

Zoning Freezes

**By Brian W. Blaesser, Esq. and Michael S. Giaimo, Esq.
Robinson & Cole LLP***

Massachusetts landowners and developers concerned about the potential for unfavorable changes in local zoning requirements should be familiar with the statutory “zoning freeze” protections available under Massachusetts law, G.L. c. 40A §6.1. Before it learns about a proposed zoning change, a developer may already have incurred considerable pre-construction investment, over a period of years, in a project that conforms to current zoning requirements. Whether a zoning amendment is intended to thwart the proposed development, or its detrimental effects are merely incidental, a savvy project proponent can often invoke a “freeze” provision to preserve the zoning status quo. A developer may be able to save the project as originally intended by staying alert for proposed changes to the local zoning requirements, and by knowing, planning for and taking timely advantage of the available “freezes.”

ZONING AMENDMENTS

In order to fully appreciate and understand zoning freezes, it is important to know a little something about the zoning amendment process. In Massachusetts, every zoning amendment is the subject of a hearing by the municipal Planning Board. The Planning Board reports its recommendations on the amendment to the Town Meeting in a Town, or to the City Council in a City, which in turn votes on whether to pass the amendment. If it passes, the date of that vote is the “effective date” of the amendment. However because of the way that the “zoning freeze” provisions operate, a zoning amendment may, in fact “take effect” with respect to a particular property or development well before, or long after, its statutory effective date, or not at all.

CATEGORIES OF ZONING FREEZES

There are two general categories of zoning “freezes” under Massachusetts law — *non-plan freezes* and *plan freezes*. These freezes differ in their breadth and duration, and it is helpful to think about them distinctly, even though they are related concepts. In addition, there are freezes that specifically protect rights in certain residential lots for single and two-family dwellings.

Non-Plan Freezes

* Brian Blaesser and Michael Giaimo are partners in the *Landlaw* practice of Robinson & Cole LLP in Boston. They are the co-authors of the chapter on *Zoning Freezes* in the Massachusetts Continuing Legal Education *Zoning Manual*.

¹ It is probably worth noting that the term “zoning freeze” is a colloquial one for the various provisions of G.L. c. 40A §6 that establish the rules for vesting of rights under specified circumstances. The term itself is not used in the statute.

Non-plan zoning freeze protection is not limited in its duration. However, non-plan freezes protect only the particular use or development in question. They do not attach generally to the land on which the use or development is located, and will not necessarily extend to a later modification of the use or structures to which the freeze applies.

(1) “Commencement Freeze” for structure or use lawfully in existence or lawfully begun prior to the first published advertisement of the planning board hearing on the zoning amendment.

A zoning amendment does not apply to a structure or use lawfully in existence or lawfully begun prior to the date of the first advertisement of the Planning Board hearing on the amendment. This freeze may be beneficial for those property owners and developers who become aware of a proposed detrimental zoning change before the planning board hearing notice is published, and are able before then to actually commence a use or a structure lawfully without need for a building permit or special permit. If lawful commencement of the use or structure in question requires some other type of approval, such as a foundation permit, curb cut permit, demolition permit, site plan or parking plan approval, variance, or other entitlement, those processes would have to be completed, and the approvals in place before the use or construction commences, in order to invoke this freeze.

(2) “Permit freeze” for building or special permit issued prior to the first published advertisement of the planning board hearing on the zoning amendment.

A zoning amendment does not apply to a building or special permit issued prior to the date of the first advertisement of the Planning Board hearing on the amendment. In order to retain the benefit of this protection, construction or operations under the permit must be commenced within a period of not more than six months after the issuance of the permit. In cases involving construction, the construction must also be “continued through to completion as continuously and expeditiously as is reasonable.” This “permit freeze” may be beneficial for those property owners and developers who become aware of a proposed detrimental zoning change before the planning board hearing notice is published, are able to pull a building permit for a planned structure before then, and thereafter timely begin construction under that permit. Likewise, a project proponent who is able to obtain a special permit for a project under the existing zoning before the first published notice of the planning board hearing, would have the benefit of this provision. Note that the freeze vests rights upon the issuance of the building or special permit and not upon the filing of an application. If the application is filed before the publication of the planning board hearing notice, but the permit does not issue until afterwards, this freeze does not apply.

(3) Additional Observations about “Non-Plan Freezes”

Note that all of the non-plan freezes provided by G.L. c. 40A, §6 must be established prior to the date of the first published advertisement of the planning board hearing on the zoning amendment against which the freeze is sought. For that reason, those freezes protect the project proponent who has, even without knowing that a zoning change is afoot, already commenced a use, started to build, or received a building or special permit based on the current zoning provisions. This type of freeze would not help a project proponent who, in

the ordinary course, becomes aware of a proposed detrimental zoning change after the Planning Board has already published notice of its hearing on that change, or becomes aware too soon before that to pull a building permit or otherwise qualify for the freeze protection.

Very often, however, a Planning Board, Board of Selectmen or other local committee has proposed zoning changes under discussion on an *informal* basis long before they are formally proposed and scheduled for the Planning Board hearing required by the Zoning Act. Under this circumstance, the non-plan freezes can also be useful to the savvy project proponent who uses its local contacts and the press to keep abreast of such developments. A developer who keeps its ear to the ground may become aware of intended zoning changes at an early enough stage to perfect its rights under one of the non-plan freeze provisions even before the Planning Board schedules a formal hearing.

The date on which the planning board first advertises a public hearing may be weeks or even months before the statutory “effective date” of the City Council meeting or Town Meeting at which the amendment is adopted. The negative implication of the statutory language establishing the non-plan freeze protection, is that, once adopted, the zoning amendment would be applied, retroactively, to any structure or use which first received a building permit during that time period. Until the actual Town Meeting or City Council vote takes place, however, the zoning in effect in that municipality would not include the proposed changes because there would be no certainty whether the proposed amendment is going to pass or fail. Case law establishes that a building inspector cannot refuse to withhold a building permit merely on the grounds that a zoning amendment has been proposed that would, if passed, preclude the structure or use for which the permit is sought.² On the other hand, someone who pulls a permit and commences construction under these circumstances does so at risk. If the zoning change passes, it will apply retroactively so that the building inspector would be warranted in revoking the permit or even taking enforcement action with respect to any construction that had commenced under it.

PLAN FREEZES

A “plan freeze” can be used by a developer who has missed out on being able to invoke non-plan freeze protection, but knows that the municipality will soon vote on a zoning amendment that could thwart its proposed project. In theory, a property owner could effectuate a plan freeze on the eve of the Town Meeting or City Council vote to adopt the problematic zoning amendment. In practice, however, considerably more advance planning is advisable. For example, in seeking to meet a tight timeframe for filing a plan to invoke a freeze, and providing the required notice of such finding to the Town Clerk, it is important to account for the fact that some planning boards, by regulation, require that that subdivision and Approval Not Required (“ANR”) plans be filed at meetings of the Planning Board, rather than allowing them to be filed with planning staff or other municipal officials. Likewise, it is necessary to account for, and have mobilized the professional support necessary to comply with, the detailed plan content and supporting documentation requirements that most jurisdictions have for even the most basic subdivision filings, so that the Board cannot properly reject the plan on technical grounds.

² See *Ouellette v. Building Inspector of Quincy*, 362 Mass. 272, 279-80 (1972).

In contrast to the non-plan freezes, the plan freezes under Chapter 40A section 6, are not specific to a particular use or development, but rather apply more generally to the property that is shown on the plan. However, also in contrast to non-plan freezes, the protection afforded by plan freezes is limited in duration. In the case of the “ANR” freeze, the scope of the protection is limited exclusively to the local zoning “use” provisions.

(1) “Subdivision Plan Freeze” for land shown on a Definitive Subdivision Plan or on a Preliminary Subdivision Plan followed within seven months by a Definitive Subdivision Plan

Filing a Definitive Subdivision plan with the Planning Board and providing notice to the municipal clerk has the effect of preserving the zoning then in effect with respect to the land shown on the plan. The freeze period starts when the plan is first submitted to the Planning Board and extends for a period of eight years from the date of the Planning Board’s endorsement of the plan. If a preliminary subdivision plan is filed first,³ the freeze commences with the submittal of that plan, and if a Definitive Subdivision plan is filed within seven months thereafter, continues through the processing of the definitive plan, including the time needed for any appeals, and extends for another eight years after the planning board’s endorsement of it. A landowner who files a Definitive Subdivision plan, either to commence the freeze or within seven months of an earlier preliminary plan filing, must succeed in gaining approval of the definitive plan in order to maintain the benefits of the plan freeze. But it need not actually intend to construct the improvements shown on the plan.⁴ The freeze applies to the land itself, and is not limited to the particular plan of development shown on the plan.⁵

(2) “ANR Freeze” or “Use Freeze” for land shown on an Approval Not Required (“ANR”) plan submitted under G.L. c. 41 sec. 81P

Submitting a plan to a planning board under section 81P of the Subdivision Control Law,⁶ and filing the required written notice of such submission with the municipal clerk, causes the use of the land shown on the plan, to be governed by the zoning that is in effect at the time of the submission of the plan. This “use freeze” or “ANR freeze” lasts while the plan is being processed by the planning board under the Subdivision Control Law, including the time required to pursue or await the determination of any appeal, and for a period of three years from the date of the planning board’s endorsement that approval under the Subdivision Control Law is not required. An ANR plan is a plan that does not show a “subdivision.” Generally speaking, a “subdivision” results in the creation of one or more new building lots that lack sufficient frontage on one of the types of existing ways called out in the Subdivision Control Law definition of “subdivision.”⁷ A plan that shows lots having sufficient frontage, each having adequate actual access, and that does not result in new building lots without such

³ The filing of a preliminary plan is required for non-residential subdivisions, and is optional for residential ones. G.L.c. 41 §81S.

⁴ *Massachusetts Broken Stone Co. v. Town of Weston*, 430 Mass. 637 (2000).

⁵ *Id.*

⁶ These are also known as ANR or “Form A” plans.

⁷ See G.L. c. 41 §81L.

frontage and access, is entitled to ANR endorsement.⁸ As with the subdivision plan freeze, the ANR freeze attaches to the land shown on the plan, meaning the parcel that is the subject of the plan. The protected use is not restricted to the particular use or uses of the parcel at the time the freeze is effectuated, but extends to any use permitted under the then-current zoning ordinance or bylaw.

A question that sometimes arises, for example, where the landowner seeking the freeze has only enough land or frontage for a single building lot, is whether a “perimeter plan,” showing simply the existing boundaries of the lot, will qualify for ANR endorsement and hence the use freeze. It should not be necessary to show a new lot line on a plan in order to qualify for an ANR endorsement. Although some planning boards know of or suspect the applicant’s intent to invoke the use freeze protection, and resist endorsing a “perimeter plan,” case law indicates that such plans are entitled to endorsement as long as they have the requisite frontage and adequate actual access.⁹ As the Appeals Court has said, “the argument that perimeter plans, because they do not contain new lines indicating a division of land, are ineligible for submission and endorsement under § 81P flies in the face of decades of contrary practice.”¹⁰ Moreover, where the plan qualifies for endorsement, it is irrelevant that the landowner’s intent in filing a plan (perimeter or otherwise) is to invoke the freeze.¹¹

The ANR freeze will not protect against zoning changes other than those that control the uses allowed on the land. Typically that would mean changes to the uses allowed by right or by special permit on the property that is the subject of the freeze.¹² However where the nature of a zoning amendment concerning bulk and dimensional requirements is such that it is “practically prohibitive” of a protected use, the ANR freeze protection may protect against the amendment.¹³

(3) Waiver of Plan Freeze Rights

A frequent consideration with respect to plan freezes is whether the landowner may assert freeze rights with respect to some zoning amendments while availing itself of other amendments that fall within the freeze period. By statute, a landowner may file an instrument at the registry of deeds to “waive” its freeze rights, after which the land will be subject to the current zoning, and any future amendments, just as if no freeze were ever in effect. However, an owner may not “mix and match” by taking advantage of some zoning amendments, while invoking a freeze to protect against others.

RESIDENTIAL LOT FREEZES

⁸ There is a substantial body of case law interpreting the requirements for ANR endorsement and applying them to various settings, with different outcomes sometimes turning on very subtle differences in the applicable facts.

⁹ See *Cape Ann Land Dev. Corp. v. Gloucester*, 371 Mass. 19, 353 N.E.2d 645 (1976).

¹⁰ *Cumberland Farms, Inc. v. Planning Bd. of West Bridgewater*, 64 Mass. App. Ct. 902, 833 N.E.2d 153 (2005) (citations omitted).

¹¹ *Long v. Board of Appeals of Falmouth*, 32 Mass.App.Ct. 232, 236, 588 N.E.2d. 692, 694 (1992).

¹² See *Bellows Farms, Inc. v. Building Inspector of Acton*, 364 Mass. 253, 260, 303 N.E.2d 728, 733 (1973).

¹³ See generally, *Id.*; See also *McCafferey v. Board of Appeals of Ipswich*, 4 Mass.App.Ct. 109, 343 N.E.2d 154 (1976); and *Cape Ann Land Dev. Corp. v. Gloucester*, 371 Mass. 19, 353 N.E.2d 645 (1976).

Two additional freeze provisions, pertaining only to lots for single and two family residential use, provide limited protection from increases in certain dimensional requirements.

(1) Single Lot Exemption

A lot for single and two family residential use that is not owned in common with any adjacent land at the time of an increase in area, frontage, width, yard or depth requirements, is protected against such increase, provided that it has at least 50 feet of frontage and 5,000 square feet of area. As price premiums for buildable residential lots have increased, the single lot exemption has been frequently invoked to develop isolated lots that were created in years past, but not developed when adjoining properties were. However, where a lot has subsequently come into common ownership with an adjacent substandard lot, the lots are considered to “merge” and the protection of this exemption can be lost for both lots.¹⁴

(2) Common Lot Exemption

Up to three contiguous lots shown on a plan may be protected for a period of five years from an increase in area, frontage, width, yard or depth requirements. The protection applies only if the lots, whenever created, would conform to the applicable zoning requirements that were in effect as of January 1, 1976, and also each have at least 7,500 square feet of area and 75 feet of frontage. The five year period runs from the date of the zoning amendment, not from the date the lots were created.¹⁵ This exemption may be helpful in preserving the ability to build houses on commonly held adjoining lots in subdivisions where the plan freeze protections have expired, or on adjoining residential ANR lots that would otherwise be subject to dimensional increases. Where more than three adjoining lots qualify for the freeze, the protection applies to the first three lots for which the protection is sought.¹⁶

CONCLUSION

Landowners and developers should know when they are entitled to claim protection from zoning changes, and how to avail themselves of that protection through the statutory zoning “freezes” provided under G.L. c. 40A §6. Taking timely action to prevent or delay the effect of a change in local zoning requirements could make the difference between development success, and seeing long-held plans thwarted at the last minute.

For more information, please feel free to contact:

Brian W. Blaesser, Esq. (617) 557-5900
bblaesser@rc.com

Michael S. Giaimo, Esq. (617) 557-5900
mgiaimo@rc.com

¹⁴ *Preston v. Board of Appeals of Hull*, 51 Mass.App.Ct. 236 (2001).

¹⁵ *Baldiga v. Board of Appeals of Uxbridge*, 395 Mass. 829 (1985).

¹⁶ *Marinelli v. Board of Appeals of Stoughton*, 440 Mass. 255 (2003)