Chapter 2: Conveyancing

Richard B. Johnson
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Conveyancing

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A. NEW SUBDIVISION CONTROL LAW

§2.1. Background. The new Subdivision Control Law\(^1\) was approved by the Governor on July 4, 1953. It took effect, accordingly, on the second of October.\(^2\)

Subdivision control, or governmental planning of the development of land, is not new to Massachusetts. At first, the function of the planning boards was almost solely advisory, particularly with respect to private development.\(^3\) As time went on, and it became more apparent that yesterday’s substandard private development is today’s town headache, the boards were given more powers. Generally speaking, the sanctions by which their powers were enforced were the withholding of municipal services and of building permits in subdivisions made without their approval. Planning, of course, is closely akin to zoning.\(^4\) Both concern the use of land, rather than the title to it, and conveyancers have traditionally considered themselves as not obliged to pass on the legal problems involved in a particular use to which land is to be put. They saw no difference in kind between a permit to build a dwelling house and a permit to erect and operate a filling station. Both were problems for someone else after the conveyancer had ascertained who owned the land. This was particularly (and necessarily) true of the leading conveyancing institution in the Commonwealth — the Land Court.

Independent conveyancers, dealing with unregistered land, are subject to no such limitations, however, and as more and more towns and

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§2.1. \(^1\) Acts of 1953, c. 674.
\(^2\) See the foreword by Richard Preston, Commissioner of the Department of Commerce, to an annotation of the new statute prepared by the Division of Planning in September, 1953.
\(^3\) See Nichols, The Massachusetts Law of Planning and Zoning 21 et seq., (1943); House Doc. 2249, Report of the Special Commission on Planning and Zoning 8, 9 (1953).
cities have adopted more and more zoning restrictions, an increasing number of conveyancers have come to regard municipal limitations on the use of land as a subject of as much concern to them as private restrictions.

§2.2 Earlier legislation. In the meantime, the planners were being given more powers. Neither the planners nor the conveyancers realized at first that they were sailing collision courses, but there is no doubt that sooner or later a series of small encounters would have made it clear that planners and conveyancers needed to sit down together and work out a program reconciling the public need for control of haphazard land development with the public need for reducing the expense of transferring real estate. However, a real collision occurred with the enactment of Chapter 182 of the Acts of 1949. This provided that no rights could be acquired in a way other than a public way in a subdivision either expressly or by implication, unless the way be shown on an approved plat. This was crossing the line. After some deliberation, the Land Court decided that a limitation on access to land differed in kind, and not just in degree, from a limitation on the use of land, and concluded that the court's jealously guarded assurance fund might be jeopardized by the issuance of a certificate of title to land that couldn't be reached except by helicopter. The problem for the court was not confined to pending and future registration proceedings. The new statute applied to plans already recorded except with respect to lots not yet sold, and the Land Court Engineer had, prior to the statute, approved and sent to the local registries a number of subdivision plans of registered land, not all the lots on which had been sold by 1949. A stop order was sent out, instructing the assistant recorders in each registry not to issue any more certificates for subdivided lots unless and until the court had determined whether local planning board approval was necessary, and, if necessary, had been duly obtained.

At the same time, the conveyancers began to act. In December, 1949, and May, 1950, the Massachusetts Law Quarterly published articles by John A. McCarty of the Boston Bar, criticizing the Subdivision Control Law. Meeting of the Conveyancers' Association and the Abstract Club also criticized it. As a result, Philip Nichols, well-known authority on municipal law, counsel for the Massachusetts Federation of Planning Boards, conveyancer and member of the Abstract Club, introduced a bill in the legislature to amend the law. The bill was referred, with others on the same or related subjects, to a Special Commission. The deadline for 1952 legislation passed, and the Special Commission was continued. The Commissioner's report is House Doc. 2249 (1953).

the enactment of a draft, and after various changes the ultimate re­
sult was Chapter 674 of the Acts of 1953.

§2.3. Requirements of proper registry records on subdivisions. If it were feasible to punish violations of sound planning principles by fining the wrongful subdivider,\(^1\) or sending him to jail, lawyers would have no more trouble with subdivision control than they have with laws controlling the sale of narcotics or other forms of misbehavior. Criminal sanctions were not, however, satisfactory, no doubt for good and sufficient reasons, and the policy of imputing guilt to the land, like an ancient deodand,\(^2\) seems to be settled. Unfortunately, the point was overlooked that to punish, by denial of privileges, certain parcels of land for the offense of having been improperly subdivided is to create for conveyancers the problem of ascertaining the guilt or in­
ocence of every parcel of land which has been divided since the ad­
vent of subdivision control.

Under the old statute, this was a difficult and time-consuming task. For one thing, the statute did not apply uniformly to all areas of the Commonwealth,\(^3\) and hence it was necessary to investigate town or city records to learn whether or not the law applied to the time and place of a particular subdivision. In rural parts of the state where town clerks are part-time officials, available only on such evenings as they may happen to spend at home, this was especially difficult. The new statute\(^4\) makes it possible to determine this question conclusively without leaving the registry of deeds, because it requires the relevant information to be furnished to the register, and suspends the operation of the law in any city or town which fails to furnish it to him. The last sentence of Section 81Q also requires rules and regulations adopted by any planning board to be transmitted to the register.

§2.4. Definition of a "subdivision." Various changes were made in the definition of a "subdivision" as a result of difficulties and ambigui­
ties discovered in the old. The new definition\(^1\) and the old\(^2\) are set out below.

\(^{\text{§2.4}}\) The new definition reads as follows: "'Subdivision' shall mean the division of a tract of land into two or more lots in such manner as to require provision for one or more new ways, not in existence when the subdivision control law became effective in the city or town in which such land lies, to furnish access for vehicular traffic to one or more of such lots, and shall include resubdivision, and, when appropriate to the context, shall relate to the process of subdivision or the land or terri­tory subdivided; provided, however, that the division of a tract of land into two or more lots shall not be deemed to constitute a subdivision within the meaning of the..."
As can be seen in a comparison of the definitions, some major changes were made. The old definition made the "purpose" of the subdivider a determining factor although such purpose is not ascertainable from the registry records. The clause was dropped from the new definition.

The phrase "in such a manner as to require provision for a way" was also clarified to some extent as can be seen in the definition. The old provision had proved troublesome because of its ambiguity. Some subdividers sought a loophole here and gerrymandered their lots in such a manner that the inner lot had a long thin tail extending to a public way. This appendage was carved out in fee as part and parcel of the lot, not as an appurtenance, and it was claimed that this eliminated the necessity of "provision for a way" to furnish access. Often the real access was over an unapproved way in a different location. This device was even more objectionable when undivided fractional interests in fee in the appendage were granted to the buyers of several lots. Furthermore, and this was a defect from the planning standpoint, if an ancient way, no matter how narrow, crooked, and steep, led through the tract to be divided, no division of the tract into lots touching the ancient way was considered a "subdivision." This was not only ribbon development; it was development on a rather ragged ribbon.3

In view of all this, it was expected that the planning groups would agree to discarding the phrase "in such manner as to require provision for a way" in favor of a better definition. Suggestions to that effect made by the Abstract Club were rejected, perhaps because the rather vigorous treatment which the idea of planning had received at meetings of the club made proposals from that quarter suspect. Moreover,
there would have been strong opposition on constitutional grounds to allowing planning boards to disregard rights in ancient ways. Although such constitutional objections would seem to be unsound, the fact remains that veneration for ancient ways would have made a radical alteration of the definition, however desirable, a very touchy matter.

On the other hand, the planning groups did agree to add words specifying what is not a subdivision. These exclusions are quite significant. The additional language removes from the definition of subdivision the following: (1) a division of a tract into lots if every lot has frontage on a public way or on an approved private way of at least a distance required by the applicable zoning laws for the erection of a building on the lot, and if no such distance is required, then a minimum distance of twenty feet; (2) conveyances changing the size and shape of lots in such a manner as not to leave any lot without the prescribed frontage; (3) division of a tract on which two or more buildings were standing, when subdivision control became effective in the locality, into separate lots on each of which one of the buildings remains standing.4

A curious result of the new definition is that a division of land which is not expressly excluded from the definition of subdivision by the new proviso may, by reason of a minute frontage on an unapproved way, be deemed not to be a "subdivision" on the theory that "provision for one or more new ways" is not required. Grammatically, there is some basis for this view but it renders the new proviso completely superfluous and does violence to the principle of statutory construction which requires that effect be given, if possible, to every word. There is good reason to believe that the planners considered the two limitations complementary and, therefore, that any division lacking the required frontage for each lot on a public way or approved private way is a "subdivision." However, many lawyers seem to be of the opinion that the existence of an ancient way removes the land from subdivision control despite the absence of the frontage prescribed in the amendment.5

Boundary adjustments and divisions which go with the sale of one or more existing building are, by and large, excluded from the definition of subdivision. Conveyances made to adjust boundaries clearly

4 G.L., c. 41, §81L, inserted by Acts of 1953, c. 674, §7. It is not always easy to find out whether a particular way is a public way or not, but that is a problem that conveyancers have long been accustomed to.
5 This precise question has already come before the Superior Court in Rettig v. Rowley Planning Board (Essex Superior Court, In Equity, No. 10143), and on August 2, 1954, Rome, J., decreed: "... the plan in question does not require the approval of the Planning Board of Rowley under the Subdivision Control Law G.L. (Ter. Ed.), c. 41, §81A to 81GG Incl., inasmuch as the ways in question were all existing and adequate for access for vehicular traffic to the lots shown on said plan when the Subdivision Control Law became effective in Rowley." As this volume goes to press, an appeal is being taken to the Supreme Judicial Court.
ought not to be subject to subdivision control. Although such a conveyance is necessarily made to an abutter, if the planning board qualifies its endorsement of the plan by some such language as "approval not required for conveyance to an abutter" it would, with respect to acceptance of the plan for recording, amount to a refusal to endorse at all, because the register of deeds does not know the identity of the abutters. If the planning board is satisfied as to the identity of the abutter, it can designate him by name. Since most boundary adjustments involve parcels too small for building, planning boards are usually content to give unqualified endorsement.

§2.5. Clarifying powers of planning boards. To meet complaints that some planning boards were arrogating to themselves the zoning powers of the town meeting or the city council and prescribing rules and regulations relating to the size and use of lots, such activities were expressly prohibited. At the same time, to meet complaints, made by developers and planning boards alike, that the old law was too inflexible and gave the board no discretion to do other than impose the same requirements (as to paving, curbstones, sidewalks, utilities, etc.), for little divisions and for big developments, the new law provided for waiver of strict compliance in any particular case. A board is now empowered to approve a substandard way leading to a limited number of houses, and attach conditions requiring resubmission for further development.

To avoid a constitutional doubt, the provision which authorized a board to require a subdivider to dedicate a park to the public was stricken out, and such a requirement, without just compensation, was expressly prohibited.

§2.6. Subdivision laws and the clearing of some titles. Since many titles had become somewhat tangled in recent years by reason of the unsuspected impact thereon of the Subdivision Control Law, the need for some kind of retroactive cure was recognized. With respect to registered land, this took the form of a provision that plans of subdivisions registered or confirmed by the Land Court prior to February 1, 1952, should be as valid as if approved. Planning board control was protected by the power given to the board to require, as to lots not sold or mortgaged, a change in a plan as a condition of its retaining its board-approved status.

* It would seem, however, that the frontage requirements introduced by the amendment are applicable to boundary adjustments. The pertinent sentence of the amendment recites: "Conveyances or other instruments adding to, taking away from, or changing the size and shape of, lots in such a manner as not to leave any lot so affected without the frontage above set forth . . . shall also not be deemed to constitute a subdivision." G.L., c. 41, §81Q, inserted by Acts of 1953, c. 674, §7.

§2.5. ¹ G.L., c. 41, §81Q, inserted by Acts of 1953, c. 674, §7.
² Id. §81R.
³ Compare §81M of the old law with §81Q of the new.

§2.6. ¹ See G.L., c. 41, §81FF, inserted by Acts of 1953, c. 674, §7.
² Since February 1, 1952, the court has made sure of compliance with the law.
³ G.L., c. 41, §81W.
§2.7. Requirement of approval of planning board before recording plans of ways. The old statute provided that no register of deeds should record any plan showing proposed ways in any city or town having a planning board established under Section 81A without an endorsement by the board to the effect that the laws had been complied with. This imposed on the registers the burden of ascertaining whether ways shown on a plan were proposed ways or existing ways, and the making of such a quasi-judicial determination was foreign to the traditional duties of a register. Moreover, he had no means of making it. To relieve him of this burden, the new statute provides that no register shall record any plan showing a division of a tract and ways, whether existing or proposed, providing access thereto, without an endorsement by the planning board that it approves, or that its approval is not required. There was some grumbling at what appeared to be the grant of even more power to the board, but it seemed fairly obvious that the register ought to be relieved, and the board is the logical resort for what is not a discretionary determination.

§2.8. Sanctions for enforcement. In the new statute, the sanctions for enforcement are made more specific. The old statute's denial of a building permit meant nothing in towns which had subdivision control but did not have a building by-law. The new statute prohibits building in a subdivision without permission from the planning board, if subdivision control is in effect and there is no building code.

For the sake of quieting titles, a one-year statute of limitations was imposed upon proceedings in equity to enforce the Subdivision Control Law. This does not mean that a year after a division the law can be ignored, for a person who buys a vacant lot may not get municipal services, or a permit to build, because of an improper subdivision more than a year old. It does mean that one who buys a house in a subdivision more than a year old is safe from having to move it or tear it down, but theoretically he might have trouble getting a permit to rebuild in case of fire. The practical risk of such trouble, however, seems very remote. A mortgage on such property, if adequately insured against casualty, would be a safe enough investment.

§2.9. Board of appeals. Under the old statute, the power to grant relief from strict compliance in case of practical difficulty or unnecessary hardship was denied the planning board and vested in a board of appeals. Conscientious planning boards felt themselves hampered by this restriction and, accordingly, the new statute empowers the

§2.7. C.G.L., c. 41, §81O.


§2.9. C.G.L., c. 41, §81Q.

See a note by the author in 38 Mass. L.Q., No. 4, p. 10 (1953).
planning board to waive strict compliance in appropriate situations. The provisions for a board of appeals were left in, however, including the provision which forbids a planning board to be the subdivision board of appeal, even though it is permitted to be the zoning board of appeal. This confusing multiplicity of boards could no doubt have been simplified, but that would have involved a general recasting of planning and zoning procedures somewhat outside the scope of a revision based on the need to reconcile them with title procedures.

§2.10. Judicial appeal provisions. The existing provision for appeal to the Superior Court was retained substantially unchanged, except that the period for appeal was changed from fifteen days to twenty. There was some discussion of the term “any person, whether or not previously a party to the proceedings, aggrieved by a decision,” both in this connection and in connection with the requirements for notice of hearings. The class of “persons aggrieved” is not defined. The requirement of notice to the abutters, and the history of the same language in the Zoning Enabling Act make it fairly clear, however, that the class is not limited to the subdividee and the town officials. It was argued that whereas a neighbor might be injured and so aggrieved by the operation of a soap factory in a district zoned for residential purposes, thus justifying his individual right of appeal, he would have no concern with the creation of a private way through his neighbor’s land, and hence would have no standing to object that the way might be too steep or too narrow. The objection to giving an indefinite class of neighbors a right of appeal is that every improper subdivision nipped by vigilant neighbors when the planning board goes to sleep is offset by the proper subdivisions being delayed by the necessity of waiting out the appeal period. The clinching argument, from the conveyancing point of view, in favor of giving the right of appeal to “any person aggrieved” is that it brings all possible objectors within the same form of procedure, with its twenty-day limitation. If they did not have this right of appeal they might have a right to seek mandamus and there would be no limitation other than laches on the time within which this petition might be brought. For a record title, laches are far less satisfactory than the expiration of a statutory appeal period of twenty days. Everyone agreed on one thing: that the word “previously” was superfluous, and it was dropped.

§2.10. 1 §81T of the old law; §81BB of the new.  
 §81L of the old law; §81T of the new.  
 4 Nichols, The Massachusetts Law of Planning and Zoning 187 (1943). His remarks were directed to zoning, but the reasoning may also be applied to planning.  
The expression "or make such other decree as justice and equity may require," contained in the appeal section of the old law, was lifted bodily from the Zoning Enabling Act and was left unchanged in the revision of the subdivision control law, although no one was quite sure what it meant. This question has been partially clarified by the Court in Pendergast v. Board of Appeals of Barnstable, at least in so far as the appeal is taken from the denial of discretionary relief. The case dealt with zoning, but the language construed is identical.

The main function of a board of appeal under the subdivision control law is to grant discretionary relief. The statute also provides for appeal directly to the Superior Court from any decision of a planning board concerning a plan of a subdivision. Since some of the power of the planning board is also discretionary, such as the power to waive strict compliance with its rules, the Pendergast case would apply to appeals in that category.

On the other hand, a decision by a planning board to approve or disapprove a definitive plan under Section 81U, highly technical and administrative as it may be, is not discretionary, and should not be, so long as we enjoy a government of laws and not of men. One may not have a legal right to a variance, but one who complies with all reasonable rules and regulations of the board ought to have a legal right to have his plan approved unless the board finds and states a good reason to disapprove. So far as possible, the reasons for disapproval ought to be set forth in the regulations, but it is conceivable that peculiar circumstances might afford a reason for disapproval which would not be of sufficiently general application to be made a regulation.

B. OTHER LEGISLATION

§2.11. Notice to the Commissioner of Corporations and Taxation in corporate conveyances. An interesting episode in the history of Massachusetts conveyancing came to an end with the enactment of Chapter 461 of the Acts of 1954. For many years a statute had been on the books under which

The sale or transfer, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the corporation's business, of any part or the whole of the assets of a domestic busi-
ness corporation, or of any part or the whole of the assets situated in the commonwealth of a foreign business corporation, shall be fraudulent and void as against the commonwealth, unless such corporation shall, at least five days before the sale or transfer, notify the commissioner [of corporations and taxation] of the proposed sale or transfer and of the price, terms and conditions thereof, and of the character and location of said assets.

It underwent occasional changes as from time to time the tax laws were overhauled, but the changes are not material to this discussion. In fact, the statute and the amendments were ignored by the bar. If anyone remembered them at all, they were vaguely associated with stockholders' votes which are required for a sale of all the assets. That the Commissioner was entitled to notice of a sale of "any part" of the assets was overlooked.

A few lawyers, including the writer, however, were bothered by the statute, and they made themselves extremely unpopular now and then by insisting on the notice, to the annoyance of their brothers. In an appendix to the 1949 Supplement to Crocker's Notes on Common Forms (Swaim ed.), the writer undertook to justify himself by calling attention to the statute, with results entirely unexpected by him. The bankruptcy bar picked it up; read it alongside Section 70(e) of the Bankruptcy Act, which provides: "A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this Act which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this Act, shall be null and void as against the trustee of such debtor"; and proceeded to attack a number of mortgages which had been given by their debtors without notice to the Commissioner. This was a bombshell, naturally, to mortgages generally and to their attorneys. Since the statute provided no machinery for a release or discharge of the Commissioner's rights, there was little that could be done to reinforce mortgages already taken to secure loans already made, but great care was exercised with respect to deeds and mortgages given thereafter.

The question came before the United States District Court for the District of Massachusetts and Judge Sweeney found ample evidence to support the referee's finding that the particular mortgage involved had been given in the ordinary course of trade and the regular and usual prosecution of the corporation's business. He went on to express a doubt that Chapter 63, Section 76 applied to mortgages, or that

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2 G.L., c. 156, §42.
4 Pages 105, 106.
6 In the Matter of F. A. Whitney Carriage Co., In Bankruptcy, No. 350-52. The mortgage attacked in the Davis case was held valid by Referee Wilfred H. Smart, in an order dated October 30, 1953, from which no appeal was taken.
a trustee in bankruptcy could step into the Commissioner's shoes if it did.\footnote{See an unreported memorandum on file in the case in the District Court.}

This guarded language did not reassure the conveyancing bar, and two bills were filed in the legislature,\footnote{House No. 553 and No. 1466 (1954).} both designed to cure retroactively all prior transfers of any flaw based on lack of notice. One of these bills proposed to repeal Section 76 outright; the other merely to amend it. The proponents joined forces, conferred at length with the Commissioner of Corporations and Taxation and worked out a compromise, which was reported favorably by the Joint Committee on Taxation.\footnote{House No. 2825 (1954).}

The basic changes were as follows:
1. The former statute applied to the sale or transfer "of any part or the whole of the assets." The new statute is limited to a sale or transfer "of all or substantially all of the assets." "Or substantially all" is not very satisfactory to conveyancers, who traditionally like to know exactly where they stand. It is far better, however, than "any part," and the Commissioner was understandably reluctant to consent to language which would enable a collapsing corporation to evade him by retaining a peppercorn. He has undertaken to define his version of "substantially all" by regulations to be issued pursuant to the requirements of the new State Administrative Procedure Act.\footnote{G.L., c. 30A, inserted by Acts of 1954, c. 681.}

2. Instead of a notice to the Commissioner, the corporation must now file a return. This was the Commissioner's proposal. It has no relation, of course, to conveyancing. Tax lawyers who may be wondering how the corporation can file, five days before the sale, "all such tax returns as may be necessary to determine the taxes due . . . to and including the date of the sale" may find the answer in the regulations to be issued.

3. On account of the drastic consequences which Section 70(e) of the Bankruptcy Act attaches to a transfer which is "fraudulent and void," this language was dropped, and in its place the Commonwealth was given a lien.

4. To fill an obvious need ignored by the former statute, the Commissioner was authorized to grant a waiver prior to the transfer, and the Commission on Corporations and Taxation to do so afterward.

5. The statute was expressly made inapplicable to mortgages given in good faith.

There was no disagreement as to the desirability of curing, nunc pro tunc, all those earlier transfers, made without compliance, which were skeletons in the closet of almost every lawyer in the Commonwealth, and the curative language was also quickly agreed upon. The Commissioner wiped the slate clean as to all corporate transfers made prior to January 1, 1950, and as to all transfers made after December 31, 1949 and before September 1, 1954, by corporations...
which have paid their taxes. Provision is made for clearing this of record in the registry of deeds.

No express attempt was made, of course, to interfere with the rights of creditors and trustees in bankruptcy proceedings commenced before the effective date of the new statute. The writer is informed that at least two such proceedings are pending and that the trustees are attacking, in the Superior Court in Suffolk and Middlesex Counties, mortgages given without notice to the Commissioner. It will be interesting to see how they come out, but for most of the bar the interest will be academic, in sharp contrast to its interest prior to the new statute.

§2.12. Tenancies by the entirety. Another statute which is of particular importance to conveyancers authorizes the creation of a tenancy by the entirety by a direct conveyance from a husband to himself and his wife. The conveyance does not become effective until duly acknowledged and recorded. The statute, by abrogating the rule laid down in *Ames v. Chandler*, makes it unnecessary to use the device of a conveyance to uses or a conveyance to a straw followed by a reconveyance to the spouses. It is clear that the statute was intended to apply to conveyances from a wife to her husband and herself as well as to conveyances from husband to husband and wife.

The act also amends General Laws, Chapter 184, Section 7 (relating to conveyances and devises to two or more persons) by adding the following: "A devise of land to a person and his spouse shall, if the instrument creating the devise expressly so states, vest in the devisees a tenancy by the entirety." To the extent that the statute permits the creation of a tenancy by the entirety by devise, it is declaratory of the common law. It is probable that the act was not intended to change the existing rule that a devise to husband and wife "as joint tenants" without more creates a tenancy by the entirety, but it is at least arguable that the act impliedly permits the creation of a tenancy by the entirety by devise only "if the instrument creating the devise expressly so states."

3 See G.L., c. 4, §6 (in construing statutes words importing the masculine gender may include the feminine).  