establish the submission and review process for a site plan which is submitted in connection with an application for a variance, special permit, or other discretionary zoning approval. This submission and review may be conducted as part of the review of the application for discretionary approval or may be a separate review process under subsection (c)(4) below;
 - (4) establish the submission and review process for applications not governed by the procedures for review of discretionary zoning approval under subsection (c)(3) above, which may include the requirement of a public hearing held pursuant to the provisions in section eleven of this chapter. A decision under this subsection (4) shall require a vote by no more than a majority of the full board and shall be made within the time limits prescribed in the ordinance or by-law, not to exceed the time limits for special permits contained in section nine of this chapter. If no decision is issued within the prescribed time limit, the applicant shall be entitled to constructive approval of the site plan submitted as provided in section nine, paragraph eleven of this chapter;
 - (5) establish standards by which the use of land or structures and its impact on the neighborhood shall be evaluated; and
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- (6) contain provisions that make the terms, conditions, and content of the site plan once approved enforceable by the municipality, which may include the requirement of performance guarantees.
 - (d) The local board or official charged with review of site plans may adopt, and from time to time amend, after a public hearing, rules to implement the local site plan ordinance or by-law adopted under this section. Notice of the proposed rules and of the location, date and time of the public hearing shall be filed with the city or town clerk and published in a newspaper of general circulation in the city or town at least fourteen days before the public hearing.
 - (e) A site plan submitted for the use of specific land or structures provided in subsection (c)(4) shall be approved if the site plan:
 - (1) meets the procedural and submission requirements of the site plan review process applicable to the specific land or structures;
 - (2) complies with the regulations applicable to such land or structures in the local zoning ordinance or by-law; and
 - (3) meets such standards as the local zoning ordinance or by-law provides by which the use of land or structures and its impact on the neighborhood shall be evaluated.
 - (f) A site plan approved hereunder may include reasonable conditions, safeguards and limitations to mitigate the impacts of a specific use of land or structures on the neighborhood.

- (g) Decisions made under site plan review may be appealed as specified in the ordinance or by law, which may include direct judicial review pursuant to section seventeen of this chapter.
- (h) Zoning ordinances or by-laws shall provide that a site plan approval granted under this section shall lapse within a specified period of time, not more than two years from the date of the filing of such approval with the city or town clerk, so long as substantial use or construction has not yet begun, except as extended for good cause by the approving authority designated under (c)(2) above. Such time shall not include time required to pursue or await the determination of an appeal under subsection (g) above.

SECTION 8. Section 9 of chapter 40A of the General Laws, as appearing in the 2000 Official Edition, is hereby amended by striking out the fourth paragraph, inserted by section 1 of chapter 197 of the acts of 2002, and inserting in place thereof the following paragraph:-

Zoning ordinances or by-laws may provide for the authorization of the transfer of development rights of land within or between districts. Such authorization may be by special permit or by other methods, including but not limited to the applicable provisions of sections eighty-one K to

Massachusetts Land Use Reform Act – 12/3/02 (final as submitted by ZRWG) 9 eighty-one GG, inclusive, of chapter forty-one and in accordance with a planning board's rules and regulations governing subdivision control.

SECTION 9. Section 1A of said chapter 40A, as so appearing, is hereby amended by inserting the following definition:-

"Development impact fees", a contribution paid to a city or town by the person undertaking a development for the purpose of offsetting the impacts related to the development.

SECTION 10. Chapter 40A of the General Laws is hereby amended by inserting after section 9C the following section:-

40A:9D. Development Impact Fees

(a) Authority

Cities and towns may adopt ordinances and by-laws establishing and governing the procedure by which they may calculate, assess and impose development impact fees on proposed developments, including procedures to allow waiver or reduction of development impact fees for affordable housing developments.

(b) Administration

(1) Any development impact fee assessed under this section shall be paid to and held in a separate account in the city or town in which the proposed development is located. In the event that the proposed development is located in more than one municipality, the impact fee shall be apportioned among the municipalities in accordance with the land area or other equitable unit measure of the impacts of the proposed development in each city or town having adopted an ordinance or by-law under this section.

(2) Any development impact fee imposed or permitted under this section shall comply with the following:

- (i) The fee shall be rationally related and reasonably proportional to an impact directly or indirectly created by the development.
- (ii) The purposes for which the fee is expended shall reasonably benefit the proposed development.
- (iii) The fee shall be expended for the creation or improvement of capital facilities in accordance with a municipal plan, including, but not limited to, the creation or improvement of streets, sewers, water supplies, pollution abatement, parks, schools and similar capital facilities.

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- (3) Nothing in this section shall prevent a municipality from imposing fees or conditions which it may otherwise impose under applicable laws and constitutional provisions.

SECTION 11. Chapter 40A of the General Laws is hereby amended by inserting after section 9D the following section:-

40A:9E. Negotiated Special Permits

(a) Authority

A local zoning ordinance or by-law may provide that certain uses of land or structures may have available a negotiated special permit in accordance with the provisions of this section. The purpose of such negotiated special permit shall be to encourage such users of land or structures and the potentially affected community to seek to meet the particular interests of both parties in ways that other lawful measures might not provide. However, the rights of owners of land to use their land under existing rules and such powers as a city or town may otherwise have to regulate such uses of land or structures independent of this section are expressly preserved, unless modified by a negotiated special permit granted hereunder. The denial of a negotiated special permit hereunder shall be deemed to leave unimpaired existing zoning procedures and regulations of the city or town.

(b) Administration

(1) A local zoning ordinance or by law may provide that a negotiated special permit may be granted by the special permit granting authority for the city or town under the following procedures.

- (i) The owner of land or structures at issue shall file an application for a negotiated special permit pursuant to such ordinance or by-law with the special permit granting authority of the city or town. Such application shall describe the nature of the proposed use and such of its potential impacts as may be determined to be relevant for this purpose by the zoning ordinance or by-law. Thereafter the special permit granting authority shall cause notice of such application to be sent to parties in interest as hereinafter determined, and shall notice a public hearing on the negotiated special permit within sixty days of receipt of such notice.

- (ii) Such negotiated special permit ordinance or by-law may provide for designation of parties in interest entitled to notice hereunder, which may include but need not be limited to the following parties or their designees: (A) the municipal elected official or officials representing the district or ward in which such land or structures is to be located, (B) parties otherwise entitled to notice for any special permit for the use of such land or structures if a special permit were being sought pursuant to section nine of this chapter, (C) such neighborhood organizations within such city or town as may be concerned with the effect of the use of such land or structures which an ordinance or by-law may provide may qualify for such notice by registration in a form thereby to be provided, and (D) the planning board and any special permit granting authority of any abutting city or town if the use of land or structures occurs within 300 feet of its municipal boundary.
- (iii) At such public hearing, the negotiated special permit ordinance or by-law may provide that the applicant shall present the proposed use in more detail. The special permit granting authority shall hear such presentation, including a presentation by counsel to the special permit granting authority if it so desires, as to the municipal ordinance or by-laws otherwise applicable to the proposed use, and such comments as may be offered from parties in interest as previously determined and the public.
- (iv) At the conclusion of such public hearing, the special permit granting authority may recess the hearing after appointing a review committee as provided in its negotiated special permit ordinance or by-law including a representative or representatives of the applicant and such of the parties in interest hereinbefore determined or such other persons as the ordinance or by-law may permit or as the authority may designate, to discuss the feasibility of a negotiated special permit hereunder. Such review committee shall be chaired by a neutral facilitator, who may be a representative of the special permit granting authority, or a mediator acceptable to the parties as hereinafter provided. Such recess shall be limited to ninety days from the initial hearing unless both the applicant and the special permit granting authority vote to extend the time, which extension shall not require an additional public hearing.
- (v) The review committee shall then determine if there are modifications from the otherwise applicable zoning ordinance that would serve the interest of the applicant as well as conditions on the grant of a negotiated special permit that would serve the interests of abutters, and other parties in interest as hereinbefore determined or other third party interests affected by the project. Such matters as may be discussed, and made the subject of conditions of the negotiated

special permit, shall be as such local negotiated special permit ordinance or by-law may provide, but may include:

(A) bulk and height of structures, yard sizes, lot area, frontage, setbacks, open space, parking, floor area, floor area ratio and building coverage requirements, which may be made more favorable to the applicant user of land or structures than would otherwise be applicable under local ordinances or by-laws absent this negotiated special permit;

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(B) mitigation of possible impacts of the use subject to the negotiated special permit approval, including, but not limited to the following aspects as long as they are not otherwise subject to review by other local agencies other than the special permit granting authority hereunder; provided, however, that the special permit granting authority hereunder is authorized to grant such permission as would otherwise be required from a "local board" as defined in section twenty of chapter forty B as therein provided:

- (1) traffic management and parking, including traffic demand management and alternative transportation modes, driveway access and design to assure convenient and safe movement for vehicles and pedestrians as well as off-street loading and unloading of vehicles servicing buildings on the site;
- (2) aspects relating to public health, such as waste disposal;
- (3) surface water drainage;
- (4) aspects related to visual quality, including lighting, screening of parking areas and structure(s) on the site from adjoining premises or from the street by from lighting or sound by walls, fences, plantings, or other means;
- (5) avoidance of major topographic changes, including tree and soil removal;
- (6) under-grounding of utility lines;
- (7) site design and layout, including the location and configuration structures and relationship of the site's structures to nearby structures in terms of major design elements, including scale, materials, color, roof, and cornice lines, as well as landscaping;
- (8) avoidance of removal or disruption of historic resources on or off-site, including designated historical structures or sites, historical architectural elements or archeological sites;

(9) conditions of construction or operations to mitigate the impact of aspects hereinbefore identified or external effects not hereinbefore identified of either construction or operation of the facility subject to the negotiated special permit, including but not limited to hours of operation,

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noise control, on-site supervision, manual traffic control, limits of work, and so forth, as such local negotiated special permit ordinance or by law may provide, as well as provision for guarantees for performance, including but not limited to bonds or other security;

(10) impact fees or payment in lieu of taxes to offset the burden of public services required; and

(11) if appropriate to the use proposed, a low and moderate income housing component.

- (vi) A negotiated special permit ordinance or by-law may provide that the meetings of the review committee may be convened with the assistance of a neutral facilitator or a mediator, as defined in section twenty-three C of chapter two thirty-three, with costs of such facilitator or mediator to be paid by the applicant subject to negotiated special permit review or as the parties in interest may otherwise agree. Such review may include caucuses by the facilitator or mediator with participants which need not be subject to the provisions of section twenty-nine B of chapter thirty-nine.
- (vii) If the review committee shall not complete its work so as to produce a recommended form of negotiated special permit within the recess period specified in subsection (iv), then the negotiated special permit shall be deemed denied and the applicant shall have such rights as are hereinafter provided. If the review committee has completed its work within such recess period so as to produce a recommended form of negotiated special permit, then the applicant may proceed to file the negotiated special permit with the special permit granting authority. The authority may then deny, amend or approve such negotiated special permit as it deems advisable as if it were a special permit pursuant to section nine of this chapter, provided that failure to so act within ninety days, or such additional time as the applicant may agree, of the date of filing of such negotiated special permit shall be deemed constructive approval. If the negotiated special permit is amended or denied, then the applicant shall have all pre-existing rights absent the provisions of a negotiated special permit or by law, including the right to apply for a building permit, variance or special permit as such other statutes, local ordinances or by law shall permit.
- (viii) If such a negotiated special permit is approved, a zoning ordinance or by law providing a negotiated special permit hereunder shall

allow the user of land or structures seeking such negotiated special permit to withdraw its application for a negotiated special permit without prejudice at any time up to and until any appeal period has expired and to rely on its rights under otherwise applicable local ordinances or by-law. After such appeal period has run, however, any negotiated special permit granted pursuant to

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a negotiated special permit ordinance or by-law shall be binding on the applicant and its successors in interest in the same way as a special permit issued pursuant to section nine of this chapter.

(ix) A negotiated special permit granted hereunder may be appealed by other than the applicant so long as appellant is a party with standing to appeal as if the negotiated special permit were granted under section nine of this chapter, provided that such appeal shall not supercede the right of the applicant to withdraw the negotiated special permit application as provided above.

(x) Nothing herein shall be construed to limit the effect or scope of any local ordinance or by-law otherwise applicable to the applicant absent a negotiated special permit incident to a negotiated special permit ordinance or by-law hereunder.

SECTION 12. Section 17 of chapter 40A of the General Laws, as appearing in the 2000 Official Edition, is hereby amended by inserting after the seventh paragraph the following paragraph:-

Mediation of land use appeals: After the filing of an appeal hereunder, the parties may agree to mediate the decision that was appealed. In all events, the parties shall file a statement advising the court in which such appeal was filed that the dispute has been considered for mediation, and if they agree to mediation, such mediation shall begin within sixty days of the date such statement was filed, or such other period as the parties may agree or the court may allow upon application by any party. Such mediation shall conclude not more than one hundred and eighty days of such filing, provided that such period may be extended for an additional one hundred and eighty days upon mutual agreement of the parties, or for such additional period as the court may allow upon application by any party. Mediators may be chosen by the parties from a list to be provided by the court in which the appeal was filed or from a list compiled by the parties. The mediator shall be compensated by the parties as they may agree, or under terms approved by the court as a cost of such appeal as hereinafter provided. During such mediation, however, any appeal otherwise pending is stayed. A party may withdraw from mediation at any time after written notification to the other parties and to the court in which such appeal was filed, but shall remain responsible for that party's share of the costs of mediation until the time of withdrawal. The mediator shall have the protections provided under section twenty-three C of chapter two hundred and thirty-three, and to the extent that public agencies are participants in such mediations, their deliberations shall not be subject to the provisions of section twenty-nine B of chapter thirty-nine. At the conclusion of such mediation, the mediator shall file with the court a statement describing whether the parties have come to agreement or not. If unresolved, the appeal will then go forward, and if the matter has been resolved, the appeal will be dismissed with prejudice.

The cost of mediation will be distributed among the parties as costs of the appeal as the parties may agree and if not, as the court in which such appeal was filed may determine. Mediation hereunder shall not be the only method of resolving a zoning appeal.

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SECTION 13. Section 81D of said chapter 41, as so appearing, is hereby amended by striking out the first sentence in the twelfth paragraph and inserting in place thereof the following words:- Such plan shall be made, and may be added to or changed from time to time, by a majority vote of such planning board after a public hearing in accordance with section five of chapter forty A and a later two-thirds majority vote of the legislative body of the city or town after a public hearing in accordance with section five of chapter forty A. For towns with a town meeting form of government, the vote of the legislative body shall be without amendment except for minor technical corrections. For cities, the vote of the legislative body shall be after such amendment as the city council or board of aldermen may deem appropriate. Upon adoption the plan shall be public record.

SECTION 14. Section 81L of chapter 41 of the General Laws, as appearing in the 2000 Official Edition, is hereby amended by striking out, in lines 52-78 inclusive, the definition of “Subdivision” and inserting in place thereof the following definition:-

“Subdivision” shall mean the division of a tract of land into one or more lots and shall include resubdivision. When appropriate to the context, subdivision shall include the process of subdivision or the land or territory subdivided. Except as provided in this chapter, any adjustments to existing lot lines of a recorded lot by any means shall be considered a subdivision. Lot area and frontage shall be of at least such dimension as is then required by zoning or other ordinance or by-law, if any, of said city or town for erection of a building on such lot. If no such dimensions are so required, such area shall be at least five thousand square feet and such frontage shall be at least fifty feet.

SECTION 15. Section 81O of said chapter 41, as so appearing, is hereby amended by striking out the second sentence in the first paragraph and inserting in place thereof the following sentence:- After the approval of a plan the location and width of ways, or the number, shape, and size of the lots shown thereon shall not be changed unless the plan is amended accordingly under section eighty-one W, except that the planning board may adopt alternate rules and regulations under sections eighty-one P and eighty-one Q of this chapter defining and regulating changes to the number, shape, and size of the lots shown thereon as minor subdivisions.

SECTION 16. Said chapter 41, as so appearing, is hereby amended by striking out section 81P and inserting in place thereof the following section:-

41:81P. Alternative Approvals for Minor Subdivisions

Under section eighty-one Q, a planning board may adopt rules and regulations defining and regulating minor subdivisions in a more expeditious manner than would apply to other subdivisions. Such rules and regulations may establish reduced procedural requirements, review periods, fee schedules, performance guarantees, and construction and design standards than would otherwise apply.

SECTION 17. Section 81T of said chapter 41, as so appearing, is hereby amended by striking out, in lines 2-3 inclusive, the following words “or for a determination that approval is not required”.

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SECTION 18. Section 81X of said chapter 41, as so appearing, is hereby amended by striking out, in lines 12-13 inclusive, the following words “such plan bears the endorsement of the planning board that approval of such plan is not required, as provided in section eighty-one P, or (3)”.

SECTION 19. Section 81X of said chapter 41, as so appearing, is hereby further amended by striking out, in lines 17-20 inclusive, the following words “or that it is a plan submitted pursuant to section eighty-one P and that it has been determined by failure of the planning board to act thereon within the prescribed time that approval is not required.”.

SECTION 20. Section 81X of said chapter 41, as so appearing, is hereby further amended by striking out the fourth paragraph and inserting in place thereof the following paragraph:-

Notwithstanding the foregoing provisions of this section, the register of deeds shall accept for recording and the land court shall accept with a petition for registration or confirmation of title any plan bearing a certificate by a registered land surveyor that 1) the property lines shown are the lines dividing existing ownerships, and the lines of streets and ways shown are those of public or private streets or ways already established, and that no new lines for division of existing ownership or for new ways are shown, or 2) unless subject to section eighty-one O of this chapter or subject to alternate rules and regulations under sections eighty-one P and eighty-one Q of this chapter, the property lines shown do not create a new lot or render an existing lot nonconforming or more nonconforming. The recording of such plan shall not relieve any owner from compliance with the provisions of the subdivision control law or of any other applicable provision of law.

SECTION 21. Section 81M of said chapter 41, as so appearing, is hereby amended by inserting, after the word “systems”, in the third sentence, the words:- , and for a plan adopted by the city or town under section eighty-one D of this chapter.

SECTION 22. Section 81O of said chapter 41, as so appearing, is hereby amended by striking out the second paragraph and inserting in place thereof the following paragraph:- A plan shall be deemed submitted under this section at the next regularly-scheduled meeting of the planning board provided it is 1) sent by registered mail or delivered to the planning board and received by said board seven days prior to said meeting, and 2) determined to be complete by the board or their designee at said meeting in accordance with the planning board’s rules and regulations.

SECTION 23. Section 81Q of said chapter 41, as so appearing, is hereby amended by inserting after the first paragraph the following paragraphs:-

Notwithstanding anything to the contrary in this section, a planning board may adopt a rule or regulation that a plan for a residential subdivision show a lot or lots that shall be reserved for the required construction by the applicant of dwelling units affordable to persons whose household income does not exceed a percentage of the area median income, as such income is determined by the federal Department of Housing and Urban Development. Such requirements shall not

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exceed fifteen percent of the dwelling units within the subdivision. In lieu of the construction of the required affordable dwelling units within a subdivision, a planning board rule or regulation may allow for the construction of such units off-site, the dedication of land for such purpose, or the payment of sufficient funds to a separate account created by the city or town for such purpose. Cities and towns are hereby empowered to establish said separate accounts to be administered by the treasurer of the city or town.

Rules and regulations adopted or amended under this chapter shall not be inconsistent with a plan prepared under section eighty-one D of chapter 41. Said rules and regulations shall provide that in the instance of uncertainty in the construction or application of any section therein, the rules and regulations shall be construed in a manner that will further the implementation of, and not be contrary to, the goals, policies and applicable elements of said plan. This paragraph shall not become effective until five years after it is enacted in the General Laws.

SECTION 24. Section 81Q of said chapter 41, as so appearing, is hereby amended by striking out, in lines 62-69 inclusive, the words “No rule or regulation shall require, and no planning board shall impose, as a condition of approval of a subdivision, that any of the land within said subdivision be dedicated to the public use, or conveyed or released to the commonwealth or to the county, city or town in which the subdivision is located, for use as a public way, public park or playground, or for any other public purpose, without just compensation to the owner thereof.” and inserting in place thereof the following words:- The rules and regulations may require the plan to show a park or parks suitably located for playground or recreation purposes or for providing light and air and not unreasonable in area in relation to the area of land being subdivided and the prospective uses of such land.

SECTION 25. Section 81U of said chapter 41, as so appearing, is hereby amended by striking out, in lines 174-175 inclusive, the words “for a period of not more than three years”.

SECTION 26. Section 81U of said chapter 41, as so appearing, is hereby amended by inserting, after the word “applicant”, in line 79, the words “, subject to the discretion and approval of the planning board:”.

SECTION 27. The provisions of Sections 1-26 herein shall not be construed to affect any general or special law other than the provisions of chapters 40A and 41 therein revised.

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BIBLIOGRAPHY

- Auburn v. Planning Board of Dover. 12 Mass. App. Ct. 998. December 1981.
- August, Robert M. ed., and Susan Mitchell. A Guide to Massachusetts' New Zoning Act—Chapter 808 of the Acts of 1975. Massachusetts: University of Massachusetts, 1977.
- Bobrowski, Mark. Handbook of Massachusetts Land Use and Planning Law. New York: Aspen, 2002.
- Cantelmo, William J. and Flavel Shurtleff. Planning Law and Administration in Massachusetts. Massachusetts: Massachusetts Federation of Planning Boards, 1964.
- Carol A. Osberg & Others v. Planning Board of Sturbridge & Others. 44 Mass. App. Ct. 56. December 1997.
- City of Waltham, MA. Zoning Code. Waltham, 2002.
- Fisher, Fred W. "Trends in Zoning in Massachusetts." Boston University Law Review – Zoning in New England. Ed. Boston University School of Law. Massachusetts: Boston University, 1956. pp. 347-353.
- Gitelman, Morton., and Robert R. Wright. Wright and Gitelman's Land Use in a Nutshell, 4th Edition. Minnesota: West Group. 2000. pp. 180-184.
- Healy, Martin R. ed. Massachusetts Zoning Manual. 2 vol. Massachusetts: Massachusetts Continuing Legal Education, 1999 & supp. 2002.
- Massachusetts Land Use Reform Act of 2002.
- McDonald's Corporation v. Town of Seekonk & Others. 12 Mass. App. Ct. 351. August 1981.
- Richard P. Quincy v. Planning Board of Tewksbury; Kevin C. Sullivan & Another. 39 Mass. App.Ct. 17. July 1995.
- SCIT, Inc. v. Planning Board of Braintree & Another. 19 Mass. App. Ct. 101. December 1984.
- The Prudential Insurance Company of America v. Board of Appeals of Westwood; Alan H. Rutan & Others. 18 Mass. App. Ct. 632. October 1984.

Towermarc Canton Limited Partnership v. Town of Canton. Misc. Case No. 131947
Land Court. 1986

Town of Framingham, MA. Zoning By-Laws. Framingham, 2003.

Town of Lexington, MA. Zoning Bylaw. Lexington, 2003.

Town of Milton, MA. General Zoning Bylaws and Wetlands Bylaws of the Town of
Milton. Milton, 2001.

Town of Natick, MA. Zoning Bylaws. Natick, 2004.

V.S.H. Realty, Inc. v. Zoning Bd. of Appeals of Plymouth. 30 Mass. App. Ct. 530. 1991.

Y.D. Dugout, Inc. v. Board of Appeals of Canton. 357 Mass. 25. February 1970.