

[DRAFT] Proposed Amendment to Article 32
Prepared by Andrew Dennington 3-28-18

Strike Article 32 in the Town Meeting Warrant and substitute the following:

To see if the Town will vote to amend the zoning by-laws of the Southborough Code Chapter 174 entitled "Zoning" by amending Section 174-10(G) as follows:

Any person aggrieved by the action of the Planning Board on a site plan approval application may appeal said action to ~~the Zoning Board of Appeals as provided in Article VI hereof.~~ a court of competent jurisdiction in accordance with Mass. Gen. Laws c. 40A, § 17.

Goal: Clarify that the intent of Article 32 is indeed to provide for immediate judicial appeal of a Planning Board action on site plan approval. Reduce risk that a court later finds that, because the Southborough zoning by-law is silent on the issue, an aggrieved party is still required to either internally appeal to the ZBA, or await the issuance of a building permit, and then appeal the building inspector's action to the ZBA under G.L. c. 40A, §§ 8, 13.

Other local towns: Ashland has an identical provision at Section 9-4.17 of its Zoning By-Law: "Any decision of the Planning Board pursuant to this Section shall be appealed in accordance with G.L. c. 40A, s. 17 to a court of competent jurisdiction." But Hopkinton has an intra-agency appeal like Southborough. See Hopkinton Zoning By-Law, §210-135(F) ("Any person aggrieved by a Decision of Site Plan Review by the Planning Board may appeal such Decision to the Board of Appeals within 20 days of the date filed with the Office of the Town Clerk.")

Northborough has different methods of appeal depending upon whether the site plan approval is accompanied by a special permit decision.

Westborough is not a good comparison because it appears to have Board of Selectmen review site plan applications.

Supporting legal authority: At least three towns – Westwood, Sudbury, and Stoughton – have enacted bylaws nearly identical to this proposed amendment. Those by-laws have survived judicial review.

In Wildstar Farm LLC v. Planning Bd. of Westwood, the Appeals Court recognized that municipalities may validly enact zoning by-laws that provide for immediate judicial review of Planning Board action on site plan review applications. 81 Mass. App. Ct. 1114, 2012 WL 468226, at *1 (unpublished); see also M & K Partners LLC v. Scardino, 2017 WL 730269, at *7 (Mass. Land Ct. 2017) (Long, J.) (affirming that Stoughton zoning by-law § 10.6.25, providing that "the appeal of any decision of the Planning Board hereunder shall be made in accordance with the provisions of Massachusetts

General Laws Chapter 40A, § 17", did indeed permit immediate judicial review of Planning Board action on site plan approval).

Discussion: As Massachusetts Land Court Judge Keith Long has explained:

The issue, put briefly, is this. Site plan review is not explicitly recognized in G.L. c. 40A, but has been found to be a permissible regulatory tool for "controlling the aesthetics and environmental impacts of land use." *Osberg v. Planning Bd. of Sturbridge*, 44 Mass.App.Ct. 56, 57 (1997). Because of this gap in the statute, there is no explicit statutory mechanism for appeal of site plan review decisions and, in that absence, case law has sought to provide guidance. In some instances, a decision is immediately appealable to court. See e.g. *Quincy v. Planning Bd. of Tewksbury*, 39 Mass.App.Ct. 17, 21–22 (1995). In others, it must await the issuance of a building permit, and the appeal is from that permit. See, e.g., *DuFault v. Millenium Power Partners LP*, 49 Mass.App.Ct. 137, 139 (2000). The distinction tends to turn on whether the site plan decision has a discretionary element. If the reviewing board has discretion to refuse approval, the decision is considered in the nature of a special permit and immediately appealable pursuant to c. 40A, § 17. See *Quincy*. If there is no discretion—if the use is "as of right" and the most the board can do is impose reasonable conditions—review must await the building permit. See *DuFault*.

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To moot any possible ambiguity, a number of municipalities, including Sudbury, have adopted bylaws providing for immediate appeal of site plan decisions in either situation. *Wildstar* upheld the validity of such bylaws.

Bourne v. Quirk, 2014 WL 3359313, at *2 (Mass. Land Ct. 2014) (Long, J.) (emphasis added).