

Kim DelNigro

From: Kristin Alexander
Sent: Tuesday, May 15, 2007 3:02 PM
To: Kim DelNigro
Subject: FW: Acton/Law: Special Permit for Subdivisions
Attachments: Wallstreet Development v. Moore - Special Permit_Subdivisions_2007.doc

-----Original Message-----

From: Roland Bartl
Sent: Monday, May 14, 2007 5:34 PM
To: Kristin Alexander
Subject: FW: Acton/Law: Special Permit for Subdivisions

FYI; and to share with the Planning Board.

I was always wondering about these attempts to draw in ANR's for closer scrutiny and discretionary review. I guess no more.

Roland Bartl, AICP
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-----Original Message-----

From: Stephen Anderson
Sent: Monday, May 14, 2007 4:53 PM
To: Roland Bartl; Don Johnson
Cc: William L. Lahey; George Hall; Kevin D. Batt; Ryan D. Pace; Daniel C. Hill
Subject: Acton/Law: Special Permit for Subdivisions

Roland:

I thought you might be interested in this new Land Court case, *Wall Street Development Corp. v. Moore* (Planning Board of Westwood), where the court invalidated (1) the Town's bylaw provision requiring a special permit for certain subdivisions (as violating uniformity requirement) and (2) the bylaw provisions that related to the construction of streets (preempted by Subdivision Control Law and Town's subdivision rules and regulations).

The particular provision that of the By-law found to violate the uniformity requirement of G.L. c. 40A, § 4, governed the following:

Section 8.5 of the By-law, titled Major Residential Development (MRD), requires the issuance of a special permit by the Planning Board for any MRD involving the creation of four or more lots (with exceptions not relevant here). ... Any applicant for a MRD shall also file with the Planning Board both a Conventional Subdivision Plan and an Alternative Subdivision Plan. These plans are defined in Section 8.5.8 as follows:

“Conventional Plan. A conventional plan in full conformance with all zoning and

5/15/2007

subdivision regulations and to the extent possible at the time of application, health regulations, wetlands regulations and other applicable federal, state and local requirements. This Conventional Plan shall be prepared in conformance with the requirements for a preliminary subdivision plan as set forth in the Planning Board's Subdivision Rules and Regulations; provided, however, that in simple cases, such requirements may be waived by the Planning Board.

Alternative Plan. An alternative plan that differs substantially from the aforementioned Conventional Plan. Examples of plans that would be 'substantially different' from a Conventional Plan includes the use of the alternative dimensional regulations set forth herein, or a plan of the same type but having major differences in the number of lots created, road pattern or open space configuration."

The court found that "a use potentially as-of-right may not be regulated by a discretionary special permit, and that not all four lot subdivisions are treated the same, as they are subject to a discretionary special permit." As a result, the bylaw provision was invalid.

Steve

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Wall Street Development Corp. v. Moore
 Mass.Land Ct.,2007.

Only the Westlaw citation is currently available.

Massachusetts Land Court.

Department of the Trial Court.

WALL STREET DEVELOPMENT
CORPORATION, Plaintiff

v.

Robert E. **MOORE**, Jr., Robert C. Malster, Henry W. Gale, Steven H. Olanoff, and George A. Nedder, as they are members of the Planning Board of the Town of Westwood, and the Town of Westwood,
 Defendants.

Nos. 310559, 315094, 316279(AHS).

April 26, 2007.

DECISION

ALEXANDER H. SANDS, III, Justice.

*1 Plaintiff Wall Street Development Corporation filed its unverified Complaint in Misc. Case No. 310559 on June 20, 2005, appealing pursuant to G.L. c. 40A, § 17, a decision (the "Morgan Farm Special Permit Decision") of Defendant Planning Board of the Town of Westwood (the "Planning Board") denying its application for a special permit (the "Special Permit") for a parcel of land containing 20.6 acres located off Morgan Farm Road in Westwood ("Locus"). Plaintiff also sought a judicial determination, pursuant to G.L. c. 240, § 14A, of the scope and validity of Sections 5.5.6 and 8.5 of the Zoning By-law for the Town of Westwood (the "By-law"), both on their face and as applied to Locus, and a declaration, pursuant to G.L. c. 231A, of its rights under an access easement. The Planning Board and the Town of Westwood (the "Town") (together, "Defendants") filed their Answer on July 21, 2005.

Plaintiff filed its unverified Complaint in Misc. Case No. 315094 on October 28, 2005, appealing pursuant to G.L. c. 41, § 81BB, a decision ("Morgan Farm Subdivision Decision 2") of the Planning Board dated October 12, 2005, denying its application for approval of a definitive nine lot subdivision plan for Locus. On November 21, 2005, Defendants filed their Answer.

Plaintiff filed its unverified Complaint in Misc. Case No. 316279 on December 1, 2005, appealing

pursuant to G.L. c. 41, § 81BB, a decision ("Morgan Farm Subdivision Decision 3") of the Planning Board dated November 15, 2005, denying its application for approval of a definitive three lot subdivision plan for Locus. On December 16, 2005, Defendants filed their Answer.

At a status conference on January 5, 2006, this court consolidated all three cases. On March 10, 2006, Plaintiff filed its Motion for Summary Judgment, together with supporting memorandum and Affidavit of Louis Petrozzi. Defendants filed their Opposition on April 28, 2006, together with supporting memorandum and Affidavits of Diane Beecham and Louis Petrozzi. On May 17, 2006, Plaintiff filed its Reply Brief. A hearing was held on the motion on June 2, 2006, and the matter was taken under advisement.

Summary judgment is appropriate where there are no genuine issues of material fact and where the summary judgment record entitles the moving party to judgment as a matter of law. See Cassesso v. Comm'r of Corr., 390 Mass. 419, 422 (1983); Cnty. Nat'l Bank v. Dawes, 369 Mass. 550, 553 (1976); Mass. R. Civ. P. 56(c).

This court finds the following facts are not in dispute:

1. Plaintiff owns Locus, which abuts an adjacent twelve lot residential subdivision known as Powisset Estates (the "Powisset Subdivision"), formerly owned by Nicholas Stivaletta, Jr. ("Stivaletta").^{FN1} A portion of Locus as shown on Powisset Subdivision Plan 1, hereinafter defined, approximately 470 feet long and twenty feet wide ("Parcel A, Parcel B and Parcel C"), separates the Powisset Subdivision from Morgan Farm Road, a public road serving as access to the Powisset Subdivision.^{FN2}

^{FN1}. The Powisset Subdivision includes three parcels owned in some combination by Stivaletta, Stivaletta as Trustee of Fairway Realty Trust, and John S. Morley, as Trustee of 103 Woodland Road Trust (the "Woodland Road Trust").

^{FN2}. Parcel A contains 3,337 square feet, Parcel B contains 1,408 square feet, and Parcel C contains 1,482 square feet.

*2 2. By Agreement dated May 30, 1997 (the "Agreement"), Boruch Frusztajer ("Frusztajer"), former owner of Locus, agreed to convey Parcel B to Stivaletta in return for an easement to allow access from Locus to the subdivision roads in the Powissett Subdivision.^{FN3} The Agreement was not recorded with the Norfolk County Registry of Deeds (the "Registry") and was never consummated.

^{FN3}. The Agreement provided that it was prepared in contemplation of Frusztajer's future desire to construct a subdivision of Locus.

3. Stivaletta, the Woodland Road Trust and Frusztajer (as owner of Parcel B) filed a twelve lot subdivision application with the Planning Board on August 11, 1998.^{FN4} By Certificate of Vote dated October 27, 1998 ("Powissett Decision 1"), the Planning Board approved the Powissett Subdivision, as shown on plan titled "Definitive Subdivision Plan Powissett Estates in Westwood, Mass." dated August 7, 1998 and prepared by Guerriere & Halnon, Inc. ("Powissett Subdivision Plan 1"), which contained two cul-de-sac subdivision roads, Road A (1,167.86 feet long extending from Morgan Farm Road) and Road B (532.36 feet long extending from Woodland Road). Road A and Road B were connected by a connector right-of-way approximately 200 feet long by fifty feet wide (the "Connector ROW"). Powissett Decision 1 granted a number of waivers, including a waiver of the maximum length of a dead-end street for both Road A and Road B. Powissett Decision 1 referenced the Connector ROW as an "emergency vehicle access connecting the two cul-de-sac roadways," and provided that the Connector ROW be paved to a width of twelve feet.^{FN5, FN6} Powissett Decision 1 also stated that "[t]he Planning Board determined that the road and lot layout of this Plan most closely met the intent and purposes of the Subdivision Control Law, as compared to the other alternative plans that were reviewed by the Board including the through street plan." Road A connected with Morgan Farm Road across Parcel B. A fifty foot wide right-of-way (the "Easement ROW") connected Road A and Locus.

^{FN4}. Two of the lots (Lots 10 and 11) are not buildable.

^{FN5}. The Rules and Regulations for the Subdivision of Land in Westwood (the

"Rules and Regulations") require that a roadway be paved to a width of twenty-six feet.

^{FN6}. Powissett Decision 1 also states that "[t]he right-of-ways as shown on the Plan shall not provide frontage to any lot within the Subdivision."

4. On December 4, 1998, Plaintiff^{FN7} filed an eleven lot subdivision application for Locus with the Planning Board ("Morgan Farm Subdivision 1").^{FN8} The primary access was from an extension of Morgan Farm Road. The secondary access was from the Easement ROW through Road A in the Powissett Subdivision.

^{FN7}. It appears that Plaintiff filed this application as buyer under a purchase and sale agreement with Frusztajer.

^{FN8}. The plans for this subdivision are not in evidence.

5. By Certificate of Vote dated May 19, 1999 ("Morgan Farm Subdivision Decision 1"), the Planning Board denied Morgan Farm Subdivision 1, citing as one of the primary reasons the lack of a proper access (both primary and secondary) to the subdivision because of a violation of the 500 foot length dead-end street requirement in the Rules and Regulations. Plaintiff filed an appeal of this denial (Misc. Case No. 256953) on June 9, 1999. That case was dismissed without prejudice on December 16, 2003.

6. By deed dated July 12, 2000, Frusztajer conveyed Locus to Plaintiff.^{FN9}

^{FN9}. Plaintiff purchased Locus over a year after Morgan Farm Subdivision Decision 1 was issued and, therefore, had knowledge that the Planning Board had denied a waiver of the dead-end street requirement for an extension of Morgan Farm Road.

7. On November 13, 2000, Plaintiff granted Stivaletta and the Woodland Road Trust a perpetual easement over Parcel A and Parcel B, as shown on Powissett Subdivision Plan 1, including the right to construct a subdivision roadway thereon. This easement was recorded with the Registry in Book 14626, Page 552.

*3 8. On December 12, 2000, Stivaletta, individually and as Trustee of Fairway Realty Trust (the "Fairway Realty Trust"), and the Woodland Road Trust, granted Plaintiff a perpetual easement (the "Easement") for the benefit of Locus to use Road A, Road B, the Connector ROW and the Easement ROW as shown on Powissett Subdivision Plan 1 "for all purposes for which streets and ways are now or may hereafter be used in the Town of Westwood," including the right to install and replace utilities.^{FN10} Paragraph 3 of the Easement states, in part:

FN10. The easement to use the Easement ROW was exclusive; the remaining easements were non-exclusive.

"Following execution and delivery of this Grant of Easements and Agreement, Grantor shall promptly commence and diligently prosecute to completion, construction of the Subdivision Roads in accordance with the Definitive Subdivision Plan, as it may be amended. In any event, Grantor shall complete such construction within three (3) years following the date hereof.... The design and construction of the Subdivision Roads and connection [sic] Right of Way shall be such that *any vehicles that can use the public streets in the Town of Westwood* can use the Subdivision Roads and Connection Right of Way." (emphasis added)

Paragraphs 4 and 5 of the Easement state, in part:

"Grantor acknowledges that Grantee intends to subdivide Grantee's Land and the use of the easement areas by Grantee or the future lot owners of Grantee's Land shall not be considered overburdening the Easements or easement areas by Grantor or its successors and assigns. It is Grantee's intent to file an application for a definitive subdivision of Grantee's Land with the Westwood Planning Board. Grantor agrees to cooperate with Grantee in connection with such application and agrees to sign any application that may reasonably be required in order to facilitate Grantee's proposed subdivision of Grantee's Land and Grantee's exercise of the Easements granted herein, including, but not limited to, an application for modification of any approval of the Definitive Subdivision Plan...."

The Easement was recorded with the Registry in Book 14626, Page 533.^{FN11}

FN11. On the same day Stivaletta, individually and as trustee of the Fairway Realty Trust, and the Woodland Road Trust,

granted an Option Agreement for the purchase of Lot 11 in the Powissett Subdivision to Plaintiff. This option was exercised by Plaintiff on November 1, 2004. On January 11, 2005, Plaintiff conveyed Lot 11 to Jeffrey Temkin.

9. On January 18, 2001, Stivaletta, the Woodland Road Trust, and Plaintiff (as owner of Parcel B) filed an Application for Approval of Definitive Subdivision Plan (the "Application") relative to the Powissett Subdivision with the Planning Board. The Application related to a modification of the Powissett Subdivision as shown on plan titled "Modification of Definitive Subdivision Plan Powissett Estates Major Residential Development in Westwood, Mass." dated July 11, 2000 and prepared by Guerriere & Halnon, Inc. ("Powissett Subdivision Plan 2"). The modification resulted from negotiations with the Westwood Conservation Commission resulting from a denied Notice of Intent relative to the Powissett Subdivision. On the same day the parties filed an application for a special permit for the Powissett Subdivision.^{FN12}

FN12. The special permit was approved by decision dated May 18, 2001, and recorded with the Registry at Book 16145, Page 244.

10. By Certificate of Vote dated May 7, 2001, the Planning Board approved modifications to the Powissett Subdivision ("Powissett Decision 2") pursuant to Powissett Subdivision Plan 2, reconfiguring a number of the lots, substantially shortening the length of Road A (but not less than 500 feet) and expanding the length of the Connector ROW to more than 500 feet. As a result, the Easement ROW now connects the Connector ROW, rather than Road A, to Locus. On August 7, 2001, the Planning Board endorsed Powissett Subdivision Plan 2.

*4 11. Powissett Decision 2 granted numerous waivers and provided that "[t]he 50-foot right-of-way connecting Road "A" and Road "B" shall be paved to a width of twelve (12) feet and shall provide access to one lot located on the westerly side of said right-of-way and shall also provide for use by emergency and public safety vehicles and for pedestrian and bicycle access at all times.... The purpose of this 12-foot roadway beyond the driveway serving the one building lot is for use by emergency and public safety vehicles only and for pedestrian and bicycle access at all times."

Powissett Decision 2 also provided that the Connector ROW and the Easement ROW “shall remain private ways in perpetuity and shall not be proposed or accepted as public ways. There shall also be no non-emergency municipal services provided to said rights-of-way, which include snow and trash removal.”

Powissett Decision 2 also provided that “[t]he Applicant shall submit the final Articles of Association and Imposition of Covenants and Easements to the Planning Board for their final review and approval. These articles shall then be recorded at the Norfolk County Registry of Deeds and a copy of the recording be forwarded to the Planning Department.”

Powissett Decision 2 was not appealed.

12. A Covenant dated January 2, 2002 (the “Covenant”), securing the construction of ways and the installation of municipal services as shown on Powissett Subdivision Plan 2, was executed by the Fairway Realty Trust, the Woodland Road Trust, Matthew J. Tryder, and Plaintiff (as owner of Parcel B) and accepted by the Planning Board.

13. The “Articles of Association and Imposition of Covenants and Easements Powissett Estates Homeowners’ Association Westwood, Massachusetts” (the “Articles of Association”) dated November 21, 2002, and executed by the Fairway Realty Trust, Matthew J. Tryder, and Plaintiff, created the homeowners’ association for the Powissett Subdivision, provided for the ownership and maintenance of the subdivision roads, and required compliance with Powissett Decision 2 and the Order of Conditions. The Articles of Association incorporated all of the conditions of Powissett Decision 2. Article V, Section 1H of the Articles of Association states:

“There is hereby imposed upon the Land all restrictions necessary to effectuate or permit compliance at all times with the Orders of Condition and the Planning Board Decisions as presently in effect. To the extent that the Orders of Condition and the Planning Board Decisions are amended hereafter so as to require less stringent restrictions in order to effectuate or permit compliance with the Orders of Condition and the Planning Board Decisions as so amended, such restrictions shall be deemed lessened accordingly.”

Article VII of the Articles of Association states: “Any

and all provisions of this instrument shall be enforceable by the Association and also by any Lot Owner. The Municipality shall be deemed to have an interest in the provisions of this instrument insofar as such provisions relate to performance of the Storm Water Management System Activities, compliance with the Orders of Condition and the Planning Board Decisions, as the same may be amended from time to time, or the maintenance, until occurrence of the Account Responsibility Termination Event, of funds in the Assigned Account at a level of at least Twenty-Five Thousand Dollars (\$25,000.00) (the “Municipality-Interest Covenants”), and the Municipality shall have the right to enforce the Municipality-Interest Covenants.”

*5 A paragraph on the signature page of the Articles of Association beneath the signature of Plaintiff states: “Wall Street Development Corp. (“Wall Street”) signs these Articles of Association solely in its capacity as the owners of 4,745 square feet of land within the Powissett Estates subdivision. By so signing, Wall Street does not waive, and expressly reserves (i) any and all rights that Wall Street has under that certain Grant of Easements and Agreement, dated December 12, 2000 and recorded with Norfolk County Registry of Deeds in Book 14626, Page 533, and (ii) any and all claims Wall Street has made, or in the future may make, in Land Court Misc. Case No. 256953, or in any subsequent litigation filed by Wall Street against the Westwood Planning Board or any other party.”

14. On October 26, 2004, Plaintiff filed with the Planning Board an application for the Special Permit pursuant to the provisions of Section 8.5 of the By-law.^{FN13} On May 31, 2005, the Planning Board denied the Special Permit by the Morgan Farm Special Permit Decision, finding that “since it has not been adequately demonstrated that the Conventional Plans can be expected to be developed without the use of bonuses or substantial waivers or variances from applicable development regulations, the Applicant has not met the required threshold for the Planning Board to consider the Alternative Plan.”^{FN14} The Morgan Farm Special Permit Decision was the basis for the appeal in Misc. Case No. 310559.

^{FN13}. The special permit application requires the filing of two plans, a Conventional Plan meeting all of the requirements of the Subdivision Rules and Regulations, and an Alternative Plan.

Plaintiff filed both a Conventional Plan and an Alternative Plan, both dated October 12, 2004, with the special permit application. The Conventional Plan had ten building lots and one open lot with a primary access from an extension of Morgan Farm Road and a secondary access through the Easement ROW, the Connector ROW, and the subdivision roads in the Powissett Subdivision. The Alternative Plan had five building lots and no open space, with a primary access from an extension of Morgan Farm Road and a secondary access for only one lot through the Easement ROW, the Connector ROW, and the subdivision roads in the Powissett Subdivision.

FN14. The major waiver involved the length of a dead-end street.

15. On June 10, 2005, Plaintiff filed with the Planning Board an application for approval of a nine residential lot definitive subdivision plan ("Morgan Farm Subdivision 2"), using as its primary access a lengthy extension of Morgan Farm Road and as its secondary access the Easement ROW connecting to the Connector ROW and the subdivision roads in the Powissett Subdivision. The Planning Board denied the application on October 11, 2005, by Morgan Farm Subdivision Decision 2, primarily on the basis for the need of a waiver for the length of dead-end streets, stating that the "proposed \pm 1,250-foot extension of the existing Morgan Farm Road dead-end street, which has an existing length of 500 feet, exceeds the 500-foot maximum length standard in Section IV.A.4.b." Furthermore, relative to the Connector ROW, Morgan Farm Subdivision Decision 2 states, "[t]his right-of-way between the dead-end streets of Little Boot Lane and Shoe String Lane is restricted to emergency and pedestrian access only and there has been no change in the adjoining subdivision's definitive subdivision and special permit approvals to allow for a change in the use and/or construction standard of said right-of-way." Morgan Farm Subdivision Decision 2 was the basis for the appeal in Misc. Case No. 315094.

16. On July 20, 2005, Plaintiff filed with the Planning Board an application for approval of a three residential lot subdivision plan ("Morgan Farm Subdivision 3"), using a much shorter extension of Morgan Farm Road as access and deleting a secondary access across the subdivision roads in the Powissett Subdivision. The Planning Board denied the application on November 15, 2005, by Morgan

Farm Subdivision Decision 3,^{FN15} primarily on the basis of the need for waiver of the length of dead-end street provisions. Morgan Farm Subdivision Decision 3 was the basis for the appeal in Misc. Case No. 316279.

FN15. Plaintiff, in his Statement of Undisputed Material Facts, points out that Morgan Farm Subdivision Decision 3 was not signed by any member of the Planning Board. Plaintiff, however, does not note that Morgan Farm Subdivision Decision 1 and Morgan Farm Subdivision Decision 2 were also not signed by any member of the Planning Board. Section III.B.9 of the Rules and Regulations states, "[i]f the Board modifies or disapproves said plan, it shall state in its vote the reasons for its action. Final approval, if granted, shall be endorsed on the original reproducible mylar or linen of the Definitive Plan by the signatures of a majority of the Board..." Although Plaintiff does not raise any arguments relative to the lack of Planning Board member signatures on any of the Morgan Farm Subdivision Decisions, this section of the Rules and Regulations suggests that Planning Board signatures are only required on a definitive plan.

*6 Plaintiff argues that the Morgan Farm Special Permit Decision, Morgan Farm Subdivision Decision 2 and Morgan Farm Subdivision Decision 3 are invalid decisions and that the Planning Board was arbitrary, capricious and unreasonable in not allowing such approvals. Plaintiff also argues that provisions of the By-law relating to such decisions, specifically Sections 8.5 and 5.5.6, are invalid. The Planning Board argues that its decisions are valid. In order to analyze the validity of the decisions, which are all based on the lack of adequate access to the subdivision, it is necessary to first examine the validity and scope of the Easement.

Validity of the Easement.

Plaintiff argues that the Easement is valid and was not impacted by Powissett Decision 2. Defendants argue that notwithstanding the Easement, Plaintiff's rights to use the ways of the Powissett Subdivision are limited by Powissett Decision 2.

On October 27, 1998, the Planning Board approved Powissett Subdivision Plan 1, which showed the Easement ROW tying into Road A. Road A had been approved as a regular subdivision road. On December 4, 1998, Plaintiff filed Morgan Farm Subdivision 1 with the Easement ROW tying into Road A of the Powissett Subdivision. This had been authorized by the owners of the Powissett Subdivision by the Agreement dated May 30, 1997. On May 19, 1999, the Planning Board denied the subdivision in Morgan Farm Subdivision Decision 1 for lack of proper access, based on the extension of Morgan Farm Road, a dead-end street, even though the Easement ROW connected to Road A, a subdivision road, for secondary access.^{FN16} On December 12, 2000, the owner of the Powissett Subdivision granted the Easement to Plaintiff, giving Plaintiff the right to use all of the subdivision roadways in the Powissett Subdivision. At that time, the Connector ROW was only an emergency vehicle access. On January 18, 2001, the owners of the Powissett Subdivision filed an application for the modification of the Powissett Subdivision, which was assented to by Plaintiff because it owned a portion of land over which Road A crossed. The modification reconfigured the lots and rearranged the subdivision roads so that the Easement ROW connected Locus to the Connector ROW rather than Road A in the Powissett Subdivision. Powissett Decision 2 approved the modifications which extended the length of the Connector ROW and added conditions which limited the use of the Connector ROW for emergency vehicles only, in effect nullifying the use of the Powissett Subdivision roads by Plaintiff for uses other than emergency vehicles. Powissett Decision 2 stated that the Articles of Association must be executed and recorded as a part of the modification. The Articles of Association were executed by Plaintiff on November 21, 2002, and provided for the ownership and maintenance of the Powissett Subdivision roads, and also provided for enforcement of Powissett Decision 2 by not only the signatories to the Articles of Association but also the Town of Westwood. The Articles of Association stated that Plaintiff reserved all rights under the Easement and all claims which it might make in the future against the Planning Board.

^{FN16}. In Morgan Farm Subdivision Decision 1, the Planning Board states, as a reason for denial, that “[t]here are no off-site improvements shown on said Definitive Plan to indicate that the ‘50’ Access Easement/Emergency Access Road

[Easement ROW]’ is connected to an existing through street. Therefore, this [Easement ROW] is an extension of a dead-end street as defined in Section IV.A.4.a. of the Rules and Regulations,” which states that “[t]he term ‘Dead-end street’ shall include, without limitation, any street with only a single access onto an existing through street.” Morgan Farm Subdivision Decision 1 indicates that the Planning Board determined that the Connector ROW does not provide access to an existing through street. As a result, Morgan Farm Subdivision 1 created a loop road situation with the only access to an existing through street (Dover Road) being from Morgan Farm Road, regardless of whether that intersection is approached from Road A or the extension of Morgan Farm Road. In this regard, a loop road, for practical purposes, is a dead-end street.

*7 On October 26, 2004, Plaintiff filed the application for the Special Permit, together with a Conventional Plan, which provided primary access over an extension of Morgan Farm Road and secondary access over the Easement ROW through the Powissett Subdivision, and an Alternative Plan, which also provided primary access over an extension of Morgan Farm Road, but provided secondary access to only one lot over the Easement ROW through the Powissett Subdivision. On May 31, 2005, the Planning Board denied the Special Permit on the basis that Plaintiff did not submit a Conventional Plan that could be developed without a waiver from the Rules and Regulations, finding “that the [Easement ROW] connecting the extended Morgan Farm Road to the [Connector ROW] is a dead-end street as defined in the Town of Westwood Rules and Regulations ... and exceeds the 500-foot maximum length regulation.” Similarly, on October 11, 2005, the Planning Board issued Morgan Farm Subdivision Decision 2 denying Morgan Farm Subdivision 2, which was filed on June 10, 2005, and which also sought to connect an extension of Morgan Farm Road to the Connector ROW over the Easement ROW, on the basis that the “proposed ±1,250-foot extension of the existing Morgan Farm Road dead-end street, which has an existing length of 500 feet, exceeds the 500-foot maximum length standard in Section IV.A.4.b.” Finally, on November 15, 2005, the Planning Board issued Morgan Farm Subdivision Decision 3 denying Morgan Farm Subdivision 3, which was filed on July 20, 2005, and which eliminated the connection to the Powissett

Subdivision and shortened the extension of Morgan Farm Road. Notwithstanding the reduction of the length of the extension of Morgan Farm Road, the Planning Board found that the “proposed ±310-foot extension of the existing Morgan Farm Road dead-end street [which has an existing length of ±500 feet measured from its intersection with Dover Road to the end of its existing cul-de-sac] provides for a combined measurement of ±810 feet and thus exceeds the 500-foot maximum length standard in Section IV.A.4.b.”

Plaintiff argues that the Easement was properly granted by the owner of the Powissett Subdivision and has not been abandoned. The Planning Board does not dispute that the Easement was properly granted and does not argue that Plaintiff has abandoned the Easement.^{FN17} The Planning Board, however, argues that Plaintiff's rights under the Easement are limited because the use of the Connector ROW has always been limited by the Planning Board; moreover, Plaintiff signed the Application and the Covenant, aware of the conditions on the use of the Connector ROW, thereby agreeing to the terms of Powissett Decision 2, and did not appeal Powissett Decision 2. The issue, then, is how Plaintiff's rights under the Easement are limited by the Powissett Subdivision decisions.

^{FN17} Case law holds that there must be an intent to abandon. See *Emery v. Crowley*, 371 Mass. 489 (1976). Plaintiff's reservation of his rights in the Easement on the signature page of the Articles of Association is evidence that Plaintiff did not intend to abandon the Easement and Defendants have not offered any evidence of, and do not argue, Plaintiff's intent to abandon.

Plaintiff clearly knew when it executed the Application which allowed the Easement ROW to connect to the Connector ROW, that it could not use the Powissett Subdivision roads as a means of access to Locus other than for emergency vehicles. Moreover, Powissett Decision 1, which was issued more than two years before the Easement was granted, referred to the Connector ROW as an “emergency vehicle access” that was to be paved to a width of twelve feet. As such, and contrary to paragraph 3 of the Easement, the Connector ROW was not designed “such that any vehicles that can use the public streets in the Town of Westwood” could use it. Paragraph 3 of the Easement also provides that the subdivision roads (Road A and Road B) and the

Connector ROW were to be constructed “in accordance with [Powissett Subdivision Plan 1], as it may be amended.” Furthermore, paragraph 5 of the Easement contains Stivaletta's promise to “sign any application that may reasonably be required in order to facilitate [Plaintiff's] proposed subdivision of [Locus] and [Plaintiff's] exercise of the Easements granted herein, including, but not limited to an application for modification of any approval of [Powissett Subdivision Plan 1].” Therefore, while the Easement appears to grant Plaintiff broad rights to use the ways in the Powissett Subdivision “for all purposes for which streets and ways are now or may hereafter be used in the Town of Westwood,” taken as a whole, the Easement itself recognizes that the rights granted are limited by the approval of, and any amendments to, Powissett Subdivision Plan 1.

*8 With respect to the failure to appeal Powissett Decision 2, Plaintiff relies on *Musto v. Medfield Planning Board*, 7 LCR 281 (1999), affirmed, 54 Mass.App.Ct. 831 (2002). In that case, plaintiff created a subdivision adjacent to another subdivision and presented a preliminary plan to tie into the adjacent subdivision roads, which was approved on the condition that there be no connection to the adjacent subdivision roads. The planning board advised the owners of both subdivisions that it did not favor such roadway connection. The owner of the adjacent subdivision received definitive approval and a waiver of the length of the dead-end street, with a condition that plaintiff could not tie into the subdivision roads. Plaintiff did not appeal this decision. When plaintiff amended its definitive plan to delete the roadway connection, the planning board rejected the waiver request for length of dead-end street and denied the definitive plan. On appeal of such decision, the planning board argued that plaintiff should have appealed the adjacent subdivision. The Land Court decision stated:

“The planning board implies that the Mustos could have challenged the definitive approval of the Woodcliff Hills subdivision, so as to preserve their right to make a through connection and submit a definitive plan that did not require a waiver. Under the circumstances, it is difficult to imagine why the Mustos should have taken an appeal of the Woodcliff Hills approval, when both it and their own preliminary plan approval were entirely consistent with the discussions they had held with the planning board toward elimination of a through connection in exchange for a waiver of the maximum dead end street length requirement.” *Musto*, 7 LCR at 286, n. 13.

The Land Court held that the planning board had acted in bad faith in denying plaintiff's subdivision, and this decision was upheld by the Appeals Court. See *Musto*, 54 Mass.App.Ct. at 839. In the case at bar, however, Plaintiff was a party to the Application that resulted in the Easement ROW intersecting with the Connector ROW rather than Road A, which, as discussed, *supra*, limited Plaintiff's rights under the Easement to what was shown on Powissett Subdivision Plan 2. Furthermore, unlike *Musto*, the submission, and subsequent approval, of Powissett Subdivision Plan 2 resulted from negotiations with the Westwood Conservation Commission concerning a denied Notice of Intent relative to the Powissett Subdivision. As such, it was the Westwood Conservation Commission's concerns rather than the Planning Board's discussions with Stivaletta and Plaintiff that resulted in Powissett Subdivision Plan 2. Plaintiff does not suggest, and there is no evidence, that Powissett Subdivision Plan 2 resulted from the Planning Board's indication that it preferred to grant waivers of the dead-end street requirements rather than a connection to the adjacent subdivision. Additionally, the Planning Board never approved a preliminary plan for Plaintiff. Cf. *Musto*, 7 LCR at 286-287 (where the trial judge found "that the planning board acted in bad faith, by first requesting the Mustos and the Hoover Realty Trust to eliminate a through street connection from the plans for their adjacent subdivisions, then approving preliminary subdivision plans for both projects conditioned on there being no through connection and then, after granting final approval of the Woodcliff Hills project preventing a through connection and with a waiver of the dead end street length requirement, refusing the Mustos' request for a waiver of the same requirement"). As a result, the case at bar is distinguishable from *Musto* and, therefore, if Plaintiff was not satisfied with the conditions placed on the Connector ROW under Powissett Decision 2, then Plaintiff should have appealed those conditions.^{FN18} Otherwise, the Planning Board "enjoys broad discretion under G.L. c. 41, § 81R, to waive strict compliance with the requirements of its subdivision rules and regulations when such waiver is in the public interest and not inconsistent with the intent and purpose of the subdivision control; it is not, however, required to grant a waiver." *Musto*, 54 Mass.App.Ct. at 837 (citing *Miles v. Planning Bd. of Millbury*, 404 Mass. 489, 490 n. 4 (1989); and *Mac-Rich Realty Constr., Inc. v. Planning Bd. of Southborough*, 4 Mass.App.Ct. 79, 85-86 (1976)).

FN18. Alternatively, under the terms of the

Easement, Plaintiff can have Stivaletta submit an application to modify Powissett Subdivision Plan 2 "to facilitate [Plaintiff's] proposed subdivision of [Locus] and [Plaintiff's] exercise of the Easement[]."

*9 As a result of the foregoing, I find that the Easement is still in full force and effect, but Plaintiff's rights in the Easement are limited by Powissett Decision 2.

Validity of the Morgan Farm Special Permit Decision.

Plaintiff argues that the Morgan Farm Special Permit Decision was an abuse of discretion of the Planning Board because the Special Permit met all the requirements of the By-law. Defendants argue that the Conventional Plan does not meet the requirements of the By-law because of the length of the dead-end street (Morgan Farm Road).

Section 8.5.8 of the By-law requires that an applicant submit, among other things, "[a] conventional plan in full conformance with all zoning and subdivision regulations...." Section IV.A.4.a of the Rules and Regulations states, "[t]he term 'Dead-end street' shall include, without limitation, any street with only a single access onto an existing through street." Section IV.A.4.b of the Rules and Regulations require that no subdivision plans have dead-end streets in excess of the 500-foot maximum. The Morgan Farm Special Permit Decision provides as its major finding that the length of the dead-end street is the problem. Plaintiff argues that there is no need for a waiver of the dead-end street requirement because of the existence of the Easement, which the Planning Board refuses to accept. As discussed, *supra*, the Easement is valid and enforceable, but is limited by Powissett Decision 2. The issue, then, is whether the Easement provides "access onto an existing through street" within the meaning of the Rules and Regulations so as to obviate the need for waivers of the dead-end street requirements. Although the Rules and Regulations do not define the term "access" as it relates to dead-end streets, the Appeals Court in *Musto* indicated that dead-end street length limits are adopted for "public safety purposes." 54 Mass.App.Ct. at 838. Since Powissett Decision 2 limits use of the Connector ROW for emergency vehicles, the Easement ROW would have several accesses for emergency vehicles only-one over the Connector ROW, Road A and Morgan Farm Road onto Dover Road and one over the Connector ROW and Road B onto Woodland

Road. The problem, however, is that the Rules and Regulations also do not define the term “through street.” Section II.A.3 of the Rules and Regulations defines a “Minor Street” as “[a] street, which in the Board’s opinion, is being used or will be used primarily to provide access to abutting lots, and which is designed to discourage its use by *through* traffic (emphasis added).” In this sense, it is reasonable to interpret the term “through street” in the Rules and Regulations as a street that is used not only to provide residents access to abutting lots, but also to provide everyone access to the nearest public road and beyond. The Connector ROW does not provide for access by everyone and is, therefore, not a “through street.” As a result, Morgan Farm Road and the Easement ROW, as shown on the Conventional Plan submitted with the application for the Special Permit, are dead-end streets which violate the dead-end street provision of the Rules and Regulations. As such, I find that Plaintiff did not submit a conventional plan which complied with the Rules and Regulations, as required by Section 8.5 of the By-law, and, therefore, the Planning Board acted lawfully in denying the Special Permit.

*10 As a result of the foregoing, I find that the Morgan Farm Special Permit Decision is valid.

Validity of Morgan Farm Subdivision Decision 2 and Morgan Farm Subdivision Decision 3.

Similarly, Plaintiff argues, based on *Musto*, that both Morgan Farm Subdivision Decision 2 and Morgan Farm Subdivision Decision 3 are unlawful and an abuse of discretion because the Planning Board’s findings that Morgan Farm Subdivision 2 and Morgan Farm Subdivision 3 violate the dead-end street length requirements of the Rules and Regulations are based on the Planning Board’s erroneous determination that Plaintiff has no right to construct a through street across the Powissett Subdivision. Defendants argue, as they did with respect to the Special Permit, that Plaintiff’s rights under the Easement are limited by Powissett Decision 2 and, therefore, Morgan Farm Subdivision Decision 2 and Morgan Farm Subdivision Decision 3 were lawful.

Judicial review on an appeal under G.L. c. 41, § 81BB, as Plaintiff notes, is *de novo*, wherein the court makes its own findings of fact in order to determine the validity of the Planning Board’s decisions. Mac-Rich Realty Constr., Inc., 4 Mass.App.Ct. at 81. The burden of proof is on the

appellant to show that the Planning Board acted improperly in reaching its decisions. Selectmen of Ayer v. Planning Bd. of Ayer, 3 Mass.App.Ct. 545, 548 (1975).

Morgan Farm Subdivision 2 provides for primary access over an extension of Morgan Farm Road and secondary access over the Easement ROW connecting to the Powissett Subdivision along the Connector ROW. As discussed, *supra*, Plaintiff’s rights under the Easement are limited by Powissett Decision 2 and, unless that decision is amended, the Connector ROW can only be used for emergency vehicle access. As a result, the Planning Board determined that the Easement ROW is a dead-end street. Both the Easement ROW and the proposed extension of Morgan Farm Road would be longer than 500 feet and would require waivers of the dead-end street length requirement of the Rules and Regulations. As discussed, *supra*, with respect to *Musto*, the Planning Board, absent evidence of bad faith or abuse of discretion, is not required to grant a waiver from its Rules and Regulations. Plaintiff has produced no evidence that the Planning Board acted in bad faith or abused its discretion. As a result, I find that the Planning Board acted properly in refusing to waive the dead-end street length requirements of the Rules and Regulations and, therefore, Morgan Farm Subdivision Decision 2 is valid.

Morgan Farm Subdivision 3 reduced the number of lots in the subdivision to only three lots, with the only access provided by an extension of Morgan Farm Road. While this extension is shorter than the previously proposed extensions of Morgan Farm Road, it nevertheless results in a dead-end street that is longer than 500 feet. As a result, for the same reasons discussed with respect to Morgan Farm Subdivision Decision 2, *supra*, I find that the Planning Board acted properly in refusing to waive the dead-end street length requirements of the Rules and Regulations and, therefore, Morgan Farm Subdivision Decision 3 is valid.^{FN19}

FN19. The progression from Morgan Farm Subdivision 1, with eleven lots, to Morgan Farm Subdivision 3, with only three lots, indicates Plaintiff’s willingness to work to address the access and public safety concerns of the Planning Board. This court encourages the Planning Board and Plaintiff to work together to determine whether an acceptable dead-end street length is possible while also providing adequate emergency

vehicle access to protect public safety.

Validity of the By-law provisions.

A. Section 8.5 of the By-Law.

*11 Plaintiff argues that Section 8.5 of the By-law is invalid because it violates (a) the uniformity requirement of G.L. c. 40A, § 4, (b) the zoning freeze protection afforded by G.L. c. 40A, § 6, (c) the Subdivision Control Law (G.L. c. 41, § § 81K-81GG), and (d) the principles of substantive due process. Defendants argue that Plaintiff does not meet the requirements of the By-law, and even if it did, Section 8.5 is valid.

Section 8.5 of the By-law, titled Major Residential Development (MRD), requires the issuance of a special permit by the Planning Board for any MRD involving the creation of four or more lots (with exceptions not relevant here). Section 8.5.1 of the By-law states that “[t]he purpose of this Section is to allow greater flexibility and creativity in residential development and to assure a public voice and public authority in consideration of development...” Any applicant for a MRD shall also file with the Planning Board both a Conventional Subdivision Plan and an Alternative Subdivision Plan. These plans are defined in Section 8.5.8 as follows:

“Conventional Plan. A conventional plan in full conformance with all zoning and subdivision regulations and to the extent possible at the time of application, health regulations, wetlands regulations and other applicable federal, state and local requirements. This Conventional Plan shall be prepared in conformance with the requirements for a preliminary subdivision plan as set forth in the Planning Board’s Subdivision Rules and Regulations; provided, however, that in simple cases, such requirements may be waived by the Planning Board.

Alternative Plan. An alternative plan that differs substantially from the aforementioned Conventional Plan. Examples of plans that would be ‘substantially different’ from a Conventional Plan includes the use of the alternative dimensional regulations set forth herein, or a plan of the same type but having major differences in the number of lots created, road pattern or open space configuration.”

Section 8.5.17 of the By-law provides that “[t]he Planning Board may approve or approve with conditions a special permit for a MRD ...”

Plaintiff argues that the uniformity requirement of

G.L. c. 40A, § 4 is violated because some as of right uses require a special permit, citing *SCIT, Inc. v. Planning Board of Braintree*, 19 Mass.App.Ct. 101 (1984) and *Prudential Ins. Co. of America v. Board of Appeals of Westwood*, 23 Mass.App.Ct. 278 (1986). “It has been settled since the decision in *SCIT, Inc. v. Planning Bd. of Braintree*, 19 Mass.App.Ct. 101 (1984), that a use allowed as of right and a use dependent on discretion are mutually exclusive.” *Prudential Ins. Co. of America*, 23 Mass.App.Ct. at 281. G.L. c. 40A, § 4 states as follows: “[a]ny zoning ordinance or by-law which divides cities and towns into districts shall be uniform within the district for each class or kind of structures or uses permitted.” Plaintiff states that if a subdivision of four or more lots produces lots that meet all the other By-law and Rules and Regulations requirements, such lots should be able to be created as of right and should not be discretionary. Although Defendants argue that not all subdivision uses require a special permit, as in *SCIT*, since only subdivisions with more than four lots activate the special permit process, there is no guaranty that all subdivisions with four or more lots will be treated the same. Defendants also argue that Section 8.5 of the By-law only allows the Planning Board to either approve or approve with conditions an application that includes a conventional plan that conforms with all zoning and planning regulations. In support of this argument, the Planning Board alleges that it has always granted a special permit where the application included such a conforming conventional plan. Defendants’ argument, however, ignores the language of Section 8.5.17 of the By-law which uses “may” rather than “shall”, thereby giving the Planning Board the discretion to deny a special permit. Moreover, even assuming the By-law only allows the Planning Board to either approve or approve with conditions, the Planning Board’s conditions may be so onerous as to effectively amount to a denial (i.e. by forcing the applicant to appeal the imposition of unreasonable conditions on an as-of-right use). See *Castle Hill Apartments Limited Partnership v. Planning Bd. of Holyoke*, 65 Mass.App.Ct. 840 (2006) (where the Appeals Court affirmed the Land Court’s finding that a condition imposed on an as-of-right multifamily use after site plan review that would have effectively reduced the number of units by more than half was unreasonable). See also *Prudential Ins. Co. of America*, 23 Mass.App.Ct. 278, *supra*, (where the Appeals Court discusses the difference between conditions imposed on special permit uses and conditions imposed on as-of-right uses).

*12 Defendants, however, argue that Plaintiff cannot

challenge the validity of the By-law because Plaintiff does not meet the requirements of the Rules and Regulations, and therefore the By-law. The Supreme Judicial Court (the "SJC") has stated that G.L. c. 240, § 14A,

"authorizes a petition by a landowner on whose land there is a direct effect of the zoning enactment.... In such a case, the landowner comes to court because of the effect of the enactment on the continued 'use, enjoyment, improvement or development' of his property for the purpose for which it is zoned." Harrison v. Braintree, 355 Mass. 651, 654 (1969).

For purposes of the By-law analysis, therefore, it is irrelevant whether Plaintiff meets the requirements of the By-law. Because the By-law applies to Plaintiff's attempt to develop Locus, Plaintiff has standing to challenge the validity of the By-law and rightfully argues both that a use potentially as-of-right may not be regulated by a discretionary special permit, and that not all four lot subdivisions are treated the same, as they are subject to a discretionary special permit.

As a result of the foregoing, I find that Section 8.5 of the By-law violates the uniformity requirement of G.L. c. 40A, § 4, and is, therefore, invalid.

Plaintiff's next two arguments are simply another way of arguing that a plan which complies with the Rules and Regulations and is permitted as-of-right cannot be subject to a discretionary special permit. Plaintiff argues that Section 8.5 of the By-law conflicts with protection afforded by G.L. c. 40A, § 6, by allowing the Planning Board to effectively change the zoning rules after a plan has been filed by either disapproving a plan or approving a plan with onerous conditions. G.L. c. 40A, § 6, relative to zoning freezes, states, in part:

"If a definitive plan, or a preliminary plan followed within seven months by a definitive plan, is submitted to a planning board for approval under the subdivision control law, and written notice of such submission has been given to the city or town clerk before the effective date of ordinance or by-law, the land shown on such plan shall be governed by the applicable provisions of the zoning ordinance or by-law, if any, in effect at the time of the first such submission while such plan or plans are being processed under the subdivision control law, and, if such definitive plan or an amendment thereof is finally approved, for eight years from the date of the endorsement of such approval...."

Under G.L. c. 40A, § 6, once a definitive subdivision plan has been approved, it will be subject to the

applicable provisions of the By-law in effect at the time the plan was first submitted. Whether certain provisions of the By-law to which an approved definitive plan is subjected are valid is a separate question from whether Section 8.5 of the By-law conflicts with the zoning freeze provided by G.L. c. 40A, § 6.

Plaintiff next argues that Section 8.5 violates the Subdivision Control Law because the Subdivision Control Law has priority over the By-law. Plaintiff argues that a subdivision plan that meets the requirements of the Subdivision Control Law and the Rules and Regulations should not be subject to the discretion contemplated by the Section 8.5 special permit. They cite G.L. c. 41, § 81M which states:

*13 "It is the intent of the subdivision control law that any subdivision plan filed with the planning board shall receive the approval of such board if such plan conforms to the recommendation of the board of health and to the reasonable rules and regulations of the planning board pertaining to the subdivision of land."

For the reasons discussed, *supra*, a plan that meets the requirements of the Subdivision Control Law and the Rules and Regulations cannot be subject to a discretionary special permit.

Finally, Plaintiff argues that Section 8.5 of the By-law violates the principles of substantive due process in that it is not rationally related to a legitimate zoning purpose. See Zuckerman v. Town of Hadley, 442 Mass. 511, 516 (2004) ("due process requires that a zoning bylaw bear a rational relation to a legitimate zoning purpose"). The constitutional validity of a zoning bylaw, however, will be supported by "any permissible public objective that the legislative body may plausibly be said to have been pursuing," with "every presumption in favor of a zoning bylaw." *Id.* (citing Sturges v. Chilmark, 380 Mass. 246, 256-257 (1980)). A "challenger must prove by a preponderance of the evidence that the zoning regulation is arbitrary and unreasonable, or substantially unrelated to the public health, safety, morals, or general welfare." Johnson v. Edgartown, 425 Mass. 117, 121 (1997) (citing Sturges, 380 Mass. at 256; Massachusetts Broken Stone Co. v. Weston, 346 Mass. 657, 659-660 (1964); Simon v. Needham, 311 Mass. 560, 564 (1942)). Plaintiff argues that if Section 8.5 serves any purpose at all, it is related to subdivision control, not zoning. Defendants do not argue the constitutionality of Section 8.5 of the By-law. In furtherance of the purpose of allowing greater flexibility and creativity in residential development,

however, Sections 8.5.1.1 through 8.5.1.5 of the By-law aim to achieve the following:

“[L]ocation of development on sites best suited for building, and protection of land not suited for development, reflecting such considerations as:

permanent preservation of open space for conservation or recreational use, especially in large contiguous areas within the site linked to off-site protected areas;

protection of water bodies, streams, wetlands, wildlife habitats and other conservation resources;

protection of the character of the community through preserving open space within view from public roadways, preservation of stone walls and other historic landscape features, preservation of scenic vistas and through siting of dwellings at low visibility locations;

protection of street appearance and capacity by avoiding development close to or having egress directly onto such streets;

[E]fficient patterns for construction and maintenance of public facilities and services such as streets and utilities;

[C]ontinuation of the community's social and economic diversity;

*14 [P]rivacy for residents of individual lots; and

[A]voidance of unnecessary development cost.”

Plaintiff argues that even if these stated purposes are legitimate, Section 8.5 of the By-law is invalid because it is not rationally related to achieving these purposes. Plaintiff argues that the key difference between Section 8.5 and other by-laws intended to allow flexibility in residential development is that Section 8.5 purports to authorize the Planning Board to reject the conventional plan, the alternative plan, or both. As discussed, *supra*, I have found Section 8.5 violates the uniformity requirement of G.L. c. 40A, § 4, because it appears to allow the Planning Board to deny a special permit for an as-of-right use. Beyond that infirmity, however, Plaintiff has not produced evidence to show that the provisions of Section 8.5 are substantially unrelated to the public health, safety, morals, or general welfare, which would warrant a finding that Section 8.5 is unconstitutional.

B. Section 5.5.6 of the By-Law.

Plaintiff also argues that Section 5.5.6 of the By-law is invalid because it violates the Subdivision Control Law and principles of substantive due process. Defendants do not argue this issue in their memorandum.

Section 5.5.6 of the By-law states as follows:

“No way created pursuant to the Subdivision Control Law shall be closer than forty (40) feet to any lot line of any lot situated outside the subdivision with respect to which such way is created, at any point that is further than forty (40) feet from an existing street right-of-way.”

Section 5.5.6 of the By-law imposes a 40-foot buffer between subdivision roads and lots outside of the subdivision. Section 4.A.1 of the Rules and Regulations governing the location of streets within a subdivision does not contain a similar 40-foot buffer requirement between subdivision roads and abutting lots outside the subdivision.

Plaintiff argues, first, that Section 5.5.6 impermissibly seeks to regulate through zoning a field that has been preempted by the Subdivision Control Law's comprehensive statutory scheme for regulating the layout and construction of subdivision ways. In support of its argument, Plaintiff refers to the provisions of G.L. c. 41, § 81M, discussed *supra*, which require a Planning Board to approve a subdivision plan if the Board of Health approves it and it complies with the Rules and Regulations.

State Legislation preempts a local regulation where “the local regulation would somehow frustrate the purpose of the statute so as to warrant an inference that the Legislature intended to preempt the subject” or where the “legislation on the subject is so comprehensive that any local enactment would frustrate the statute's purpose.” *Fafard v. Conservation Comm'n of Barnstable*, 432 Mass. 194, 200 and 204 (2000) (citing *Boston Gas Co. v. Newton*, 425 Mass. 697, 699 (1997)). It is clear that the Subdivision Control Law, through the adoption of subdivision rules and regulations by local planning boards, provides a comprehensive scheme for the laying out and construction of subdivision ways. See *Costanza & Bertolino, Inc. v. Planning Bd. of North Reading*, 360 Mass. 677, 679 (1971) (where the SJC discussed that “[t]he Subdivision Control Law is a comprehensive statutory scheme,” which accomplishes its “purpose by, among other things, ‘regulating the laying out and construction of ways in subdivisions ...’”) (quoting G.L. c. 41, § 81M). The issue, then, is whether the Subdivision Control Law is so comprehensive that any local enactment, other than the Rules and Regulations, would frustrate the statute's purpose. G.L. c. 41, § 81M, discussed *supra*, requires the Planning Board to approve a subdivision plan if it meets with the approval of the

Board of Health and it complies with the Rules and Regulations. G.L. c. 41, § 81M also emphasizes that in order to accomplish the purpose of the Subdivision Control Law “[t]he powers of a planning board ... under the subdivision control law shall be exercised with due regard for the provision of adequate access to all of the lots in a subdivision by ways that will be safe and convenient for travel.” G.L. c. 41, § 81Q sets forth the power of the Planning Board relative to the adoption of the Rules and Regulations which states, in relevant part, as follows:

*15 “[A] planning board shall adopt, and, in the same manner, may from time to time, amend, reasonable rules and regulations relative to subdivision control not inconsistent with the subdivision control law or with any other provisions of a statute or of any valid ordinance or by-law of the city or town.... Such rules and regulations ... shall set forth the requirements of the board with respect to the *location*, construction, width and grades of the proposed ways shown on a plan and the installation of municipal services therein, which requirements shall be established in such manner as to carry out the purposes of the subdivision control law as set forth in section eighty-one M.” (emphasis added).

G.L. c. 41, § § 81M and 81Q, taken together, specifically outlines what the Planning Board can and cannot do with respect to adopting Rules and Regulations to achieve the purpose of the Subdivision Control Law. The SJC, in *Del Duca v. Town Administrator of Methuen*, indicated that “[l]egislation which deals with a subject comprehensively, describing (perhaps among other things) what municipalities can and cannot do, may reasonably be inferred as intended to preclude the exercise of any local power or function on the same subject because otherwise the legislative purpose of that statute would be frustrated.” 368 Mass. 1, 11 (1975). Any requirement applicable to the laying out and construction of subdivision ways not contained in the Rules and Regulations would, therefore, frustrate the Subdivision Control Law's purpose because the statute does not contemplate local piecemeal regulation or Planning Board consideration of requirements outside of the Rules and Regulations. The Rules and Regulations do not require a 40-foot buffer between subdivision roads and lots outside the subdivision.^{FN20} Furthermore, neither the Planning Board nor the Town of Westwood argues that the Rules and Regulations relative to the laying out of subdivision ways are invalid (i.e. that the Rules and Regulations are inconsistent with the By-law). As a result of the forgoing, I find that the Subdivision Control Law and the Rules and Regulations preempt

Section 5.5.6 of the By-law relative to the layout and construction of subdivision ways and, therefore, Section 5.5.6 of the By-law is invalid.^{FN21}

FN20. Although Section IV.D of the Rules and Regulations requires that “[a]ll lots within the subdivision shall comply with the area, frontage and width requirements of the Zoning Bylaw,” Section 5.5.6 of the By-law does not apply to lots, but to the location of ways within a subdivision.

FN21. Because I have found that Section 5.5.6 of the By-law is preempted by the Subdivision Control Law, I need not address Plaintiff's argument relative to its constitutional validity.

Judgment to issue accordingly.

Mass.Land Ct.,2007.
Wall Street Development Corp. v. Moore
Not Reported in N.E.2d, 2007 WL 1219575
(Mass.Land Ct.)

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