

To: Southborough Zoning Board of Appeals

Cc: Southborough Planning Board

Re: 40B - 120 Turnpike Road 40B Apartment Bldgs. Questions and Comments

Dated: September 3, 2024

From: Paul Carter, P.E. Town Resident 6 Hillside Avenue

Board of Appeals Public Hearing 9/4/24

1. The 120 Turnpike Road 60 Unit 40B Apartment Building is currently proposed to be 5 stories high. It was originally proposed to be 4 stories high than increased to 6 stories high and now proposed to be 5 stories high. The explanation that has always been given so far as to the number of stories needed is that the project becomes uneconomical with fewer stories. It is understood that there is a direct relationship between the number of stories and the size of the needed building footprint.
2. In order to clearly show this relationship rather than just talk about it, attached is a sketch entitled Exhibit 1 that shows exactly the additional length of the building that would be needed to attain the same desired square footage of 81,000 square feet that is proposed for the 5 story building. For a 4 story building, the building length would need to be an additional 54 feet long. For a 3 story building, the building would need to be an additional 144 feet long.
3. Clearly the footprint of a 4 story building would not have a cost prohibitive impact on the project site plan. The only impact of the increased footprint required for a 3 story building would be on parking which could probably worked out.

4. There are no other 4 story buildings in the Town of Southborough, not even the existing buildings fronting on Route 9. The Madison Place apartments are an exception located at the intersection of Route 495 and Route 9 close to the Westborough Town Line.
  - a. Approving the Comprehensive Permit allowing a 4-story building would set a bad precedent for the Planning Board and Zoning Board of Appeals for any proposed developments going forward. Four (4) story buildings are more appropriate for a semi-urban setting than a small residential community.
  - b. All the existing zoning including Industrial and Industrial Park, Business Highway and Village, Research, Scientific and Professional and Residential are restricted to 3 story buildings.
  - c. In order to get a sense of scale and a real understanding of what a five (5) story apartment building would look like attached as Exhibit "A" and "B" are photos of the new five (5) Story Apartment Building currently being constructed at the intersection of Route 85 and the Bypass Road across from the 3 story Main Street Bank near Marlborough City Center
  - d. **If the Zoning Board of Appeals does not decide now what is going to be a permissible building height than the Zoning Board of Appeals and the Planning Board could be forced into a "take it" or "leave it" trap by the Developer of this site.**
5. **I recommend that the building height issue be properly addressed before the project is allowed to move forward.**
6. **The Developer still needs to submit a Preliminary Subdivision Plan with a list and explanation of any required Waivers from the Subdivision Rules and Regulations.**
  - a. The Revised "Site Plan of Land" does not comply with the requirements of a Preliminary Subdivision Plan which are very clearly spelled out in the Southborough Subdivision Rules and Regulation.

- b. The revised site plans now show some additional lines, dimensions, lot labels and areas regarding the proposed lots but they are incomplete, very hard to read and require a separate Property Line Plan suitable for recording at the Registry of Deeds. The Preliminary Subdivision Plan needs to show the following: A Proposed Subdivision Road that provides the required frontage to the existing lots, the Proposed 40B Project (which has yet to be adequately defined for legal or permitting purposes) and the 6.2 acre Conservation Land.
- c. **In order to make some progress and stop just talking around this issue (which is all that has been done so far) Attached is a sample Preliminary Subdivision Plan, Exhibit 2, 3 and 4. It is primarily a Property Line Plan so it can be easily read, meets the Preliminary Subdivision Plan Regulations and includes a the required Preliminary Subdivision Road.**

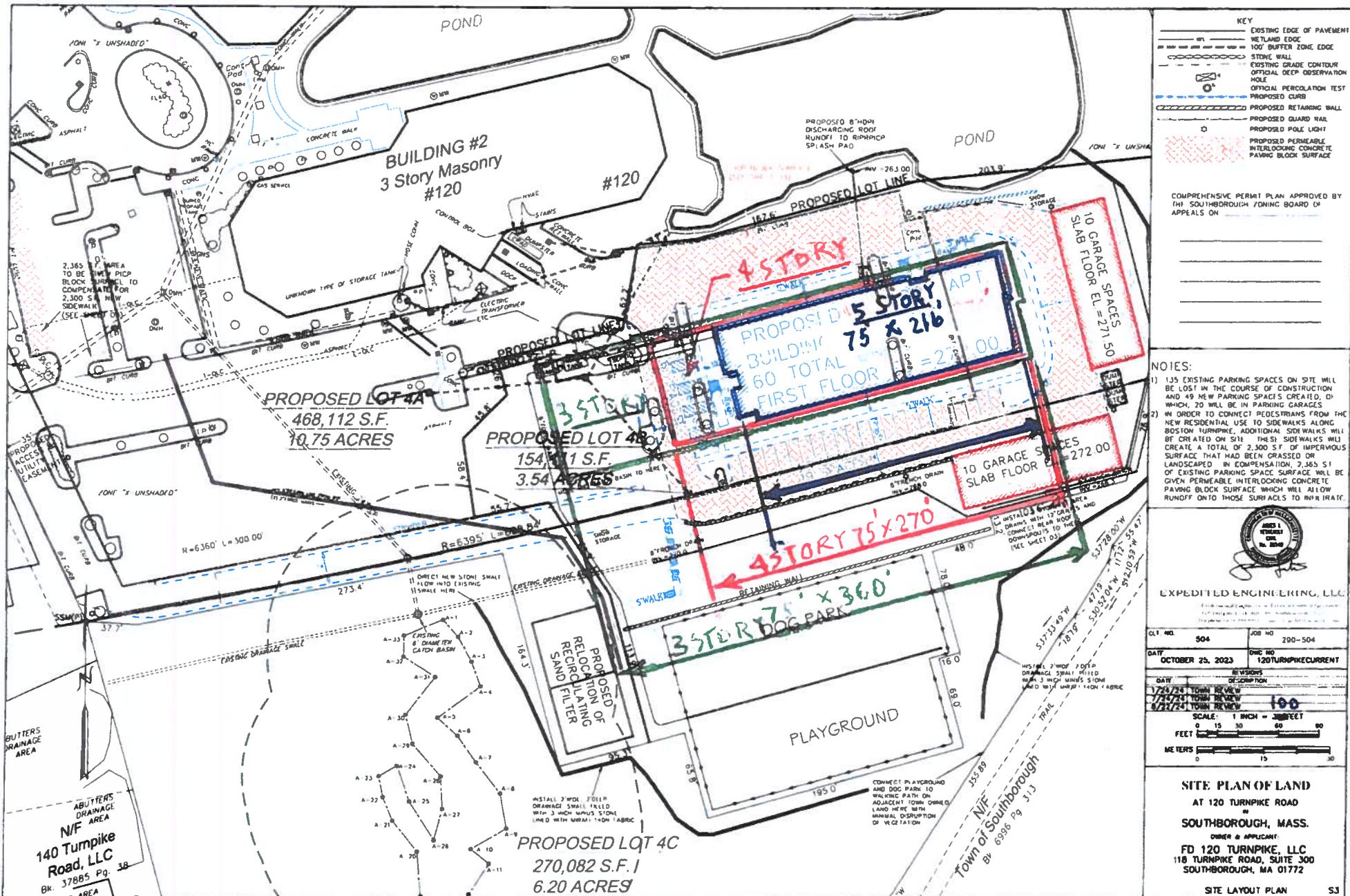


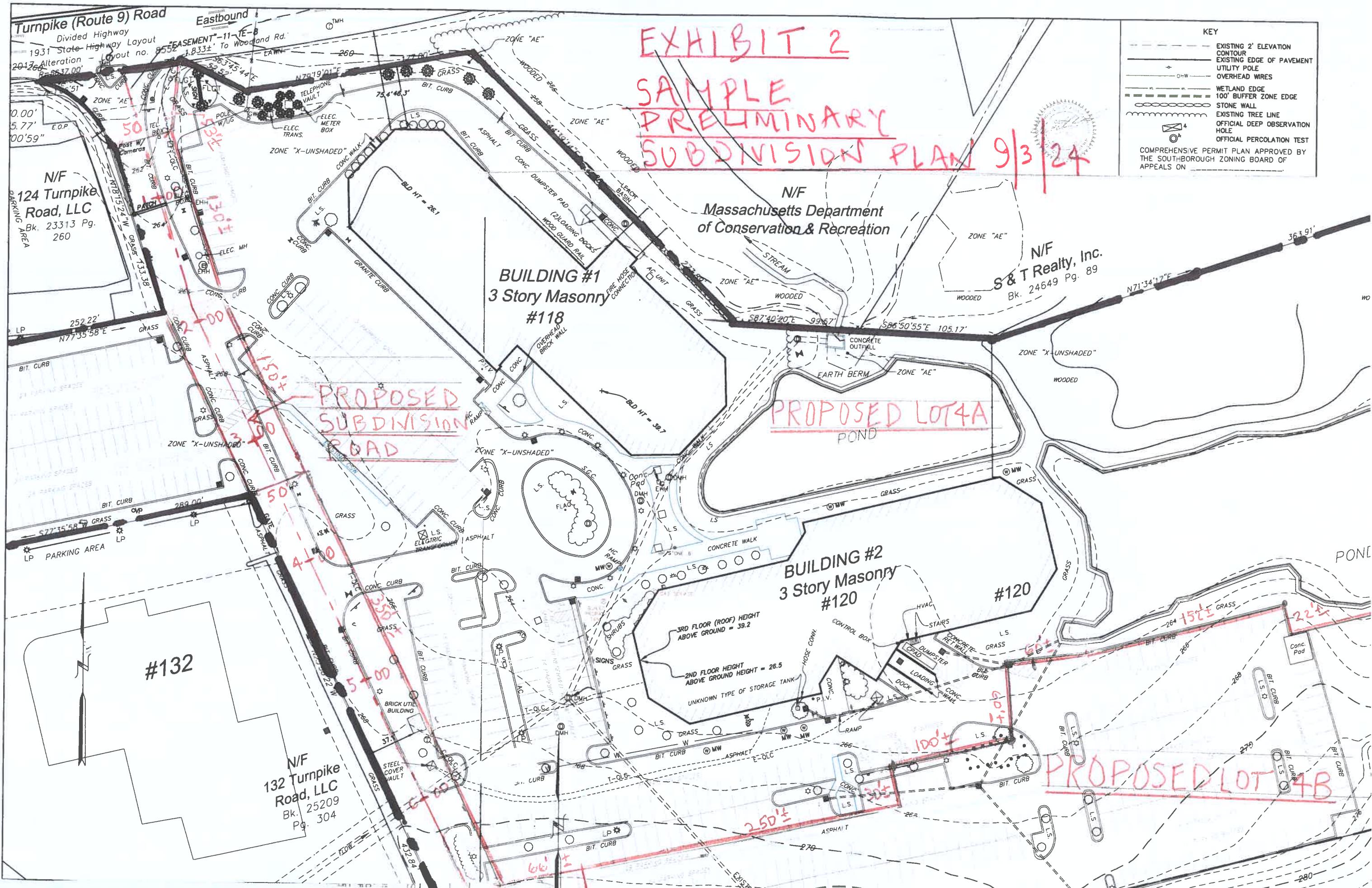
EXHIBIT 1 - 9/3/24  
BLDG HEIGHT (# OF STORIES)  
VS BLDG FOOTPRINT

EXHIBIT "A"

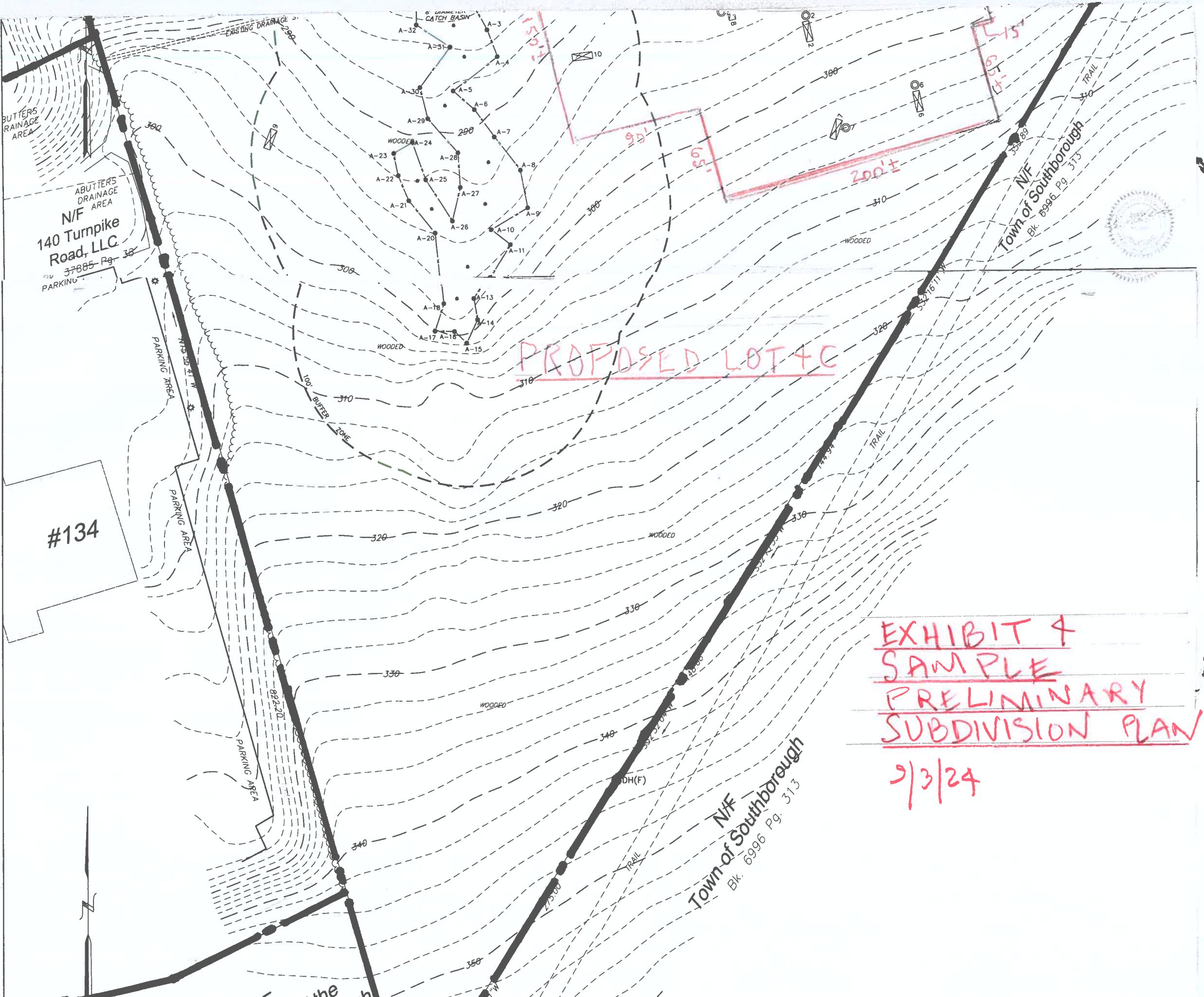


EXHIBIT "B"









9/4/24 1

ZONING  
- SUBMITTED TO THE 1. S' BORO BOARD OF APPEALS  
2. S' BORO PLANNING BOARD

### DEFINITION OF SUBDIVISION

As previously mentioned, the Legislature made a comprehensive revision to the Subdivision Control Law in 1953. This legislation made two significant changes to the statute. It clarified the definition of a subdivision and provided for the recording of approval not required (ANR) plans. The procedures for the submission and endorsement of an ANR plan are found in Section 81P.

Prior to the 1953 statute, a plan showing lots and ways could be recorded without the approval of the Planning Board if such ways were existing ways and not proposed ways. The purpose of providing for an approval not required process was to alleviate the difficulty encountered by Registers of Deeds in deciding whether a plan showing ways and lots could lawfully be recorded. As explained by Mr. Philip Nichols on behalf of the sponsors of the 1953 legislation, "... it seems best to require the person ... who contends that (his plan) is not a subdivision within the meaning of the law, because all of the ways shown on the plan are already existing ways, to submit it to the planning board, and if the board agrees with his contention, it can endorse on the plan a statement that approval is not required, and the plan can be recorded without more ado."

Section 81P requires that an approval not required endorsement cannot be withheld unless a plan shows a subdivision. Therefore, whether a plan requires approval or not rests with the definition of "subdivision" as defined in Section 81L.

Simply put, a subdivision is the division of a tract of land into two or more lots. However, a division of a tract of land into two or more lots will not constitute a subdivision if, at the time it is made, every lot has the necessary frontage on a certain type of way.

MGL, Chapter 41, Section 81L defines a subdivision as follows:

"Subdivision" shall mean the division of a tract of land into two or more lots and shall include resubdivision, and, when appropriate to the context, shall relate to the process of subdivision or the land or territory subdivided; provided, however, that the division of a tract of land into two or more lots shall not be deemed to constitute a subdivision within the meaning of the subdivision control law if, at the time when it is made, every lot within the tract so divided has frontage on (a) a public way or a way which the clerk of the city or town certifies is maintained and used as a public way, or (b) a way shown on a plan theretofore approved and endorsed in accordance with the subdivision control law, or (c) a way in existence when the subdivision control law became effective in the city or town in which the land lies, having, in the opinion of the planning board, sufficient width, suitable grades, and adequate construction to provide for

- SEE UNDERLINED SECTIONS REQUIRING:

1. 20 FT MINIMUM FRONTAGE FOR ANR

2. A DEFINITIVE SUBDIVISION APPROVAL BY

THE PLANNING BOARD IN ADDITION TO THE ZONING BOARD  
OF APPEALS

the needs of vehicular traffic in relation to the proposed use of the land abutting thereon or served thereby, and for the installation of municipal services to serve such land and the buildings erected or to be erected thereon. Such frontage shall be of at least such distance as is then required by zoning or other ordinance or by-law, if any, of said city or town for erection of a building on such lot, and if no distance is so required, such frontage shall be of at least twenty feet. Conveyances or other instruments adding to, taking away from, or changing the size and shape of, lots in such a manner as not to leave any lot so affected without the frontage above set forth, or the division of a tract of land on which two or more buildings were standing when the subdivision control law went into effect in the city or town in which the land lies into separate lots on each of which one of such buildings remains standing, shall not constitute a subdivision.

## APPROVAL NOT REQUIRED PLANS

Any person wishing to record a plan that he believes is not a subdivision plan may submit an ANR plan to the Planning Board. The review of an ANR plan by the Planning Board does not require a public hearing. If the Board finds that the plan does not show a subdivision it must immediately endorse the plan "approval not required under the Subdivision Control Law" or words of similar import.

Basically, the court has interpreted the Subdivision Control Law to impose three standards that must be met in order for lots shown on a plan to be entitled to an endorsement by the Planning Board that "approval under the Subdivision Control Law is not required." The Planning Board must determine whether: (1) all lots abut a qualified way; (2) all lots have adequate frontage; and, (3) vital access exists to each lot.

### Qualified Ways

Lots shown on an ANR plan must front on one of the following types of ways:

1. A public way or a way that the municipal clerk certifies is maintained and used as a public way. As was discussed in Fenn v. Town of Middleborough, 7 Mass. App. Ct. 80 (1979), a way becomes public in one of three ways: (1) a laying out by a public authority pursuant to MGL, Chapter 82, Sections 1-32; (2) by prescription; and, (3) prior to 1846, by dedication by the owner to public use, permanent and unequivocal, coupled with an express or implied acceptance by the public. Because the 1846 statute put an end to the creation of public ways by dedication, it has only been possible since that time to create a public way either by a layout in the statutory manner or by prescription.
2. A way shown on a plan that has been previously approved in accordance with the Subdivision Control Law.
3. A way in existence when the Subdivision Control Law took effect in the municipality having, in the opinion of the Planning Board, sufficient width, suitable grades, and adequate construction to provide for the needs of vehicular traffic in relation to the proposed use of the lots.

### Adequate Frontage

The lots shown on an ANR plan must meet the minimum frontage requirements as specified in the local zoning bylaw. If the local zoning ordinance or bylaw does not specify any minimum frontage requirement, then the proposed lots must have a minimum 20 feet of frontage in order to be entitled to ANR endorsement.

A plan showing a lot having less than the required frontage is not entitled to ANR endorsement even if the Zoning Board of Appeals has granted a frontage variance for the lot.

Absent a zoning provision authorizing a reduction in lot frontage by special permit, an owner of land wishing to create two building lots where one lot will have less than the required lot frontage needs to obtain approval from both the Zoning Board of Appeals and the Planning Board. A zoning variance from the Zoning Board of Appeals varying the lot frontage requirement is necessary in order that the lot may be built upon for zoning purposes. It is also necessary that the lot owner obtain a frontage waiver from the Planning Board for the purposes of the Subdivision Control Law.

The need to obtain approval from both the Planning Board and Zoning Board of Appeals was noted in *Arrigo v. Planning Board of Franklin*, 12 Mass. App. Ct. 802 (1981), where landowners wished to create a building lot which would not meet the minimum lot frontage requirement of the zoning bylaw. The minimum lot frontage requirement was 200 feet. They petitioned the Zoning Board of Appeals for a variance and presented the Board with a plan showing two lots, one with 200 feet of frontage, and the other with 186.71 feet of frontage. The Board of Appeals granted a dimensional variance for the lot that had the deficient frontage. Upon obtaining the variance, the landowners submitted a subdivision plan to the Planning Board showing the two lot subdivision.

After a public hearing, the Planning Board waived the 200-foot frontage requirement for the substandard lot and approved the two lot subdivision. MGL, Chapter 41, Section 81R, authorizes a Planning Board to waive the minimum frontage requirement of the Subdivision Control Law. The court found that the Planning Board had to grant the frontage waiver before the plan could be approved by the Board.

Later, in *Seguin v. Planning Board of Upton*, 33 Mass. App. Ct. 374 (1992), the court defined the process that must be followed when a landowner seeks a frontage waiver from the Planning Board. The Seguins wished to divide their property into two lots for single family use. One lot had the required frontage on a paved public way. The other lot had 98.44 feet of frontage on the same public way. They applied for and were granted a variance from the 100 foot frontage requirement of the Upton Zoning Bylaw. Upon obtaining the variance, the Seguins submitted a plan to the Planning Board seeking the Board's endorsement that approval under the Subdivision Control Law was not required. The Planning Board denied endorsement on the ground that one of the lots shown on the plan lacked the frontage required by the Upton Zoning Bylaw. Rather than resubmitting

5

the plan as a subdivision plan for approval by the Planning Board, the Seguins appealed the Planning Board's denial of the ANR endorsement. The court held that the Seguin's plan showed a subdivision and had to be submitted and approved as a subdivision plan.

### Vital Access

One of the more interesting aspects of the ANR process, if not the Subdivision Control Law, is the vital access standard. The necessity that the Planning Board determines that access exists to the lots before endorsing an ANR plan is not expressly stated in the Subdivision Control Law. The vital access standard has evolved from court decisions. The decisions have dealt with whether proposed building lots have actual access and have focused on the adequacy of the way on which the proposed lot fronts and the adequacy of the access from the way to the buildable portion of the lot.

### Adequacy of a Public Way

In Perry v. Planning Board of Nantucket, 15 Mass. App. Ct. 144 (1983), the court looked at the adequacy of access of an existing public way. Perry submitted a two lot ANR plan to the Planning Board. Both lots had the required frontage on Oakland Street which was a way that had appeared on town plans since 1927. The County Commissioners of Nantucket, by an order of taking registered with the Land Court in 1962, took an easement for the purposes of a public highway. Oakland Street, a public way, had never been constructed. The Planning Board decided that the plan constituted a subdivision because the lots did not front on a public way as defined in the Subdivision Control Law. Because no way existed on the ground to serve the proposed lots, the court found that the Planning Board was right in denying ANR endorsement. The court noted that a board can properly deny an ANR endorsement because of inadequate access, despite technical compliance with frontage requirements, where access is nonexistent for the purposes set out in Section 81M.

Relying on the Perry decision, among others, the Hingham Planning Board denied endorsement of a plan where all the proposed lots abutted a public way. In Hutchinson v. Planning Board of Hingham, 23 Mass. App. Ct. 416 (1987), the court found that the public way provided adequate access and that the Planning Board had exceeded its authority in refusing to endorse the plan.

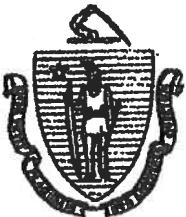
Hutchinson proposed to divide a 17.74 acre parcel on Lazell Street in Hingham into five lots. Lazell Street was a public way that was used and maintained by the Town of Hingham. It was a paved way and, except for a portion that was one-way, was 20 to 22 feet wide which was about the same width as other streets in the area. Each lot met the frontage requirement of the Hingham zoning bylaw.

6

Deval L. Patrick, Governor  
Timothy P. Murray, Lieutenant Governor  
Tina Brooks, Undersecretary

## **AN OVERVIEW OF THE SUBDIVISION CONTROL LAW**

October, 1996  
Revised December, 2009



Commonwealth of Massachusetts  
**DEPARTMENT OF HOUSING &  
COMMUNITY DEVELOPMENT**

Deval L. Patrick, Governor ♦ Timothy P. Murphy, Lt. Governor ♦ Tina Brooks, Undersecretary

7

Dear Local Official:

The Department of Housing and Community Development provides a wide range of technical assistance, information services, and grant programs to municipal governments throughout the Commonwealth to assist communities in solving local programs. We are pleased to offer this edition of An Overview of the Subdivision Control Law to planning boards, other municipal officials, and interested persons.

Our Department has received numerous questions over the years concerning the operation of the Subdivision Control Law. This publication highlights many of the substantive and procedural requirements that apply to subdivision and non-subdivision plans which require an endorsement or an approval by a planning board. We have also noted interesting court cases that have looked at a variety of issues dealing with subdivision control. This publication should be used as a resource and should not be used as a substitute for your reading of either the statute or the court cases that have interpreted the law. Whenever a question of legal interpretation arises, local officials should always seek the advice of their municipal counsel.

We trust that this publication and the services that the Department of Housing and Community Development provides will be helpful to you in carrying out your responsibilities. Questions concerning this publication should be directed to Elaine Wijnja, Principal Land Use Planner at (617) 573-1360 or [Elaine.wijnja@state.ma.us](mailto:Elaine.wijnja@state.ma.us)

Sincerely,

*Tina Brooks*

Tina Brooks  
Undersecretary

8

**AN OVERVIEW OF THE SUBDIVISION CONTROL LAW  
MGL, CHAPTER 41, SECTIONS 81K-81GG**

**October, 1996  
Revised December, 2009**

**Prepared by**

**Department of Housing and Community Development**

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