

COMPREHENSIVE REVISION OF ZONING BYLAW & SUBDIVISION REGULATIONS

REGULATORY DIAGNOSTIC & ISSUES REPORT

Final Report
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Submitted to:
Southborough Planning Board
Zoning Advisory Committee

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Table of Contents

1.0	ZONING OVERVIEW.....	1
1.1	FORMAT AND ORGANIZATION	2
1.1.1	<i>Tables</i>	2
1.1.2	<i>Access and Ease of Use</i>	3
1.2	ZONING DISTRICTS.....	4
1.2.1	<i>Residence A and Residence B Districts</i>	4
1.2.2	<i>Business Districts</i>	5
1.2.3	<i>Industrial and Office Districts</i>	6
1.2.4	<i>Conservation Districts</i>	7
1.2.5	<i>Overlay Districts</i>	8
1.3	NON-CONFORMING USES AND STRUCTURES	9
1.4	TOPICS OF INTEREST.....	11
1.4.1	<i>Major Residential Development</i>	11
1.4.2	<i>Plan Review</i>	12
1.4.3	<i>Frontage</i>	14
1.4.4	<i>Lots Divided by Zoning District Boundaries</i>	15
1.4.5	<i>Building Height</i>	17
2.0	MASTER PLAN OPPORTUNITIES & CHALLENGES	18
2.1	BUSINESS VILLAGE AND BUSINESS HIGHWAY DISTRICTS.....	18
2.1.1	<i>Use Regulations and Mixed-Use Development</i>	18
2.1.2	<i>Other Issues</i>	20
2.2	WORKING WITH INCENTIVES.....	22
2.2.1	<i>Preservation and Public Amenities</i>	22
2.2.2	<i>“Green” Development</i>	25
2.2.3	<i>Transit-Oriented Development</i>	27
2.3	FORM BASED CODES	28
2.3.1	<i>Elements of a Form-Based Code</i>	29
3.0	CONSOLIDATED PERMITTING PROCEDURES & REGULATIONS.....	32
3.1	SPECIAL PERMITS AND SITE PLAN APPROVAL.....	32
3.2	OTHER OPPORTUNITIES TO INCREASE PERMITTING EFFICIENCY	33
3.2.1	<i>Water Resource Protection (§ 174-13.4)</i>	33
4.0	CLARIFICATIONS & TECHNICAL REFERENCE UPDATES.....	37
4.1	ZONING BYLAW.....	37
4.1.1	<i>Definitions</i>	37
4.1.2	<i>Other</i>	37
4.2	SUBDIVISION REGULATIONS.....	39

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1.0 ZONING OVERVIEW

The Southborough Zoning Bylaw (ZBL) consists of six major sections:

- ◆ **Article I: Miscellaneous Provisions**, establishes the ZBL's purposes and scope of authority (§ 174-1) and includes definitions of terms (§ 174-2).
- ◆ **Article II: Establishment of Districts**, lists all of Southborough's use districts and overlay districts (§ 174-3), provides for the adoption of a Zoning Map (§ 174-4) and for its interpretation (§ 174-5).
- ◆ **Article III: Use Regulations**, is a large chapter with many sections. It contains a standard applicability provision (§ 174-6) and conflict of use classifications clause (§ 174-7), and outlines all of the uses allowed as of right and by special permit in each district (§ 174-8, Schedule of Use Regulations). The subsection for each district includes both use regulations and basic dimensional requirements. Further, Article III includes basic development requirements and procedures, e.g., special permits (§ 174-9), common driveway applications (§ 174-9.1), site plan approval (§ 174-10), signs (§ 174-11), off-street parking (§ 174-12), lighting (§ 174-12.1), and landscaping (§ 174-13). In addition, Article III establishes a process for concept plan submissions and pre-permitting town meeting approval for any use so designated in the use regulations (§ 174-13.1). Article III also contains a provision for Major Residential Development (§ 174-13.2), which imposes a special permit requirement on residential developments of eight or more lots or dwelling units. Finally, Article III includes three sections on water resource protection and stormwater management (§ 174-13.3, Lower Impact Development, § 173-13.4, Water Resource Protection, and § 174-13.5, Stormwater and Erosion Control).
- ◆ **Article IV: Dimensional Regulations**, includes a scope of authority provision (§ 174-14), an applicability provision and the Schedule of Dimensional Regulations (§ 174-15), the latter appearing in a table separated from the text of the ZBL and labeled Addendum 2, provisions for construction on lots created under the Town's former Residence C regulations (§ 174-16), and a section that mirrors portions of chapter 40A, section 6, concerning previously recorded lots (§ 174-17).
- ◆ **Article V: Nonconforming Uses and Structures**, tracks the provisions of chapter 40A, section 6, for the continuation, expansion or alteration of uses and structures that lawfully pre-existed the effective date of the ZBL and subsequent amendments to it (§§ 174-18 to 174-23).
- ◆ **Article VI: Administration**, contains fairly standard enforcement language (§ 174-24), provides for a Zoning Board of Appeals (ZBA) as required by chapter 40A (§ 174-25), and miscellaneous provisions pertaining to amendments, effective dates, and severability (§§ 174-26 to 174.28).

There is nothing particularly noteworthy about the organization of Southborough's ZBL. It needs some reformatting for ease of use, but the ZBL's format and organization do not present as many problems as some of its substantive provisions. The following sections of this report provide a discussion of issues identified during our review. In some cases, these issues also were mentioned in the Southborough Master Plan and by board members, staff, and external stakeholders familiar with Southborough's ZBL and permitting procedures.

1.1 FORMAT AND ORGANIZATION

A ZBL should be a “friendly” reference document for the average resident. Although town officials, professional staff, attorneys, and engineers need a well-organized code, the format and organization of a ZBL should make it possible for reasonably motivated residents to find the rules that apply to their own property and the property next door. A clearly written ZBL can still be “unfriendly” to users if it is poorly organized or formatted in a way that makes it hard to find information. Techniques to make a ZBL readable to a wide variety of audiences include:

- ◆ Providing a table of contents with article numbers, section numbers, and the numbers or letters for major subsections
- ◆ Providing an index;
- ◆ Adopting and applying a consistent numbering system and indenting each tier of a numbered outline;
- ◆ Following a consistent approach to cross-referencing;
- ◆ Citing the dates of adoption and amendment;
- ◆ Providing page layouts that include running headers, page numbering, the current date of the ZBL, and plenty of white space;
- ◆ Using tables and illustrations;
- ◆ Using bold type to signal major headings and sub-headings;
- ◆ Locating all definitions in a single section or, alternatively, listing all defined terms in a single section and for definitions located elsewhere, cross-referencing those sections so the reader knows how to find them; and
- ◆ Adopting a framework for dividing the contents of a ZBL into coherent sections.

Southborough’s ZBL adheres to some of these principles. Major section headings are highlighted (in bold type), pages are numbered, the numbering system is reasonably consistent, and the General Code version of the ZBL (www.eCode360.com) provides adoption and amendment dates as well as an index. However, neither the existing print version nor the version of the ZBL on the town’s website includes some of these features. All of the existing formats appear in fairly dense page layouts that lack running headers and contain very few illustrations. In general, the Southborough ZBL would meet the needs of a wider group of users if the document were designed for readability and ease of access.

1.1.1 Tables

Using tables to present comparative information, such as density and dimensional standards or use regulations, offers some advantages. First, a table reduces the risk of error as a ZBL is amended over time. If a use is listed in a table of use regulations as permitted in several districts and the community wants to convert it to a special permitted use in one district, the table can simply be amended by replacing “P” with “SP” in the column that applies to that district. By contrast, for an outline format that follows the

traditional hierarchy of most to least restrictive districts with “nested” uses, amending a use provision in a more restrictive district could lead to unintended consequences in one of the less restrictive districts. Tabular formats also make efficient use of space.

Tables that convey information effectively include lines, colors, or shading, alone or in combination, as an aid to the reader. Multiple columns and rows should be delineated in some manner or the table will be difficult to interpret. Simple techniques such as shading applied to every other column, or graduated shading to depict lower to higher density, provide graphic reinforcements that can help a reader interpret standards and understand relationships between them. Southborough’s existing Table of Dimensional Regulations (ZBL Addendum 2) contains only one type of delineation: separators between rows. The nine columns of standards include both primary and secondary headings in up to five lines of text, none divided or otherwise symbolized in a way that makes column breaks easy to perceive. This is an example of a simple-to-fix issue that needs little elaboration here. Suffice it to say that table design is no less important than overall page design choices to create a usable, understandable reference document.

Presenting standards in an outline format rather than a table is not an inferior approach; in fact, many planners prefer it. Each method involves trade-offs, and Southborough needs to decide whether to retain the existing outline method or move toward a system of tables for standards such as use and dimensional regulations. These methods should not be combined to present the same content. Currently, the Southborough ZBL lists the dimensional requirements for each use district in Article III, Use Regulations, and also includes a separate section, Article IV, Dimensional Regulations, which is the “parent” section for Addendum 2. The rationale for this arrangement is unclear. It creates the potential for confusion and inconsistency between sections. Some zoning ordinances locate all district use and dimensional regulations in one chapter or section, with each district constituting a distinct subsection, much like Southborough’s present ZBL. In these cases, the chapter or section title usually appears as “District Regulations” rather than “Use Regulations,” and any rules governing the interpretation of dimensional requirements, use classifications, and the like appear in a separate section, e.g., “General Regulations.”

1.1.2 Access and Ease of Use

Since experienced town officials and staff often work with the ZBL, they probably can find obscure provisions with ease. However, the homeowner who simply wants to understand the requirements for expanding a garage or constructing an in-ground swimming pool needs some basic navigation aids. A table of contents, an index, and possibly a quick reference guide would make the ZBL more accessible not only to residents, but also newly elected or appointed town officials, developers and their consultants, and non-resident landowners.

Southborough’s ZBL is currently maintained by General Code, a commercial code service that provides online access via a link from the Town’s website. The Planning Board’s web page includes a downloadable PDF copy and a hyperlinked version as well. All three versions may be current, but since the formats are different, it is not clear that the two versions on the Town’s website match the General Code version. For example, the General Code version contains parenthetical references to adoption and amendment dates, but the versions at town hall omit this content. While the commercial code service’s searchable online system is not difficult to navigate for experienced users, infrequent or rare users of the ZBL would most likely find it cumbersome and frustrating. As a result, the Town does need to maintain printed copies, and providing a PDF version will make it easier for many people to find the information they need, especially if the PDF version is bookmarked and hyperlinked. However, all versions in

circulation should match in terms of format and features (an obviously, in terms of content). It may be difficult to assure this kind of consistency because the online systems provided by commercial code services often omit graphics, illustrations, and tables.

1.2 ZONING DISTRICTS

Southborough has eight use districts and three overlay districts. Since the ZBL does not describe the purposes and intent of the use districts, one must draw inferences from the regulations that govern what can be done, and how much can be done, on land in each area. This section summarizes the major features of Southborough's zoning districts and identifies issues that should be addressed during the ZBL revision process.

1.2.1 Residence A and Residence B Districts

The Residence A (RA) and Residence B (RB) Districts cover 64 percent of the town's total area. Like many suburbs, Southborough has a residential zoning scheme with districts that have identical use regulations and different dimensional regulations. Most residentially zoned land in Southborough is located in the lower-density (larger-lot) district, RA. The RB district extends across the town south of the Massachusetts Turnpike, and to the north, it includes land along the west side of the Sudbury Reservoir, in the town center and Fayville village, and near the intersection of Route 85 and Route 9.

Use Regulations. Southborough provides for a limited set of permitted ("by right") uses in these districts: detached single-family dwellings, accessory uses such as home occupations, garages for up to three vehicles, parking, the renting of rooms in an owner-occupied home, conservation and agricultural uses, and some of the so-called "Dover Amendment" uses that are exempt under state law, e.g., religious and public or non-profit educational uses. By special permit from the Zoning Board of Appeals (ZBA), Southborough allows accessory apartments, single-family to two-family conversions of homes that are at least two years old at the time of the special permit application, animal hospitals and kennels, mobile homes occupied as a dwelling for more than thirty days per year, multi-family senior housing if owned by a public or non-profit "community housing organization," (undefined in the ZBL), hospitals and nursing homes, a variety of outdoor recreation uses, a private school, nursery or kindergarten, and parking for more than three vehicles associated with the principal use of the lot.

The special permit uses also refer to "riding stable," which needs to be reviewed. If conducted on five or more acres of land, a riding stable will most likely fall under the definition of "commercial agriculture" in M.G.L. c.40A, § 3 and would therefore be exempt from local zoning. Similarly, the term "private school, nursery, or kindergarten" should be clarified because if operated by a public or non-profit organization, or if it is a licensed day care center with a pre-school education program, Southborough cannot require a special permit.

Dimensional and Density Regulations. A conforming lot in the RA district has at least one acre (43,540 sq. ft.) of land and at least 20,000 sq. ft. of upland, and meets the district's minimum lot frontage requirement of 150 feet. In the RB district, the minimum lot area is 25,000 sq. ft. with 20,000 sq. ft. of upland, and the minimum frontage, 125 feet.¹ In addition to these basic dimensional controls, Southborough requires new

¹ Until 1966, Southborough also had a Residence C (RC) District. When land previously included in the RC district was rezoned to RB, the Town preserved a series of basic dimensional controls to regulate construction on RC lots that

REGULATORY REVIEW

lots to comply with a lot shape regulation. In the RA district, for example, the center of an imaginary circle 75 feet in diameter (50 percent of the minimum lot frontage requirement) must be able to pass from the front to the back of the lot and across at least 40 percent of the frontage without intersecting any side or rear lot line. A similar rule applies in the RB district. Lot shape regulations help to assure reasonable access and usable yard areas. They also play an important role in regulating the amount of development that can occur on a parcel of land. The more “regular” that lots must be in order to qualify as building lots, the more likely it is that a parcel will be divisible into fewer lots than could have been created with limited or no lot shape restrictions.

Southborough regulates built form and the development envelope on individual lots with minimum setbacks and maximum building height, much like other communities. However, Southborough also imposes a maximum floor area ratio (FAR) on all types of buildings, including single-family homes. In the RA district, the maximum FAR of 0.18 means the total floor area on all floors of a single-family home – excluding attics, cellars, garages, and other space not intended for human occupancy – may not exceed 18 percent of the size of the lot, both expressed in sq. ft. The RB district’s maximum FAR, 0.30, seems out of line with the FAR of the RA district and both should be reviewed. The Town does not have other types of intensity of use controls that often apply in residential districts in other communities, such as a minimum open space requirement or a lot coverage (building coverage) requirement.

Other Provisions. Southborough requires a special permit from the Planning Board for any residential development with eight or more lots or dwelling units created within an eight-year period on a parcel or contiguous parcels that were held in common ownership in 1986. Known as Major Residential Development (MRD), this provision intends to promote alternatives to a conventional subdivision. It allows more design flexibility in the layout of lots and roadways, but in exchange, MRD requires developers to reserve some of the land as common open space and contribute to the production of affordable housing in Southborough. MRD also stands out because it offers Southborough’s only mechanism for developing multi-family housing that is not age-restricted. Developers of small projects (fewer than eight units) have the option to apply for a flexible development special permit under MRD, and while they have to meet the bylaw’s open space design criteria, they are exempt from the affordable housing requirement. This provision is discussed further in Section 1.4.1 of our report.

1.2.2 Business Districts

Southborough’s two business districts – Business Village (BV) and Highway Business (BH) – differ significantly due to their locations. The BV District, Southborough’s smallest use district, includes just 44 acres of land in three areas: the town center at the intersection of Route 30 (Boston Road/Main Street), East Main Street, and Newton Street; Fayville village, around the intersection of Oak Hill Road and Route 9 (Turnpike Road); and Cordaville village in the vicinity of the MBTA commuter rail station. By contrast, the BH District includes approximately 130 acres, most of it along Route 9. A strip of BH land also extends along Route 30 (Boston Road) between Route 9 and the town center. Due to the attention paid to these districts in Southborough’s master plan, we have devoted a special section of our report to the Business Districts (2.1.1). The information that follows here is an overview with some commentary.

had been legally created and recorded before the district was abolished. In general, these lots must have at least 15,000 sq. ft. of area and 100 feet of frontage.

REGULATORY REVIEW

Use Regulations. Southborough's two business districts have different use regulations. In the BV district, Southborough allows any uses permitted or allowed by special permit in the Residence Districts as well as a variety of small business uses in up to 2,000 sq. ft. of floor area: stores, offices, banks, restaurants, and some uses usually associated with industrial or general purpose commercial districts, e.g., a newspaper printing establishment or a medical testing laboratory. The ZBA has authority to grant special permits for most of the uses over which it has jurisdiction in the Residence Districts, but there are some exceptions. The Planning Board has special permit authority over a permitted business use that exceeds 2,000 sq. ft., multifamily housing for the elderly, hospitals and nursing homes, veterinary clinics, indoor recreation facilities, parking for more than three vehicles, a contractor's yard, and retail sale of goods produced on the premises by a very small manufacturing operation (limited to four employees).

Virtually all of the same permitted uses apply in the BH district, including uses allowed in the Residence Districts, but the size threshold for a business use special permit is much higher: 50,000 sq. ft. In addition, the BH district allows restaurants, hotels gas stations, auto sales, and auto repair facilities as of right. The ZBA has authority to grant special permits for business uses that exceed 50,000 sq. ft., and there is no upper limit on the size of a business use that could qualify for a special permit under the BH district's regulations. In general, most uses requiring a special permit in the BV district also require a special permit in the BH district.

Dimensional and Intensity of Use Regulations. Overall, the BV district's dimensional and intensity regulations imply a preference for small-scale development that is compatible with adjacent residential uses, especially when coupled with the size limit on business uses allowed by right and the limited amount of land zoned for BV uses. It seems clear that Southborough favors having small businesses arranged relatively close together in these locations, for the minimum lot area is 10,000 sq. ft. and the minimum frontage requirement, 60 feet. In turn, the district's yard setbacks allow buildings to be located fairly close to the street (minimum of 10 feet, or 25 feet on Route 9), and the minimum side yard setback does not force wide separations between buildings (minimum of 10 feet, or 25 feet adjacent to a residential district). Ironically, Southborough has no regulations that directly or indirectly control bulk or intensity of use, e.g., no minimum FAR, no minimum open space ratio, and no lot coverage ratio. Presumably off-street parking requirements serve as a surrogate for controlling use intensity in this district. For residential uses in the BV district, RB regulations apply.

Development in the BH district requires a minimum lot area of one acre with at least 20,000 sq. ft. of upland and minimum lot frontage of 200 feet. Southborough requires deep setbacks of 50 feet on all sides of a building, and a front setback of 75 feet for lots with frontage on Route 9. In addition, projects in the BH district are subject to a maximum FAR of 0.60 and a maximum height of 45 feet and three stories. Together, these regulations express a preference for moderate-scale, highway-oriented business development. Like the BV district, residential uses in BH district are subject to requirements that apply in the RB district.

1.2.3 Industrial and Office Districts

Southborough has three office and industrial districts: Industrial Park (IP), Industrial (ID), and Research, Science, and Professional (SP). The IP district includes nearly 600 acres, mainly in contiguous parcels that form large tracts of industrial land north and south of Route 9 on the west side of town. Smaller pockets of IP land exist along the west side of Route 85 (Cordaville Road), south of Route 9, and on Northborough Road near the Marlborough line. The ID district includes approximately 200 acres in parcels along Route

9, in the Southville and Cordaville village areas, and on Newton Street north of the town center. The SP district consists of 135 acres between Main Street, Chestnut Hill Road, and Fisher Road in the northwest part of town. Since virtually all land in the SP district is protected open space, its designation as an industrial district should be revisited. Accordingly, this section of our report focuses on the ID and IP districts, which have different use regulations but very similar dimensional requirements.

Use Regulations. An interesting facet of Southborough's zoning is the near-absence of permitted industrial uses in the industrial districts. Land in the IP district can be used as of right for offices, banks, printing operations, and wholesale distributors. Research and development with manufacturing as an accessory use is permitted, too, but subject to a noteworthy limit on accessory manufacturing: a maximum "density" of three employees per acre. All of these uses are subject to the same 50,000 sq. ft. cap on floor area that applies in the BH district, but the ZBA has authority to grant special permits for larger projects. Other permitted uses in this district include conservation uses, an accessory cafeteria for employees of a permitted business, and an accessory dwelling for a night watchperson or custodian. The ZBA can grant special permits not only for projects exceeding 50,000 sq. ft., but also for most uses that appear on the list of special permitted uses in other districts, including residential uses other than single-family dwellings. In addition, light manufacturing, hazardous waste storage and disposal facilities, heliports accessory to a permitted use, and adult uses are allowed by special permit.

By contrast, permitted uses in the ID district include all uses allowed in the Residence Districts, outdoor recreation facilities, a hospital or nursing home, a private nursery school or kindergarten, and a veterinary clinic; and subject to the 50,000 sq. ft. floor area cap, office buildings, hotels, restaurants, a medical testing laboratory, indoor recreation, sale of lumber and building supplies, stand-alone retail and retail associated with a manufacturing enterprise, printing operations, and automotive uses (gasoline stations and repair shops). The ZBA can grant a special permit for projects exceeding 50,000 sq. ft., wholesale distributors, hazardous waste storage and disposal facilities, research and development uses with accessory manufacturing, and light manufacturing.

Dimensional and Intensity of Use Regulations. The lot dimensional and intensity of use regulations in the ID and IP districts are virtually the same: a minimum lot of one acre, with at least 20,000 sq. ft. of upland, a minimum lot frontage of 200 feet, 50-ft. setbacks on all sides of a building, with a deeper (75 ft.) front setback for lots on Route 9, a maximum floor area ratio of 0.60, and a maximum building height of 45 feet and three stories. The only difference is that for ID district lots with a boundary on Route 9 and frontage on a different street, the minimum setback next to Route 9 is 37.5 feet.

1.2.4 Conservation Districts

The Conservation (C) District is the second largest and most restrictive of Southborough's eight use districts. It covers nearly 2,500 acres, or roughly 25 percent of the town, including land submerged beneath the Sudbury Reservoir. In fact, a majority of the C district is composed of the reservoir and surrounding state-owned land, but according to the Town's GIS zoning map, the Crane Swamp and some properties owned by the Conservation Commission have also been placed in the same zone. The ZBL's description of the C district boundaries could be hard for many readers to understand unless they were familiar with map referred to in the text (§ 174-4, Zoning Map): "For purposes of defining the boundaries of the Conservation District, the map entitled 'Planning Board, Town of Southborough, Worcester County, Massachusetts,' dated 1964, James V. Sewall Company, Oldtown, Maine, is hereby, by reference,

incorporated into and made a part of this chapter, and the Zoning Map, and all land shown on said map as green, shall be deemed to be in the Conservation District.”

Southborough allows a limited, predictable repertoire of uses in the C district: open space, passive recreation, wildlife management, farming (excluding a piggery or fur farm), and a roadside stand. By special permit from the ZBA, a garage for more than three vehicles may be constructed in the C district as well. Although this district has minimal use regulations, it has no associated dimensional requirements. The C district’s basic regulations and requirements, the manner of defining its boundaries, and the types of land included within the district should be reviewed. Among other matters, communities do not have zoning authority to prohibit “piggery or fur farm” in areas zoned for agriculture or on parcels of five acres or more in any zoning district. Boards of Health have some applicable jurisdiction, but agriculture on five or more acres is explicitly protected from local zoning control by M.G.L. c. 40A, § 3.

1.2.5 Overlay Districts

Southborough’s three overlay districts include the Wetland and Floodplain (WFP) District, the Critical Resource (CR) District, and the Wireless Communication Service (WCS) District.

Wetland and Floodplain District. Though similar to the flood plain overlay district bylaws found in other communities, Southborough’s WFP district is somewhat unusual because its boundaries are tied to several sources and standards. Under § 174-4 of the ZBL, the WFP district is described as follows:

For the purpose of defining the boundaries of Wetland and Floodplain Districts, the following maps on file in the office of the Town Clerk are hereby specifically, by reference, incorporated into and made a part of this chapter and the Zoning Map: Profiles — Main Stem Upper Sudbury River, and all land shown thereon at or below the one-hundred-year flood elevation along or sloping toward Sudbury River between Westborough-Hopkinton and Ashland Town lines is included in the WFP District, and Town of Southborough Natural Resources Map and all wetlands three acres or larger shown thereon are included in the Wetlands and Floodplain District.

In this district, Southborough appears to allow expansion of homes, farm buildings and accessory structures that existed in 1985, up to a 25 percent maximum, as of right. However, the same provision calls for a special permit from the ZBA to expand accessory structures. The ZBA also has authority to grant special permits for new uses and structures that are allowed in the underlying district, provided that (a) the Planning Board, Board of Health, and Conservation Commission find that the land is not subject to flooding and (b) a registered professional engineer certifies that the project will not cause an increase in 100-year flood levels.

Critical Resource District. The CR district (§ 174-8.10) is a “text-only” district that Southborough adopted in 1993. It has no boundaries on the Zoning Map. Unlike most of Southborough’s zoning districts, the CR district includes a purpose statement, but the statement is remarkably broad: “The purpose of the Critical Resource District is to ensure that lands critical to the environmental quality of the Town of Southborough are not physically developed prior to consideration of alternatives to such development.” It seems clear that Southborough intended to discourage development within the CR district. For example, the regulations prohibit density bonuses for a Major Residential Development and instruct the Planning Board to deny a special permit unless there is no other feasible alternative to development. In

addition, the CR district's regulations contain an unusual provision that imposes a stay on the issuance of a building permit for up to 120 days from the date that the special permit was granted. The status and future of the CR district need to be determined by the Town.

Wireless Communication Service District. In 1997, Southborough established the WCS overlay district in order to allow the construction of wireless communications towers on town-owned land. The ZBA serves as special permit granting authority. In general, this section of the ZBL is unusually brief and it lacks many of the standards and conditions found in suburban counterparts elsewhere. The WCS district regulations and boundaries needs to be updated and revised.

1.3 NON-CONFORMING USES AND STRUCTURES

Any community engaged in a comprehensive zoning revision needs to be conscious of the effects of zoning changes on properties that meet current requirements. Most communities try to minimize adverse impacts on existing zoning rights, especially the rights of homeowners. However, sometimes it is impossible to avoid putting some of today's conforming properties into a state of nonconformity. Laws providing some degree of zoning protection for nonconforming uses and structures exist throughout the nation. Massachusetts establishes these rights in M.G.L. c. 40A, § 6, a byzantine provision that inspires considerable debate in cities and towns, the courts, and law schools. This is because § 6 contains some unclear if not conflicting language, and the case law has been inconsistent. Nevertheless, all zoning bylaws and ordinances in Massachusetts include a provision for buildings and land uses that no longer comply with current zoning in one or more ways but retain a "grandfathered" right to continue as long the use or structure does not change. Owing to case law, nonconformity also includes a non-conforming lot, i.e., one with insufficient land area. The critical issues under § 6 are whether a proposed alteration, reconstruction or extension of a non-conforming use or structure will increase the nonconformity and if so, whether the outcome will be more detrimental to the neighborhood.

Southborough regulates lawfully pre-existing non-conforming uses and structures under Article V of the ZBL, which requires a special permit from the ZBA in order to extend or alter a nonconforming use or structure. In concert with M.G.L. c. 40A, § 6, Southborough makes some exceptions for single-family homes.² Under § 174-19(B), the ZBL provides that alteration, reconstruction, or extension of a one-family dwelling is allowed as of right if the structure complies with all current dimensional and height requirements and the proposed project also will comply, but the lot does not meet the current minimum area or frontage requirement; or the existing structure encroaches on one or more of the minimum required setbacks, but the proposed alteration will comply with all current setbacks and building height requirements.³ The ZBL contains other provisions that largely track the statute. For example, grandfathered rights dissolve when a non-conforming use has been abandoned or discontinued for two years, or when a non-conforming use has been converted to a conforming use. In addition, a structure substantially damaged by fire or a natural catastrophe can be rebuilt to the same dimensions and in the same location as the original, but any expansion or change in location on the lot requires a special permit from the ZBA.

² To be consistent with the statute, § 174-19(B) should apply to nonconforming single-family *and* two-family homes.

³ N.B. this clause is unclear in its meaning and it appears to have at least a missing word. It needs to be rewritten for clarity of intent.

REGULATORY REVIEW

Last year (2008), the Supreme Judicial Court issued a decision with profound importance for nonconformity regulations throughout the state. In *Bjorklund vs. Zoning Board of Appeals of Norwell* (2008), the SJC held that under the so-called “second except” clause in M.G.L. c.40A, § 6, even though a proposed teardown and replacement house (quintupling the size of the tiny original dwelling) met all of Norwell’s current dimensional and height requirements, the project created an increase in nonconformity because the 0.8-acre lot involved did not comply with the minimum one-acre requirement.⁴ Justice Greaney’s decision drew a sharp distinction between small or minor home improvements and larger ones, such as a major addition or, as in *Bjorkland*, a teardown and replacement. Earlier, the Land Court had upheld the Norwell ZBA’s denial of the special permit because the proposed house was an extension of nonconformity that would be substantially more detrimental to the neighborhood. The SJC narrowed its review because the plaintiff (Bjorklund) did not challenge the Land Court’s finding of substantial neighborhood detriment. As a result, the case centered on whether the proposed structure constituted an increase in nonconformity. The SJC concluded that it did, citing doctrine from an earlier but less conclusive case.⁵

In Southborough, the single-family dwelling provisions under Article V should be run through the *Bjorklund* filter to ensure that there is no conflict. The first two “as of right” provisions (compliance with all dimensional requirements where there is nonconforming area or frontage) seem acceptable. The third should be revisited, however. As for uses other than single-family and two-family homes, the Town will need to make fundamental policy decisions in order to guide revisions to Article V. Specifically:

- ◆ Does Southborough want to allow existing non-conforming uses to evolve on a case-by-case basis, subject to ZBA approval, even if that evolution involves converting from one non-conforming use to another non-conforming use?
- ◆ Should the ZBL prohibit conversions to other non-conforming uses – a policy that would encourage, and essentially require, eventual compliance with the ZBL? And if the Town prefers this approach, should the existing provision for use variances be removed from the ZBL? While regulating alterations to lawfully pre-existing non-conforming uses and structures falls under a different statutory provision than that which applies to variances, it seems appropriate to discuss why disallowing conversion from one non-conforming use to another would be prohibited if the ZBL still allows use variances.
- ◆ Does the Town want to establish some specific review standards to guide the ZBA’s decision about whether an alteration or extension is more or less detrimental to a neighborhood?

⁴ In M.G.L. c.40A, § 6, the “second except” clause reads: Except as hereinafter provided, a zoning ordinance or by-law shall not apply to structures or uses lawfully in existence or lawfully begun, or to a building or special permit issued before the first publication of notice of the public hearing on such ordinance or by-law required by section five, but shall apply to any change or substantial extension of such use, to a building or special permit issued after the first notice of said public hearing, to any reconstruction, extension or structural change of such structure and to any alteration of a structure begun after the first notice of said public hearing to provide for its use for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent except where alteration, reconstruction, extension or structural change to a single or two-family residential structure does not increase the nonconforming nature of said structure.

⁵ See *Bjorkland v. Norwell Zoning Board of Appeals* (2008), 450 Mass. 357, and *Bransford v. Zoning Board of Appeals of Edgartown*, 444 Mass. 852 (2005).

1.4 TOPICS OF INTEREST

During our interviews with stakeholders and our own review of the ZBL, issues surfaced that will require policy direction from the Town. This section contains a sample of the issues we have identified or heard from others as concerns about Southborough's present regulatory controls.

1.4.1 Major Residential Development

A basic building block of Southborough's ZBL is § 174-13.2, Major Residential Development (MRD). For nearly 23 years, Southborough has required a special permit for developments with eight or more residential lots or dwelling units. The ZBL establishes an eight-year window of applicability in order to prevent or discourage "segmentation," i.e., dividing a project into small projects, each falling below the eight-unit threshold. It also contains special provisions for larger projects involving repetitive subdivisions (successive stages of subdividing within the original parcel of land), phased development, and other kinds of multi-year development scenarios.

Since the early 1980s, the MRD concept has become a commonly used tool to achieve some higher level of regulatory action, such as a special permit requirement, or an environmentally-sensitive building mode such as mandatory cluster development. Close to a score of Massachusetts communities have similar provisions and use them effectively, such as Groton, Ipswich, Newbury, Ashby, and Lexington. Southborough's MDR bylaw includes an option for flexible development: a cluster-like provision with flexible lot area, frontage, and other dimensional requirements to encourage development that is more protective of natural and cultural resources and more sensitively sited in the landscape. The flexible development option also provides for some multi-family use, though limited. Like most MRD bylaws, flexible development in Southborough requires a dual plan submission, or a conventional subdivision plan and a flexible or cluster-type plan, each with the same number of dwelling units on the same site. Developers can state a preference for the type of project they want to build, conventional or flexible, but ultimately the Planning Board has authority to decide. The MRD section also contains site design criteria that vary by type of on-site sewage treatment: individual lot, shared septic, or package plant. Finally, the MRD provision contains inclusionary housing requirements and sets the bar at 12.5 percent of the total units in a project. A 10 percent density bonus is available for provision of extra affordable units.

In October 2008, the Massachusetts Appeals Court invalidated a bylaw very similar to Southborough's in *Wall Street Development Corporation v. Planning Board of Westwood*. Originally litigated by the developer in Land Court in 2005 after the Westwood Planning Board denied a special permit, *Wall Street Development Corp.* raises major issues for MRD in Southborough and many other towns. Westwood's case was quite complicated, involving a consolidation of three cases and issues such as options for street access, the length of dead-end streets, an abutting subdivision, and the Planning Board's restriction of a secondary means of egress. However, the portions of the ruling that pertain specifically to Westwood's MRD speak to the heart of the MRD concept and its dual submission requirement.

The Appeals Court decision in *Wall Street Development Corp.* acknowledges a potential violation of the uniformity clause in M.G.L. c.40A, § 4, which reads, in part: "Any 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.”⁶ However, the Court placed even more emphasis on a second issue: conflict with the Subdivision Control Law. In Judge Armstrong’s words:

In our view the by-law and the power it gives to the board to reject so called "conventional plans" (i.e., plans in total compliance with applicable laws and regulations) may be more easily seen as presenting a facial conflict with the subdivision control law, specifically with G.L. c. 41, § 81M, as amended by St.1957, c. 265: 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 subdivisions of land..

Subdivision control with a complying plan is interpreted to trump the required special permit. This not only calls into question the MRD threshold concept, but also seems to weaken the dual submission requirement that exists in so many MRD laws, especially where the Planning Board has the ultimate authority to choose the preferred development type. It may be possible to modify Southborough’s existing MRD provision in a way that at least partially addresses issues raised in *Wall Street Development Corp.*, such as allowing the proponent to choose the development type that will be constructed. In addition, it is possible to fine-tune the bylaw’s submission requirements by relegating the conventional plan to be more of a “yield” plan, offering minimum detail only for purposes of demonstrating identical density to a flexible development. However, none of these measures would remove all risk from using the MRD in light of the Westwood decision.

MRD could be replaced by an improved cluster-type bylaw with advanced land design principles and built-in incentives for developers to use it. This kind of provision would be in the form of an Open Space Residential Development (OSRD) by-law with the four-step design process. OSRD was conceived as an improvement on traditional cluster design, which often did a mediocre job of protecting the best open space and resources on a site. Beginning nearly 20 years ago, the OSRD concept was articulated and refined by planning design professionals such as Ian McHarg, Randall Arendt and others, who built upon the work of visionaries in the more distant past. In the four-step process, the first step is to identify the key features of the land and its resources to be protected. This is followed by careful siting of the houses, then by laying out the internal access roads, and then imposing the lotting scheme. The four-step approach is widely used now and it generally promotes better site planning. It is possible to create incentives for landowners or developers to use such a bylaw. Options range from making OSRD as-of-right or as-of-right with site plan review to retaining a special permit requirement but granting it for a concept plan, and increasing the use of density bonuses for extra open space or affordable housing.

1.4.2 Plan Review

Site plan approval us an administrative power that many Massachusetts communities assert under their home rule authority in order to evaluate and adjust the details of a project’s site development plan. Through site plan approval, communities regulate matters such as vehicular circulation, landscaping and screening, curb cuts, building placement, proximity to environmentally sensitive areas, pedestrian access, impact on abutting properties, stormwater management and the like, for the purpose of protecting and

⁶ Violation of the uniformity clause formed the basis for the oft-quoted Appeals Court decision in *SCIT, Inc. v. Planning Board of Braintree*, 19 Mass. Appeals Ct. 101 (1984), which invalidated a zoning bylaw that provided for no permitted uses in a business district and required a special permit for any use of land.

REGULATORY REVIEW

enhancing public safety, neighborhood and community aesthetics, environmental quality, and other considerations. Having standards to address these issues helps to facilitate an efficient site plan approval process for the reviewing authority and the applicant and to protect the town in the event of litigation. Though not specifically provided for in the state Zoning Act, site plan review has been upheld in the courts. Further, case law affirms that site plan review is a function of a building (not a special) permit. This makes site plan decisions appealable to the ZBA.

Under § 174-10, Southborough has established four “triggers” for site plan approval:

- ◆ Any non-residential development that results in an increase in on-site parking;
- ◆ All activity subject to regulation under the ZBL’s parking and loading and landscaping requirements in §§ 174-12 and 174-13;
- ◆ Reactivation of a use that had not been active for at least two years; and
- ◆ Multi-family elderly housing proposals.

Southborough’s Site Plan Approval bylaw creates two regulatory paths: Minor Plan Review and Major Plan Review. Minor Plan Review falls under the purview of the Site Plan Review Committee (SPRC), a committee of professional staff headed by the Town Planner. The SPRC may refer a case to the Planning Board. Major Plan Review is handled by the Planning Board, a common arrangement almost everywhere. Minor Site Plan Review includes any new project or change to an existing one that results in less than 2,000 square feet of floor area or which results in a total of five to nineteen parking spaces on-site, including pre-existing spaces. Major Site Plan Approval includes any triggering activity above 2,000 sq. ft. of floor area or 20 parking spaces. The Site Plan Approval bylaw in Southborough is better and more detailed than most, but it presents some issues.

- ◆ Paragraph B. (12) [c] compels the Committee to “approve, disapprove or refer to the Planning Board...all submittals for minor plan review...within 30 days of a completed application...” The word “disapprove” should be removed. There is strong case law indicating that a site plan cannot be disapproved simply because the reviewing parties do not like the project. The permissible decisions include approval or approval with modifying conditions. However, a submission can be rejected for incompleteness.
- ◆ Some of the submission requirements could be clarified. For example:
 - ◆ The Minor Site Plan Review requires “existing and proposed landscaping,” but offers no guidance as to the level of graphic and/or specification detail would be sufficient for this de minimus plan approval. The corresponding standard for a Major Site Plan submission requires “Landscaping designation [design?], specific plantings.” Does this mean a detailed, final planting specifications list printed directly on the detailed graphic drawing, complete with a landscape architect’s stamp?
 - ◆ Under Minor Site Plan submission: does “Location of all wetlands” always imply 100’ and 200’ buffer lines (the same vagueness occurs with the Major Plan submission requirements)?

REGULATORY REVIEW

- ◆ Does “Stormwater drainage” mean even the most conceptual level of engineering design and drainage calculations, or does it imply only the most schematic indication of the type of system planned?
- ◆ Under Major Site Plan submission, the requirement for “Topography at 2’ contour intervals” seems to indicate no requirement for finish grades. It is not as clear as it could be to the engineer.
- ◆ The dividing line between Major and Minor Site Plan Review is low, particularly the 2,000 sq. ft. floor area threshold. This puts many projects under Major Plan review and it can add to the regulatory costs for small business applicants and small projects. Perhaps setting the threshold so low made practical sense when site plan review was created. However, a reasonable upward adjustment should be considered. A quick survey of recent site plan reviews in Southborough might suggest a logical break point. Similarly, the trigger for any increase in parking with a non-residential use, even a single space, is over-regulation in the smallest instances.
- ◆ The Site Plan Approval section is not “green” in its outlook. The standards presented in section (D) could be expanded to incorporate, with Major Projects, consideration of green alternatives, inclusion of transportation-related facilities such as bus or van turnouts, pedestrian trail connections, bike racks, preferred parking for car pools, future electric plug-in stations, and possibly building improvements such as low-water consumption systems, roof gardens, energy efficiency, and compliance with energy and environmental performance standards (LEED or another source).

1.4.3 Frontage

Frontage is not only a matter of complying with a minimum length of street frontage. It is also a matter of (vehicular) access being practical and real, as opposed to illusory or “on-paper-only” access. The courts have called this *vital access*, and it is a complex regulatory topic accompanied by much case law involving numerous circumstances. The cases sometimes contain special situations, such as frontage on an adequate public way, or wetlands or some formidable man-made or natural feature physically intervening between that way and the lot in question, thus rendering access impractical or worse.

The frontage/access issue operates in various settings: access to and within Approval Not Required (ANR) lots, access to and within subdivision lots, and common driveway developments with pork chop or flag-shaped lots having less than the required street frontage. These scenarios have the effect of connecting zoning with Subdivision Control and ANR authority. Frontage/access issues in a given case might involve driveways, public ways, private ways, substandard public ways, or combinations of these, but what they all have in common is that access to the lot(s) from the frontage must be deemed adequate, or of “suitable width, grade and construction.” Applying this judgment uniformly at the local level can be difficult, but while recognizing that a determination of adequate access varies from case to case, the courts have been fairly consistent in upholding the general principle that adequate access is necessary.⁷

Southborough defines frontage as follows:

⁷ See, for example, *Gates v. Dighton Planning Board*, 48 Mass. Appeals Ct. (2000); *Corcoran v. Sudbury Planning Board*, 406 Mass. 248 (1989); *Perry v. Nantucket*, 15 Mass. Appeals Ct. 244 (1983); *McCarthy v. Edgartown Planning Board*, 381 Mass. 86 (1980); *Fox v. Milton*, 24 Mass. Appeals Ct. 572 (1987).

REGULATORY REVIEW

FRONTAGE - The distance along a continuous portion of a street line between intersections with lot side lines, provided that for lots abutting more than one (1) street, frontage shall be required and measured along one (1) street only, but the yard required by Article III hereof shall be provided along each street the lot abuts, and that for corner lots, frontage shall be measured to the intersection of street lines or to the middle of the corner rounding curve connecting such street lines, and further provided that a lot shall only be deemed to have "frontage" along any street to which it has both legal and physical access.

The last sentence alludes to legal and physical access, but provides no further guidance.

The case law concerning adequacy of access occurs largely within the domain of Subdivision Control, an entirely separate sphere of law from zoning. The great majority of those cases involve denials of ANR plans. Zoning cannot and should not veer into that track. However, in the interests of applying the frontage definition uniformly and fairly in zoning matters, the term "physical access" should be amended by affirming the requirement that access must be the equivalent of what the courts have deemed *vital access*. This means not only suitable width, grade and construction, but also the absence of formidable environmental or physical barriers that make frontage access impractical or impossible. Moreover, the ZBL should be clear that this burden applies to flexible development projects, major residential development special permits, other special permits, frontage on ways within a development parcel, and all development regulatory actions within the authority of zoning. The town can have rules governing frontage waivers – that is, situations in which minimum lot frontage may be reduced – but whether the allowable minimum frontage is 50 or 200 feet, it must still meet the definition of "frontage."

1.4.4 Lots Divided by Zoning District Boundaries

Lots split by zoning district lines exist in many communities and they present a considerable challenge. Problems arise for split lots when different sets of dimensional and use requirements apply. The problems range from determining how and from what point to measure required setbacks and yards to determining the correct method for calculating density or use intensity and establishing whether uses allowed or prohibited in the more restrictive use district take precedence. It is important to differentiate dimensional and use entitlements in split lot situations.

Access limitations can present a substantial challenge for split lots, particularly if vehicular access must take place through a more restrictive zone, such as entry to an industrial district through a single-family residential zone, which is normally a prohibited scenario. When a parcel crosses municipal lines, the problems become even more complicated. There is a substantial body of case law that provides helpful guidance to apply to various types of split lot conflicts, but the issue remains complicated. It also is regulated by means of a broad range of local provisions throughout the state.

In Southborough, § 174-5, Interpretation of Boundaries, regulates split lots as follows:

D. Where a district boundary line divides a lot existing at the time such line is adopted, the regulations relating to the less restricted portion of such lot may extend not more than thirty (30) feet into the more restricted portion, provided that the lot has frontage in the less restricted district, and further provided that this Subsection D shall not apply to the boundaries of Wetland and Floodplain Districts.

REGULATORY REVIEW

This means that for a parcel divided between business and residential districts, the full range of zoning requirements for creation or expansion of a business development may be applied only to a maximum 30 feet into the residential portion – *if* and only if the frontage access exists on the business (less restrictive) side of the lot. Southborough’s limited conveyance of expansion rights on split lots reflects a core value – to protect residential properties – but it conflicts to some extent with another community need, that of expanding the tax base.

There is no uniform standard for split lot provisions; each town regulates in its own way.

- ◆ Needham uses the following method: “If a lot is located in more than one zoning district, the minimum area, frontage and all other dimensional requirements of the district in which fifty (50) percent or more of the lot is located shall apply throughout.”
- ◆ Lexington’s bylaw seems to assume that the proposed building or use lies wholly within one of the districts which divide the lot, and it defines the point of measurement for dimensional standards by treating the district line as a lot line:

In the case of one lot which is divided by a district line ...which is proposed to be used for a building or use which is not permitted as a matter of right in both districts ...such building or use shall comply with the dimensional standards of Section 7, and Table 2 Schedule of Dimensional Controls, as if that portion of the lot in the district in which such building or use is permitted, were the lot and the district boundary line were a lot line.

Southborough does not have that many lots in more than one district, but they nevertheless represent a significant zoning issue, mainly along Route 9. The length of Route 9 running for roughly one mile west of Route 85 is lined with the BH and ID districts in a configuration that is only 250 feet deep on either side of the highway, and established residential subdivisions abut and confine the business strip. East of Route 85 and running through the Fayville area, the Business Highway corridor on both sides of Route 9 (running for about two miles to the Framingham line) is not quite as narrow on average, but it is still highly constricted and abutted by neighborhoods in at least three locations, as well as the Sudbury Reservoir. Since the maximum building height is only 45 feet and three stories, the Route 9 corridor through Southborough is tightly, even unrealistically, confined in two dimensions.

The split lot provision offers some zoning relief, particularly on Route 9 when a commercial property needs to expand and the land straddles the BH district and a residential zone. This provision was recently invoked in the Walgreen’s and Long Cadillac cases, when the commercial developments were allowed to encroach 30 feet into the residential portion of their respective parcels. Local officials report anecdotally that Southborough experienced additional instances of split lot development in the more distant past. The provision acts as a kind of safety valve for commercial growth, but on a limited, “spot” basis. However, it falls far short of providing a long-term planning solution for the Route 9 corridor.

Some have suggested widening the Route 9 zoning districts in order to increase the town’s tax base, and the highway is an obvious place to accommodate growth. However, the presence of housing as a backdrop to much of Route 9 will most likely make widening the districts less feasible as the availability of land diminishes and the potential for land use conflict increases. In addition to considering options to increase building height (discussed below), the Town may also need to consider removing regulatory barriers to locating septic systems for BH district commercial projects on abutting residential land.

1.4.5 Building Height

Maximum allowable building height has been identified as a concern for Southborough's economic future and potential for revenue growth. In some districts, notably BH, it can be seen as an impediment to prudent and desirable growth. Like so many post-World War II suburbs, Southborough zoned land for relatively low-density development and height at a time that parcels of adequate development size were readily available. The vision, simplified, was to grow and prosper, while retaining a small-town feel. Build outward, not upward, but don't build all that much.

Over the years, the Southborough ZBL was adjusted to a limited degree to accommodate changing business and residential development modes, such as flexible development and the burgeoning of research and development uses in Massachusetts. Height restrictions have remained relatively low in Southborough, and they should be re-examined in two or possibly three districts. The visual and physical impacts of significant height expansion do not appear to be what most residents of Southborough want, but careful adjustments in logical locations could create real economic opportunity.

Height limits present particular issues in the BH district. A maximum height limit of 45 feet and three stories is quite confining in a corridor with such narrow proportions and limited likelihood of horizontal expansion – due not only to the residential neighborhoods close by, but also to pronounced topographic features and steep downward slopes in some locations. The BH district is something of a catch-all district, permitting a broad range of free-standing retail, office, hotel, and restaurant uses. In the closely connected ID district, where the same height limit applies, height is of less concern only because this district allows distribution and light manufacturing uses, both known for large floor area expanse in low-rise structures, often just one story high and usually not exceeding two stories.

Changes to consider include increasing the allowable height in BH, and possibly in ID and IP, to 60 feet and four stories, by right or by special permit. This would allow a theoretical floor area increase of 25 percent. Allowing a height increase could create a practical means of business expansion without taking the buildings to such heights that present serious public or abutter issues. In a related issue, the increased parking demand, especially in narrow corridor districts, will have to be addressed because full parking compliance will have significant site design and engineering impacts. Liberal use of reserve (deferred) parking designations, shared parking opportunities between compatible businesses, and tapping into regional transportation demand management programs and other techniques, should be explored as well. Parking flexibility can fall within the discretionary powers available to a special permit granting authority, but amending § 174.12 (Parking and Loading Regulations) would be preferable.

In the BV district, the current height limit of 35 feet and three stories reflects the presence of traditional village-scale buildings. This restriction probably works in the town center area, but it may be less appropriate in the BV district at Southville Road and Cordaville Road/Route 85, which seems to be local area for carefully controlled business development or compact mixed uses. In order to consider amending the building height requirements in Cordaville village without disturbing the existing height rule in the town center, the Cordaville BV district would have to become a new district or an overlay district, but this is not a major issue.

2.0 MASTER PLAN OPPORTUNITIES & CHALLENGES

Although Southborough’s ZBL needs to be updated and to some extent reorganized, the Planning Board wants to implement the land use recommendations contained in the new Southborough Master Plan. This section of our report explores several of the Master Plan’s recommendations and provides comments on implementation possibilities.

2.1 BUSINESS VILLAGE AND BUSINESS HIGHWAY DISTRICTS

2.1.1 Use Regulations and Mixed-Use Development

The Southborough Master Plan makes several recommendations about uses in the BV and BH districts. Land Use Goal #5, LU #4 specifically recommends allowing mixed-use projects in both districts. The uses currently allowed in the BV and BH districts are summarized in the following table.

Use	Business Village		Business Highway	
	< 2,000 SF	> 2,000 SF	< 50,000 SF	> 50,000 SF
All uses permitted in the residential districts	Y	Y	Y	Y
Mobile home or travel trailer used as a dwelling or business quarter for 30 days or fewer per year	Y	Y	Y	SP
Retail sales and services which do not involve manufacturing on the premises	Y	PB SP	Y	SP
Newspaper, job printing, & publishing	Y	PB SP	Y	SP
Office, bank office building	Y	PB SP	Y	SP
Hotel or motel, restaurant (excluding drive-through food service establishments)	Y	PB SP	Y	SP
Clinic or medical testing laboratory	Y	PB SP	Y	SP
Dwelling on the premises for night watchman or janitor	Y	PB SP	Y	Y
Cafeteria on premises for use by employees and not general public	Y	PB SP	Y	Y
Major Residential Development	PB SP	PB SP	N	N
Multifamily dwelling if within a Major Residential Development	PB SP	PB SP	N	N
Hospital, nursing home, home for aged	PB SP	PB SP	SP	SP
Private school, nursery or kindergarten	PB SP	PB SP	SP	SP
Veterinarian, animal hospital, dog kennel	PB SP	PB SP	SP	SP
Multifamily housing for elderly, owned by a public or non-profit community organization	PB SP	PB SP	SP	SP
Private garage or parking for more than 3 cars or more than 1 truck or other commercial vehicle	PB SP	PB SP	SP	SP
Indoor recreation, athletic or exercise facility; theater for cultural arts (BH only)	PB SP	PB SP	SP	SP
Sale or storage of fuel, lumber, building materials and equipment, contractor’s yard	PB SP	PB SP	SP	SP
Retail sales and services involving manufacturing of products, the majority of which will be sold on the premises to consumers with not more than 4 persons engaged in	PB SP	PB SP	Y	SP

REGULATORY REVIEW

Use	Business Village		Business Highway	
manufacturing operations				
Automotive service, gas station or repair garage, auto sales	PB SP	PB SP	Y	SP
Accessory apartment	ZBA SP	ZBA SP	SP	SP
Boat livery, cemetery, children's camp, golf course, private NP membership club, public utility, riding stable ski tow	ZBA SP	ZBA SP	SP	SP
Conversion of 1-family house in existence for 2 years or longer to a 2 family dwelling on a lot with a minimum of 15,000 SF	ZBA SP	ZBA SP	SP	SP
Mobile home or travel trailer used as dwelling or business quarters for more than 30 days in a year	ZBA SP	ZBA SP	SP	SP
Hazardous waste storage and disposal facilities	N	N	SP	SP

The Master Plan clearly promotes allowing some type of mixed-use development in the BV and BH districts. However, it will be important to distinguish mixed-use development in the BV district from mixed-use development in the BH district. Based on the Master Plan's recommendations for Southborough's villages, mixed-use in the BV district most likely means development with different and complimentary land uses, which commonly include a retail and residential component, e.g., residential above retail, and possibly other uses such as office, civic, or institutional. This type of arrangement makes sense in Southborough's downtown; first, the residential development creates a local market for local businesses and also enlivens the area by creating more foot traffic, and second, retail and services establishments provide convenience for residents and, if prosperous, also add to the vibrancy of the area. While Southborough may not want a bustling, busy downtown, the Master Plan's recommendations suggest that Southborough residents want more activity, access, and convenience for reasons that include economic development, a more efficient land use pattern, and overall quality of life.

In a BH environment like Route 9, mixed-use most likely means something different. Here, the rationale may also be for greater land use efficiency and for greater general economic development potential. However, this type of mixed-use development is less about creating a more vibrant, active street life and more about pairing complimentary land uses. A mixed-use building might be more attractive for certain companies and a more attractive product for a developer. The ZAC will have to further define "mixed-use" for each type of district, considering the following:

- ◆ Types of allowed uses within mixed-use buildings for both the BV and BH districts;
- ◆ Additional minimum lot size and other dimensional requirements for mixed-use buildings;
- ◆ Whether to restrict certain uses –such as office–to the upper floors and reserving the ground floors for more active uses, such as retail;
- ◆ A methodology for adjusting off-street parking requirements for buildings or developments with a mix of land uses;
- ◆ Whether to limit "mixed uses" to a "vertical" mix, i.e., a single building with uses mixed by floor, or to provide for a "horizontal" mix, i.e., multiple buildings on a single lot, each with one or more uses – or both, perhaps depending on the individual zoning district.

2.1.2 Other Issues

Business Village District. The BV district could increase the number of by right uses to provide an incentive for new development or for more businesses or other establishments. One way to address this would be to make some uses that are appropriate in the BV allowed by right instead of by special permit, including:

- ◆ Private school, nursery or kindergarten (which may be exempt under M.G.L. c. 40A, s. 3).
- ◆ Veterinarian, animal hospital, dog kennel (also, see last bullet point under “Issues – Shared”).
- ◆ Indoor recreation, athletic or exercise facility.
- ◆ Residential uses (see next bullet point).

The following additional uses could be considered, too:

- ◆ Cultural uses, such as theaters, art galleries, and small museums.⁸
- ◆ Civic uses, recreational, or community facilities uses, such as libraries, community centers, parks, etc.
- ◆ Mixed-use buildings.

Single-family homes are the only permanent residential uses allowed by right in the BV district.⁹ The following types of residential development are allowed by special permit:

- ◆ Multi-family dwellings if within an Major Residential Development (MRD) (Planning Board Special Permit).
- ◆ Accessory apartment (ZBA Special Permit).
- ◆ Conversion of a one-family house in existence for two years or longer to a two-family dwelling, on a lot with a minimum of 15,000 square feet.
- ◆ A mobile home or travel trailer used as a dwelling or business quarters for more than thirty days per year.

Residential uses are critical in a mixed-use district or development. Housing units and their occupants support local businesses and provide the foot traffic and general activity required for a successful mixed-use area. Also, since multi-family units are smaller, they work well in a mixed-use area and contribute to the overall diversity of housing options in the community. While allowing mixed-use *buildings* by right is

⁸ Note: “theater for cultural arts” is part of the “indoor recreation, athletic or exercise facility” use in the BH district, and is allowed by special permit. This use or a similar use could be extended to the BV district, but the preferred action would be to separate theatre for cultural arts from indoor recreation, i.e., two classes of use.

⁹ A mobile home or travel trailer used as a dwelling or business quarters for than thirty days per year or fewer in a year is a by right, but not a permanent, use in the BV district.

REGULATORY REVIEW

one way to bring residential uses into the BV district, it will also be important to allow different types of residential uses on a stand-alone basis. The residential uses currently allowed in the BV district are very limited. A Major Residential Development would be extremely difficult if not impossible to create in a BV district and therefore using it for the creation of multi-family housing is highly unlikely. Allowing conversion of single-family homes to two-family dwellings is important, but there are not many homes to convert. Southborough should consider changing some special permit residential uses to by right uses and also adding new residential uses to the BV district. Possible changes and additions include:

- ◆ Making conversion of a one-family house in existence for two years or longer to a two-family dwelling a permitted use. The Town will also want to consider whether the minimum lot size of 15,000 sq. ft. is appropriate here.
- ◆ Allowing multi-family dwellings (units per acre or other density controls to be decided).
- ◆ Allowing accessory apartments as of right.
- ◆ Allowing residential units over ground floor retail or office uses in existing buildings and as a part of mixed-use buildings.
- ◆ The 2,000 sq. ft. threshold is unrealistic for hotel or motel use. This use should either be removed or the size threshold increased. Additionally, we question whether the BV district should allow motels at all. They typically have large parking lots along the street and thereby detract from the desired development pattern in traditional downtown areas.
- ◆ Some currently allowed uses may be contrary to the overall intent and purpose of the BV district. These include:
 - ◆ "Sale or storage of fuel, lumber, building material and equipment, contractor's yard."
 - ◆ Automotive sales (part of "Automotive service, gasoline station or repair garage, automotive sales.")

Business Highway District. As in the BV district, some special permit uses in the BH district could be converted to permitted uses:

- ◆ Private school, nursery or kindergarten(see previous note about M.G.L. c. 40A, s. 3)
- ◆ Veterinarian, animal hospital, dog kennel
- ◆ Indoor recreation, athletic or exercise facility; theater for cultural arts
- ◆ The following additional uses also could be considered:
 - ◆ Research and development
 - ◆ Distinguished and refined office uses, for example, medical offices, professional offices, etc.
 - ◆ Mixed-use buildings (types of allowed uses to be decided)

REGULATORY REVIEW

- ◆ The condition of having no more than four persons who may engage in manufacturing operations for retail sales and services which involve manufacturing of products should be reconsidered.

Issues – Shared

- ◆ Both the BV and BH district have floor area thresholds (2,000 and 50,000 sq. ft. respectively) above which most uses require a special permit. Many participants in stakeholder interviews said the thresholds are too low and serve as a disincentive to development, especially in the BH district. Although not strictly a use provision, the floor area cap has an impact on the types of uses that may gain approval in these districts.
- ◆ The permitted uses and uses allowed by special permit need to be reviewed for language accuracy, relevance/obsolescence, and overall appropriateness. They include:
 - ◆ “Retail sales and services which do not involve manufacturing on the premises.” Retail sales and services should be listed separately because they constitute two very different uses.
 - ◆ “Automotive service, gasoline station or repair garage, automotive sales.” While reasonable for the BH district, these uses should be reviewed for appropriateness within the BV district. Any sort of automotive sales would likely detract from the district’s purposes and intent.
 - ◆ “Hospital, nursing home, home for the aged.” Each of these uses should be considered separately for appropriateness and accuracy. This is particularly true for “home for the aged,” which requires updated terminology. Moreover, the impacts of a hospital differ dramatically from the impacts of a nursing home.
 - ◆ “Veterinarian, animal hospital, dog kennel.” These uses should be considered separately and reviewed for appropriateness in the BV district.
 - ◆ “Private garage or parking for more than three cars or more than one truck or other commercial vehicle.” This should be reviewed for appropriateness within the BV district.
 - ◆ “Dwelling on the premises for a night watchman or janitor.” This use may be out of date.
 - ◆ “Boat livery, cemetery, children’s camp, golf course, private non-profit membership club, public utility, riding stable ski tow.” This should be reviewed for relevance in both districts; some activities could (and probably should) be listed separately.

2.2 WORKING WITH INCENTIVES

2.2.1 Preservation and Public Amenities

Providing incentives through zoning is one way that a local government can influence private-sector behavior. In most cases, this involves granting an expansion of development rights or development potential in return some public benefit or public good. The Southborough Master Plan includes a Land Use recommendation (Land Use Goal #6, LU-8) to “consider zoning incentives to encourage reinvestment and redevelopment of existing properties (e.g., density bonuses for preservation of buildings, streetscape

REGULATORY REVIEW

improvements, or public amenities).” A well-crafted, effective zoning incentive needs to consider the following:

- ◆ **Purpose of the incentive.** This may be to increase public space, provide a safe pedestrian environment, increase open space, or to protect natural resources through the promotion of environmentally sensitive building practices (see 2.1.2. on “green” development and buildings, below).
- ◆ **Target area.** Incentives can be targeted to existing zoning districts or existing or new overlay districts. They can also apply to a type of special development such as Southborough’s major residential development or a similar open space residential development provision.
- ◆ **Target market.** An incentive for historic preservation in a largely single-family neighborhood would need to target individual property owners or small business owners. For sidewalk improvements in the Highway Business district, an incentive would target larger commercial developers.
- ◆ **Desired amenity.** This relates to the incentive’s purpose, but is more specific. The amenity may be a trail, bike path, sidewalks, pedestrian crossings, public plaza, or adoption of environmental standards or features into new construction.
- ◆ **Demand for incentive.** Consideration will need to be given as to whether there is enough demand from the target market to pursue the incentive. A market study or analysis of the target area may be necessary.
- ◆ **Local or neighborhood engagement and impact.** If incentives are to be introduced into residential areas, residents will need to be informed and engaged in the process of creating and implementing a new incentive.
- ◆ **Sufficient infrastructure.** If the incentive involves an increase in density, will the town’s infrastructure support the potential level of development if fully built out? This is an especially important consideration for Southborough because the town lacks public sewerage.
- ◆ **Award and administration of incentive.** Southborough should consider how the incentive will work within existing regulations. Adding the incentive to an existing process (such as site plan approvals) will reduce the number of regulatory layers, however, it might not capture a targeted area. Targeting an incentive to an area or type of development where there is no process will mean creating one. For incentives where there are clear standards for exchange of development potential for public good (i.e. two additional units for the preservation of the exterior of a historic structure), the incentive could be awarded through an administrative review. However, when the incentive involves the provision of something that is difficult to quantify, such as a public trail, park, etc. some discretionary review will be required.

Historic Preservation. Options to create incentives for historic preservation are slightly different than those for public amenities such as open space or sidewalks. This is because the desired amenity is the preservation or sensitive modification of an existing building, not a new public amenity. Accordingly, we have separated incentives for historic preservation from other types of incentives listed below. Also, the target areas or properties are identified differently. To realize zoning incentives for historic preservation,

REGULATORY REVIEW

historic properties must be identified, either through a historic district or some type of inventory. Currently, Southborough does not have any local historic districts. The town completed a historic resources survey in 2000. Depending on the status and integrity of this survey, the town could use it to identify properties in which preservation incentives should apply. If this is not sufficient, or if Southborough wishes to consider properties or types of properties not captured by the survey, the town will have to create a new inventory or target district (such as historic districts) before incentives such as those listed below can be implemented.

- ◆ **Additional units in a single-family residence.** Such an incentive would trade the preservation of a historically significant house in a RA and/or RB district to be used as a multi-family structure. The maximum number of units would need to be determined. The provision could also waive additional parking requirements for the allowed units. This type of incentive would also introduce slightly more density into residential areas without a noticeable difference to the built environment.
- ◆ **Nonresidential uses in the residential districts.** This provision would allow a historically significant structure to be used for nonresidential uses (e.g. small-scale retail, office) within the RA and/or RB districts in exchange for the preserving a building's exterior. The provision could specify the other uses that would be allowed, and also the amount of floor area that can be used for nonresidential uses.
- ◆ **Special permit uses allowed as of right.** This would allow a special permit use in a designated zoning district (such as RA, RB, Business Village (BV) and possibility Business Highway (BH)), depending on where there are historically significant buildings) to be administered as of right. In this way, the developer or property owner gets an expedited permitting process in exchange for the preservation of a historically significant building.
- ◆ **Transfer of density or floor area ratio (FAR).** This provision would allow a property owner to quantify unused development potential on a site (e.g. a building with an FAR of 0.30 in a district that allows up to 0.60) and transfer or sell the unused potential to another site and/or owner. This would work in areas where there are historic buildings that do not utilize the entire allowed building envelope. Special considerations for this type of incentive include establishing a way to price unused development potential and setting up a system for the purchase and sale of such density "credits."

Public Amenities. Incentives to provide public amenities such as open space, recreational facilities, or infrastructure improvements can be established based on Southborough's existing zoning districts and development regulations or by establishing an overlay district to target the incentive. Unlike incentives for historic preservation, the incentives below seek to influence new development or redevelopment, not preservation. Therefore, the incentive is a density bonus or an expansion of development potential on a given site. This type of incentive should only be targeted to areas where additional density is desirable and generally acceptable to the community. Density bonuses for existing zoning district for existing zoning provision include:

- ◆ An increase in FAR in exchange for public infrastructure improvements, such as sidewalks and pedestrian crossings. This type of incentive could be applied to the BV or BH districts, where there may be demand for additional density and where pedestrian infrastructure is necessary and appropriate. This would be especially powerful for the BV district if the boundaries are reconfigured to make the existing districts larger or incorporate other areas, such as Southborough's two other

REGULATORY REVIEW

“village” areas. If multi-family development is allowed as of right in the BV district, the incentive could also be for additional dwelling units in exchange for pedestrian facilities. The town will need to decide the formula or method by which to determine the amount of public amenity that must be provided per “X” amount of density. The Zoning Bylaw should also site standards and specifications to be used for the design of sidewalks and other pedestrian amenities.

- ◆ An increase in residential density in exchange for open space or recreational facilities. This type of incentive could be applied through the Major Residential Development process or whatever “cluster” provision takes it place. Although common open space is a mandatory output of a cluster-style development, Southborough could create an incentive to further increase the amount of open space that is preserved, or to encourage the provision of public recreational facilities or amenities such as a park, hiking or bike trail, or playing fields. Amenities such as open space and trails are driven by context, and therefore it would be difficult to create a strict formula for administering such an incentive. Therefore, this type of incentive will require some sort of discretionary review to determine an appropriate amenity in exchange for a certain amount of additional density. Since Southborough’s current MRD provision requires a special permit, this type of incentive would fit well into the existing approvals process. Additionally, changes to MRD or creation of an OSRD bylaw should consider the creation of open space and public amenities incentives.

Establishing an overlay district is another way to set up an incentive for any of the public goods listed above: historic preservation, open space, recreational facilities, or public infrastructure. Instead of defining the target area by existing zoning districts or a list of eligible properties, a new overlay district would be created with the purpose of offering increased development potential for the desired public good. In addition to offering density bonuses, an overlay district could be used to allow mixed-use development in certain areas in exchange for a desired and appropriate amenity, if it is determined there is sufficient demand for this use in certain areas of Southborough.

Density bonuses could also be offered for adopting “green” development practices. These options are discussed in below.

2.2.2 “Green” Development

The Southborough Master Plan includes a recommendation to “Adopt policies to encourage green development practices and LEED certifiable technologies by the Town and private developers.” “Green” development and building are very broad terms that mean different things to different people. The most challenging aspect to incorporating “green” provisions within Southborough’s zoning bylaw may not be determining where they will go, but deciding just what they are. To do this, the town needs to define what it means by “green” development and which measures make sense for Southborough, and then develop a list of objectives and standards by which it will evaluate potential projects.

Standards to decrease environmental impacts and increase energy efficiency (two general aspects of “green” development) can be applied on a number of levels and to a number of development types. Improvements can be made to a building itself, addressing its mechanical systems and materials. Green considerations also apply to the building site and can include things like stormwater remediation. Green building measures should also be targeted to a specific building type, such commercial, office, residential, and municipal buildings. For each building type and level of development, the town will need to reach agreement about the list of environmental and energy standards it wishes to either encourage or require.

REGULATORY REVIEW

Many people regard LEED (Leadership in Energy and Environmental Design) as the go-to source for environmentally progressive building standards. While LEED is a long-running and respected source for standards, it is not the only source. Also, while LEED has a relatively long history of providing standards for office and commercial development, its standards for residential development, including single-family homes, are newer and have been used less. LEED should be considered as one of several possible sources for environmental standards.

A final consideration regarding energy and environmental standards is how they will affect the cost of development. If a requirement adds substantially to a developers' cost, a well-intended environmental standard may have the unintended affect of discouraging development. For this reason, developers and other industry-side professionals should be consulted and made part of the discussion of which environmental and energy standards Southborough will adopt of its own. There are also legal implications to developing building standards; the Building Inspector should be consulted in order to determine whether suggested standards would exceed local authority under the State Building Code.

Options to encourage or require green development (which may include LEED or LEED-like standards and practices) include:

- ◆ Offer a density bonus for integrating environmental standards into a project. In the same way that zoning incentives through density bonuses could encourage the preservation of historic buildings or the provision of public amenities, so could they encourage more environmentally-sensitive building and development practices. In this case, the Town could encourage developers to integrate green building and/or development standards into new projects. Consideration would need to be given to which zoning districts (or overlay district) the incentive would apply.
- ◆ Include green development standards as Site Plan Approval criteria. This approach would enhance Southborough's existing site plan approval criteria (which are now fairly general), including stormwater remediation, transportation linkages, pedestrian facilities and connections, and landscaping and vegetation considerations. In Section 1.4.2 of this report, we noted the possibility of incorporating green development standards under Southborough's existing Section 174.10.D. Site plan approval triggers mean that most new non-residential construction projects and redevelopment projects would be subject to the new green development standards. However, with the exception of multi-family housing for the elderly, the standards would not apply to residential development in Southborough.
- ◆ Require green development standards as part of the special permit approval process. Standards similar to those developed for a site plan approvals process could alternatively be applied to the requirements for special permit approval. This would likely encompass a greater range of projects than the site plan approvals approach. However, the ZBL could specify whether the standards would only apply to some uses.
- ◆ Proceed with any of the options above, but create green building and development guidelines as a separate document referenced in the ZBL. While any of the options above could rely on standards included in the ZBL, codifying the standards makes them difficult to change. An alternative approach would be to prepare a guidelines document that can be accepted and amended as necessary, presumably by the Planning Board.

2.2.3 Transit-Oriented Development

The basic concept of TOD is to create a “center” out of a transit node—which usually includes but is not limited to rail—by allowing higher residential and commercial density, allowing mixed-use development, promoting the location of services and jobs, and creating linkages between different types of transportation with an emphasis on transit, walking, and biking. Within large metropolitan areas, TODs can become town centers in and of themselves. While the Southborough MBTA Station is not likely to become such a center, the station nevertheless presents a potential TOD opportunity. Toward that end, Southborough could establish a TOD overlay district. A TOD overlay district would be superimposed over existing zoning, giving property owners within the overlay the option to follow an alternative set of use, density, and dimensional regulations, and possibly design standards or guidelines. The overlay should include these key provisions:

- ◆ Allowance for a mix of uses, including residential, with an emphasis on pedestrian-oriented retail and service establishments on the ground floor
- ◆ Increased residential densities and expanded housing options (e.g. apartments, townhouses)
- ◆ Increased commercial densities
- ◆ Alternative dimensional requirements to bring buildings closer to the street and create an engaging, human-scale, and pedestrian-oriented environment
- ◆ Reduced parking standards for businesses and residences, including the opportunity for shared parking for two or more uses that can demonstrate different peak demands
- ◆ Pedestrian and bicycle infrastructure to connect the surrounding area with the rail station

Some of these measures are suggested for other places in the ZBL. For instance, site plan review could contain criteria for bicycle and pedestrian infrastructure, and mixed-use development could be established in the BV and BH districts. However, a TOD overlay district is a unique zoning provision for two reasons: it brings these elements together in one location, and more importantly, it allows for increased residential and commercial densities surrounding the transit station. If Southborough wants to craft a TOD overlay, the town will need to consider the following issues.

Density. Determining the “right” densities for a TOD district depends on a few factors. First, the town should determine whether a market exists for this type of development. While a transit station can boost real estate demand, it is not the sole source of demand. The town may want to conduct a market study or at the very least consult with developers to help determine the amount of residential, commercial, and if applicable, light industrial development the TOD area can sustain. Second, the town needs to confer with residents, businesses, and other property owners in the surrounding area about potential land use plans and build-out scenarios for the area, were a TOD overlay to be put in place. Allowing and promoting a concentration of development for the Southborough Station area would be a change for the town and it needs to be discussed early on and throughout the process of crafting an overlay district. This discussion could be part of a larger community conversation on the future of the Cordaville village area.

Parking. Reduced parking standards are an essential part of TOD, which allows for more concentrated development without sacrificing valuable land for surface parking. However, the Southborough Station is

also a park-and-ride facility, with commuters driving from surrounding communities and from Southborough itself to park and ride the train. To sustain existing ridership, Southborough will most likely need to maintain its current level of parking. The site's existing surface parking lots are valuable redevelopment opportunities, but replacing surface parking with a structure may not be feasible. This issue will require further analysis and investigation of funding options from state and federal sources.

Affordable Housing. A TOD overlay should require some affordable housing. Packaging affordable housing with transit makes sense because it locates transportation options and job opportunities proximate to the populations that would benefit most from them. In addition, it will allow the town to increase its supply of affordable housing. Southborough should confer with SHOPC, developers, and other communities to determine a feasible requirement for affordable housing.

TOD Boundaries. Conventional transit-oriented design principles advise that the target area for a TOD should be a quarter-mile radius from the transit station. Since the Southborough Station area is not a blank slate, other factors will figure into determining TOD boundaries, such as property ownership of key sites, the character of the built environment in the surrounding area, and the boundaries of the Cordaville village area. As with many aspects of crafting a TOD overlay district, the boundaries should be vetted with local stakeholders.

Design Guidelines or Standards. Since one of the objectives of a TOD may be to create an inviting, pedestrian-oriented, and aesthetically-pleasing environment, Southborough will want to think about creating design guidelines or standards. Many design issues would be covered in the alternative set of dimensional regulations for the district. Other guidelines could go beyond the basic form of the buildings, although they need not be stylistically prescriptive. Instead, they could provide guidance on aspects such as the relationship of buildings to street, building massing, and fenestration, and also on aspects of the built environment such as streetscape or the configuration of parking. Alternatively, design standards or guidelines for a TOD overlay district could refer to design guidelines for the Cordaville village area should Southborough decide to create such a document.

Procedures. A property owner who elects to follow regulations for a TOD overlay district would be presented with a list of permitted and special permit uses. In addition, development in the TOD would be subject to design standards or guidelines that provide site-level guidance or requirements. Since virtually all development in a TOD overlay district would require site plan review, the relationship between special permit and site plan procedures and authority to grant special permits needs careful thought. In general, care should be taken to ensure that site plan approval criteria compliment rather than conflict with design standards or guidelines for the TOD district.

2.3 FORM BASED CODES

Form-based codes are a method of regulating the built environment that emerged out of the New Urbanist movement. New Urbanism promotes a set of planning and design principles based on "traditional" city design. Some of the key principles of New Urbanist design and development are:

- ◆ A formalistic, gridded street network;
- ◆ Buildings built close to and defining the street;

REGULATORY REVIEW

- ◆ A variety of housing types within one district;
- ◆ A mix of uses within one district;
- ◆ Prominence given to civic structures and public spaces; and
- ◆ Exterior architectural features such as porches, balconies, and stoops intended to foster greater socialization.

Form-based codes (sometimes called form-based zoning) emerged as the regulating arm for New Urbanist principles and they have always accompanied New Urbanist projects. The first form-based code was exceedingly simple: a one-page poster that laid out regulations for building height, siting, and the treatment of yards and outbuildings, all in graphical format instead of text and tables. While this approach worked for private New Urbanist developments, many of the principles central to New Urbanist development—such as mixed-use areas, higher-density housing, and buildings that front the street—are usually not permitted under conventional zoning. To enable publicly-regulated New Urbanist development or redevelopment, some argued for a new method for regulating form and use.

Adopting a form-based code is not the only way to regulate the form of the built environment or implement any of the New Urbanist principles. Supporters of FBCs argue that it is better to adopt an entirely new code rather than amend and adjust existing zoning. Since its inception, however, conventional zoning has always been used as a form-giving instrument. For example, conventional zoning was used to create the distinct urban forms for different parts of New York City starting as early as 1916. It is also important to note that conventional zoning is already widely used to regulate form through use of height, lot coverage, yards, and density regulations. The following chart lists some of the advantages and disadvantages of form-based codes.

Advantages	Disadvantages
Based in a vision for an entire area that was developed with community input and support.	Usually better suited to urban environments where the relationship of building to streets, presence of public space, and mix of uses is of primary importance.
Greater control over the dimensional standards across an area (e.g. FBCs can clearly articulate different setback regulations for different streets within a single district).	Usually better suited to new development, although they have been and can be applied to an existing area to shape redevelopment and infill.
May be easier to comprehend and understand due to their highly visual nature.	True adoption of an FBC requires a whole-sale change from one type of zoning to the other.
	Questions of lawfulness in the state of Massachusetts.

2.3.1 Elements of a Form-Based Code

FBCs are based on a **Regulating Plan**, a map that shows the disposition of each building site as it relates to other buildings streets, alleys, and open spaces. The plan also shows the typology of each building, which

is usually one of a list of typologies chosen for the code during the design process. Each of the building typologies has a specific “frontage” which further defines the relationship between the building and street and helps to define the hierarchy of streets laid out in the plan. Additionally, the plan shows the “required building line,” which designates little or no setback between the building and the street, instead of the maximum setback requirements typical of conventional zoning codes.

Building Envelope Standards further articulate the relationship between building, street, and general building form by specifying basic dimensional standards such as height, setback, and for some codes, floor-area ratio, and density. Uses for each building type may also be included in this section, and the code usually allows a vertical mix of uses. It is important to note that, though use is sometimes a less-prominent factor in a form-based code as compared to its role in conventional zoning, FBCs can be just as prescriptive of uses as conventional zoning. For example, SmartCode®—a model template form-based code that is adapted for particular municipalities—has “Building Function Standards” in addition to Building Envelope Standards, which are analogous to use requirements.

Elements specify the type of street frontage, fenestration, and other general building features. An example of an Element might be a requirement that a certain percentage of the upper-story units on some building types have balconies or that lower stories along a certain street have awnings. Other common Elements might include porches and stoops for residential neighborhoods, and transparent first-floor shop fronts and arcades for commercial area.

Other standards may include architectural, streetscape, and/or landscape standards. Such standards are by far the most prescriptive part of a form-based code, and can vary quite a bit between different communities.

Adopting an entire form-based code may not be the best option for smaller New England towns that only want to influence a certain district or area. However, New Urbanist or Traditional Neighborhood Design (TND) principles can be adopted through other zoning and regulatory methods besides form-based codes. These include:

- ◆ Creating a new zoning district based on form considerations of an area rather than use. This, essentially, is the idea behind form-based codes. Instead of drawing zoning district boundaries based on use, boundaries are drawn to regulate the overall development pattern or “fabric” of an area. Thus, a community could identify a “form area” and create a zoning district with dimensional requirements that promote that form. Use regulations would also apply. While a simple approach, creating new zoning districts is often politically very difficult for most communities. However, it is still a viable option to pursue a form-based approach to zoning.
- ◆ Creating a Traditional Neighborhood Design (TND) overlay. This would provide an additional set of rules to the underlying zoning district to enable many of the ideas espoused by New Urbanists such as buildings that face the street, a mix of uses with active ground floor uses, a variety of housing types, and higher overall densities. (Note that if Southborough decides to create a TOD overlay as discussed above, many of these considerations would also apply.)
- ◆ Adjusting existing zoning. In some instances, some of the same aspects of an FBC can be delivered through changing the existing zoning’s dimensional and use requirements. This works well where zoning district boundaries also represent a “form boundary” or an area that should have a similar

REGULATORY REVIEW

development pattern and built features. A good example of this would be Southborough's BV districts, which are as much about form as they are about use. In this case, setbacks could be adjusted to bring buildings closer to the street, use regulations could be changed to allow a mix of uses and a variety of housing types, and density regulations changed to allow more concentrated development. In addition, some design standards could be codified to regulate streetscapes and frontage types.

- ◆ Create design guidelines or design standards for a certain area. In addition to codified standards for zoning district, additional design guidelines or standards, can be created. These guidelines or standards could address more nuanced aspects of the built environment such as materials, fenestration, roof pitch, and architectural style. The level of prescriptiveness could vary between districts. Such guidelines or standards could be part of the zoning code or remain in a separate document that is referenced by the zoning code.

3.0 CONSOLIDATED PERMITTING PROCEDURES & REGULATIONS

The Southborough Master Plan recommends modifying the town's existing permitting procedures with an eye toward fairness and greater efficiency. Although people sometimes think "efficient" permitting simply makes the permitting process easier and less expensive for developers, a protracted development review and decision process is time-consuming for town boards and staff and it requires residents to attend numerous public hearings. In addition, permitting procedures that place a considerable amount of discretion in the hands of town boards may seem more protective of public interests and the interests of neighbors, but this is not always the case. Regulations that state clearly what a community allows or prohibits, with unambiguous decision standards, provide fairness and transparency for all concerned. If Southborough wants to consider ways to make its land use policies more transparent and its permitting procedures more efficient, there are several opportunities to do so, as discussed in this section.

3.1 SPECIAL PERMITS AND SITE PLAN APPROVAL

Southborough currently divides special permit granting authority between the Planning Board and the Zoning Board of Appeals (ZBA). This arrangement exists in many towns, often because until passage of Chapter 808 of the Acts of 1975 – known today as the Zoning Act, M.G.L. c. 40A – the ZBA was the only local body with specific statutory authority to grant special permits. In 1975, however, the legislature overhauled the former Zoning Enabling Act, including the special permit provisions. In doing so, the legislature created an opportunity for cities and towns to assign special permits to a wider group of other officials. Under M.G.L. c. 40A, § 1A, "special permit granting authority" is defined as a ZBA, planning board, board of selectmen, city council, or zoning administrator. Over time, many communities have transferred some types of special permits to the Planning Board and retained others for decision by the ZBA, so shared responsibility for special permits is not uncommon. In Southborough, the Planning Board grants the following special permits:

- ◆ § 174-13.2, Major Residential Development
- ◆ Village Business District (Article III, Use Regulations, and § 174-10.1, Village District Plan Review)
- ◆ § 174-13.3, Lower Impact Development

All other special permits are decided by the Zoning Board of Appeals (ZBA). However, many uses requiring a special permit also require site plan approval from the Planning Board. In these cases, the applicant must submit separate applications for a special permit from the ZBA and site plan approval from the Planning Board, attend separate public hearings (both requiring notification to abutters), and risk the possibility of appeals twice. In addition, the application review and decision periods are different; the special permit process must conform to requirements set forth in M.G.L. c. 40A, § 9, while site plan approval is governed almost entirely by the ZBL.

One way to make the permitting process more efficient for applicants as well as the town and also reduce the risk of conflicting or inconsistent decisions would be to establish a special permit with site plan review provision, i.e., a consolidated process, with the Planning Board serving both as special permit granting authority and site plan review authority. This is the most common type of consolidation we see in other Massachusetts communities. Special permits not requiring plan review would remain under the

ZBA's jurisdiction, as would special permits to extend or alter a non-conforming use or structure. Alternatively, the town could consider some type of joint hearing process or, at the very least, an initial scoping session with applicants to identify what each board will require.

3.2 OTHER OPPORTUNITIES TO INCREASE PERMITTING EFFICIENCY

In February 2009, the consulting team met with Southborough town staff to discuss options for reducing redundancy and conflicts between various environmental laws and increasing the efficiency of environmental permitting procedures.¹⁰ Currently, Southborough's ZBL has a number of provisions that address environmental concerns, with separate permitting procedures and at a times different permitting authorities. In our regulatory analysis and discussion with staff, we found that some of these concerns are obsolete due to federal regulations. We also found that others, while effective at addressing an environmental concern such as stormwater remediation, are not as efficient as they could be because they require a separate permit rather than operating as part of an existing review and permitting procedure.

The general opinion of participating staff was that the technical requirements of discrete permits such as Lower-Impact Development and Stormwater and Erosion Control should be incorporated into existing permitting processes wherever possible. However, if incorporating these technical requirements into other areas of the ZBL is too difficult or cumbersome, the stand-alone permit should remain.

3.2.1 Water Resource Protection (§ 174-13.4)

Permit/Approval Issuing Authority: Board of Appeals

Applicability:

- ◆ Waste generation requiring hazardous waste identification number (required of all hazardous waste generators in Massachusetts), except for those defined as a Very Small Quantity Generator or Small Quantity Generator by the Massachusetts Department of Environmental Protection;
- ◆ On-site sewage disposal having an estimated sewage flow greater than 15,000 gallons per day (gpd) regardless of location, or greater than 1,500 gpd if within 500 feet of any surface water body;
- ◆ Rendering impervious more than 75 percent of lot area;
- ◆ Except for single family dwellings, on-site sewage disposal systems having an estimated sewage flow exceeding 120 gpd per 10,000 square feet of lot area;
- ◆ Discharge to surface water requiring a permit under 314 CMR 3.00 (Surface Water Discharge Permit/NPDES permit).

Discussion:

Southborough's Water Resource Protection bylaw is intended to provide a higher level of scrutiny for projects with potentially serious environmental effects. In our discussion of the bylaw, town staff

¹⁰ Consulting team represented by Angela Insinger, Community Opportunities Group, Inc., and Eric Bernardin, Fuss & O'Neill, Inc. Town of Southborough staff included Vera Kolias, AICP (Town Planner); John Woodsmall (Town Engineer); Beth Rosenblum (Conservation Administrator). See Exhibit 1 for outline of discussion items.

REGULATORY REVIEW

reported that they have no memory of implementing this permit, although there have certainly been projects that would have triggered it. Staff also noted some overlap with other bylaws. For example, rendering impervious more than 75 percent of lot area would also trigger the Stormwater and Erosion Control bylaw (Section 174-13.5). However, two aspects of this bylaw are unique and would not be covered by other regulations: hazardous waste generation and the Surface Water Discharge Permit (the first and last bullet points listed above, respectively), which regulates point-source pollution from a treatment structure. Therefore, while most projects would also trigger other permitting procedures in addition to Water Resource Protection, the bylaw and its associated permit should remain in the ZBL. Alternatively, however, the scope of the bylaw could be reduced to apply only to those aspects not addressed in other regulations, i.e., hazardous waste generation and the surface water discharge permit.

Wetland and Floodplain District (§ 174-8.9)

Permit/Approval Issuing Authority: Board of Appeals

Applicability:

This bylaw applies to activity within the overlay district that includes expansion of existing buildings; constructions/relocations of ways; alteration of watercourses, waterbodies and dams; fill, earth relocation, new uses; and structures of expansions allowed in underlying district.

Discussion:

Since this district matches the FEMA 100-year flood zone area protected by the Wetlands Protection Act (established in 1986), the Wetland and Floodplain District bylaw is essentially obsolete. We recommend eliminating it because this would remove the need for applicants to go to the ZBA for another permit. It also would reduce the workload of the DPW and Conservation Commission. When we made this suggestion to town staff, they agreed.

Lower Impact Development (§ 174-13.3)

Permit/Approval Issuing Authority: Planning Board

Applicability:

This bylaw currently applies to the following:

- ◆ Any activity subject to Major Plan Review (Sec. 174-10);
- ◆ Any activity that will result in soil disturbance of one acre or more;
- ◆ Any residential development or redevelopment of five (5) or more acres of land proposed pursuant to the "Subdivision Control Law" M.G.L. c41 sec. 81K to 81GG inclusive, or proposed under a special permit process pursuant to M.G.L.c40A sec.9.

Discussion:

Southborough's Lower Impact Development (LID) bylaw was adopted to promote general principles of sustainable development, especially the reduction and on-site treatment of non-point source pollution. To do this, the Town created a separate bylaw and permitting process. The LID triggers are broad and they apply to all but small, exempt projects. Because LID is so ubiquitous in the permitting process, we suggest incorporating LID into existing permitting procedures, namely Southborough's Subdivision

REGULATORY REVIEW

Regulations, site plan review, or the consolidated special permit and site plan approval process recommended under Section 2.4.1 above. Staff also favored this approach.

Stormwater and Erosion Control (§ 174-13.5)

Permit/Approval Issuing Authority: Conservation Commission

Applicability:

This bylaw applies to the following:

- ◆ Any activity subject to Major Plan Review (§ 174-10).
- ◆ Any activity that will result in soil disturbance of one acre or more, or more than fifty percent of the parcel lot, whichever is less.
- ◆ Any residential development or redevelopment of five or more acres of land proposed pursuant to the “Subdivision Control Law” M.G.L. c.41 §§ 81K-81GG inclusive, or proposed under a special permit process pursuant to M.G.L. c. 40A § 9.
- ◆ Any activity that will increase the amount of impervious surfaces more than 50 percent of the area of a parcel or lot.
- ◆ Any activity that will disturb land with 15 percent or greater slope and where the land disturbance is greater than or equal to 15,000 square feet within the sloped area.

Discussion:

The Stormwater and Erosion Control (SEC) bylaw and permitting process is closely related to Notice of Intent (NOI) filings required by the state Wetlands Protect Act, both of which are administered by the Conservation Commission. In fact, the two permits are usually filed in conjunction with each other. The SEC requirements and process overlaps considerably with Major Site Plan Review, Lower Impact Development, and the NOI. Given this apparent redundancy, we discussed ways to consolidate the SEC permit with other processes.

Since the SEC and NOI overlap so much, we discussed whether stormwater review could be rolled into the NOI filing. One way to do this would be to require that all projects triggering the wetlands NOI filing also be subject to the Massachusetts Department of Environmental Protection’s Stormwater Guidelines. Wetlands permits apply only to the project area within the wetlands buffer, so Southborough’s local wetlands bylaw would need a provision requiring that the DEP Stormwater Guidelines apply to the entire project site. This would effectively combine the stormwater and wetlands permitting processes, providing the same amount of oversight on stormwater issues while increasing administrative efficiency. To make this change, the Conservation Commission would need to propose an amendment to the local wetlands bylaw for approval by Town Meeting. For projects that do not trigger the wetlands bylaw, however, SEC requirements could be incorporated into the existing site plan approval process administered by the Planning Board, the special permit with site plan approval process mentioned above, or other permitting procedures as applicable.

REGULATORY REVIEW

Subdivision of Land (Chapter 244)

Permit/Approval Issuing Authority: Planning Board

Applicability:

The Subdivision Regulations apply to all subdivisions as defined in the Subdivision Control Law M.G.L. c. 41 § 81.

Discussion:

Town staff agreed that the subdivision regulations should be updated and amended to include all Lower Impact Development bylaw requirements. This process will require the involvement of the DPW director and Town Engineer when creating the new standards.

4.0 CLARIFICATIONS & TECHNICAL REFERENCE UPDATES

This section contains a “running list” of technical issues that need to be addressed during the revision process for the Zoning Bylaw and Subdivision Regulations.

4.1 ZONING BYLAW

4.1.1 Definitions

- ◆ ACCESS – should be defined
- ◆ BASEMENT – change “building” to “building story” or define height. Define “grade”
- ◆ CELLAR – change “building” to “building story” or define height. Define “grade”
- ◆ FAMILY – needs to be reviewed in light of non-discrimination provisions of M.G.L. c. 40A, § 3.
- ◆ FARM – existing definition is not consistent with “agriculture” under M.G.L. c. 40A, § 3 and M.G.L. c. 128A. (Similarly, FUR FARM and PIGGERY need to be reviewed; in our opinion, they should be deleted from the Zoning Bylaw.)
- ◆ FRONTAGE – this definition should be amended to be consistent with case law, as discussed in Section 1.4.3 of this report, and it could be clarified with a figure or graphic.
- ◆ LOT AREA – this term should be defined in the ZBL. The term is used in many places throughout the bylaw, but there is no definition. LOT is defined, but not LOT AREA. For example, the definition of FLOOR AREA RATIO says, in part: “The ratio of the aggregate gross floor area of all floors of a building or buildings on a lot to the total *lot area*...” Is total lot area the entire area of the lot, or only the area included in the area that constitutes a buildable lot? If the latter, perhaps the ZBL should include a definition (or a subordinate definition) for BUILDABLE LOT AREA.
- ◆ NONCONFORMING BUILDING, LOT OR USE – definition should be revised and clarified, or removed from Section 174-2 and addressed in context under the Nonconforming Uses and Structures section of the revised ZBL (currently Article V).
- ◆ YARD – this definition could be clarified with an amended figure or graphic. Define “setback,” refer to yard?

4.1.2 Other

- ◆ §174-8.2 D(6) RA District– Irregularly shaped lots – clarify dimensional requirements
- ◆ §174-8.3 D(6) RB District– Irregularly shaped lots – clarify dimensional requirements.
- ◆ §174-13.3 LID & §174-13.5 Stormwater & Erosion Control - These sections have much in common, but the definitions vary, a potential source of confusion. For example, see “New Development,” “Alter,” and “Redevelopment.”

REGULATORY REVIEW

- ◆ §174-13.5 Stormwater & Erosion Control: Includes a definition for “Better Site Design,” is this actually LID?
- ◆ §174-13.5 Stormwater & Erosion Control - DEP Stormwater Management Handbook sometimes referred to as Stormwater Management Manual; should be consistent.
- ◆ §174-13.5 (I)(1)(e) Stormwater & Erosion Control - No net increase in volume across site boundary – is this practical for many projects?
- ◆ §174-13.5 (I)(1)(i) & (m) Stormwater & Erosion Control - Requirements for dust control redundant. Can these two be combined?
- ◆ §174-13.4 (B)(1)(a) Water Resources Protection – Update reference to “DEQE” to DEP
- ◆ §174-13.3 (D)(7) LID – Exemptions for Redevelopment:
 - ◆ Total impervious cover reduced *by* 40%. Should this be total impervious cover reduced *to* 40%? For example, if cover was 100%, reducing by 40% would leave 60% impervious cover.
 - ◆ Compare to rest of exemptions: When no reduction possible, LID for stormwater controls for 40% of impervious area. When combination of reduction and LID practices used, impervious area reduction should be 40% or more
- ◆ §174-13.5 (C) Stormwater & Erosion Control – Applicability: Activity that will increase amount of impervious surface >50% of the area. Does this mean area increased *to* 50% or total impervious surface >50% as a result of project?

For example: 1-acre lot, .25-acre impervious:

- ◆ Convert additional .13 acre to impervious
- ◆ Total impervious after is .38 acre
- ◆ Increase in impervious >50%, and total impervious <50%
- ◆ Would this project be subject? Language needs clarification.
- ◆ §174-8.9 WFP Wetland and Floodplain District – Confusing
- ◆ §174-8.9 WFP Wetland and Floodplain District – Date October 8, 1985 cf. to §174-9 (F)(6) date used is May 1975, should date be referenced at all? If so, date needs to be consistent in both sections.
- ◆ §174-13.4 – Update to reflect current regulations.
- ◆ 174-13.4 - Uses requiring Special Permit: Can B(1)(b) and B(1)(d) be combined?
- ◆ Addendum #1 Illustration of Setbacks – could be improved

4.2 SUBDIVISION REGULATIONS

- ◆ Update all definitions with current terminology.
- ◆ Add LID regulation specifics including standards?
- ◆ §244-9 B(1) – Update language, specifically “tracing paper”
- ◆ §244-10 A(1)(a) – Update language, specifically “sepia”
- ◆ §244-10 B – Update to include electronic media for submission.
- ◆ §244-10 B (15) Water mains and drains – Address ownership and future maintenance
- ◆ §244-10 B (17) – Survey standards should be updated
- ◆ §244-10 D (7) – Building siting and lot shape for solar energy potential – this has been largely ignored, should it moved to LID?
- ◆ §244-12 General Requirements – This entire section needs updating
- ◆ §244-13 A (4) Update language
- ◆ §244-13 A (7) Update language
- ◆ §244-16(B)(1) Drainage: Value of imperviousness cannot be less than 0.30. This may be in conflict with the LID bylaw where imperviousness could be less than 30%.

REGULATORY REVIEW

Exhibit 1
Discussion Document – February 2009 Staff Meeting

Bylaw	Permit/Approval Issuing Authority	Applicability
Water Resource Protection (Section 174-13.4)	Board of Appeals	<ol style="list-style-type: none"> 1. Waste generation requiring DEP ID number (except small quantity generators). 2. On-site sewage disposal having an estimated sewage flow greater than 15,000 gpd regardless of location, or greater than 1,500 gpd if within 500 feet of any surface water body. 3. Rendering impervious more than 75% of lot area. 4. Except for single family dwellings, on-site sewage disposal systems having an estimated sewage flow exceeding 120 gpd per 10,000 square feet of lot area. 5. Discharge to surface water requiring a permit under 314 CMR 3.00 (NPDES permit).
Wetland and Floodplain District (Sec. 174-8.9)	Board of Appeals	<ol style="list-style-type: none"> 1. Within the overlay district, expansion of existing buildings, constructions/relocations of ways, alteration of watercourses, waterbodies and dams, fill, earth relocation, new uses and structures of expansions allowed in underlying district.
Lower Impact Development (Sec. 174-13.3)	Planning Board	<p>Required for the following:</p> <ol style="list-style-type: none"> 1. Any activity subject to Major Plan Review (§174-10); 2. Any activity that will result in soil disturbance of one acre or more; 3. Any residential development or redevelopment of five (5) or more acres of land proposed pursuant to the “Subdivision Control Law” G.L. c41 sec. 81K to 81GG inclusive, or proposed under a special permit process pursuant to G.L.c40A sec.9.
Stormwater and Erosion Control (Sec. 174-13.5)	Conservation Commission	<ol style="list-style-type: none"> 1. A Stormwater and Erosion Control Permit shall be required from the Commission for the following: 2. Any activity subject to Major Plan Review (§174-10); 3. Any activity that will result in soil disturbance of one acre or more, or more than fifty percent (50%) of the parcel lot, whichever is less; 4. Any residential development or redevelopment of five (5) or more acres of land proposed pursuant to the “Subdivision Control Law” G.L. c41 sec. 81K to 81GG inclusive, or proposed under a special permit process pursuant to G.L.c40A sec.9 5. Any activity that will increase the amount of impervious surfaces more than 50% of the area of a parcel or lot, and 6. Any activity that will disturb land with 15% or greater slope and where the land disturbance is greater than or equal to 15,000 square feet within the

REGULATORY REVIEW

Bylaw	Permit/Approval Issuing Authority	Applicability
		sloped area.
Subdivision of Land (Chapter 244)	Planning Board	<ol style="list-style-type: none"> 1. No person shall make a subdivision within the meaning of the Subdivision Control Law or any land within the town, or proceed with the improvement for sale of lots in a subdivision, or the construction of ways, or preparation therefore, or the installation of utilities and municipal services therein, unless and until a definitive plan of such subdivision has been submitted and approved by the Planning Board.