

Adopting and Revising Rules and Regulations

Prepared for: Citizen Planner Training Collaborative



MODULE



Introduction

Introduction

COURSE OBJECTIVES:

SLIDE 1 OF 2

- Understand the source(s) of regulatory authority
- Identify types of rules and regulations
- Familiarize yourself with topics frequently addressed in rules and regulations:
 - ♦ Procedural
 - ♦ Substantive
- Appreciate the limitations on regulatory authority



Introduction
COURSE
OBJECTIVES:
SLIDE 2 OF 2

- Recognize non-zoning regulatory authority
- Differentiate between the types of fees that may be assessed:
 - ♦ Administrative fees
 - ♦ Consultant fees
- Learn the procedure for adoption of rules and regulations, including applicable notice and/or filing requirement(s)



Introduction

REGULATORY AUTHORITY:

SLIDE 1 OF 2

“Massachusetts has enjoyed a strong and continuing tradition of local self-government and home rule which, of course, militates against the concept of state statutorily imposed uniform and comprehensive standards of local administrative agency or official procedure.”

38 Mass. Prac.,
Administrative Law &
Practice § 1.14 (Apr. 2019)



Introduction

REGULATORY AUTHORITY:

SLIDE 2 OF 2

- An administrative agency has the authority to adopt regulations giving effect to legislative mandates
- A regulation does not have the same force or effect as does a duly-adopted ordinance or bylaw
- Administrative regulations are not binding upon the courts
- But they are entitled to great weight



Introduction

TYPES OF RULES AND REGULATIONS

What are the types of rules and regulations?

- Zoning rules and regulations, including:
 - ♦ Special permit, variance, administrative appeal
 - ♦ Comprehensive permit
 - ♦ Site plan review
- Subdivision rules and regulations
- Non-zoning rules and regulations





Zoning Regulation

Zoning Regulation

INTRODUCTION:

SLIDE 1 OF 4

- G.L. c. 40A, § 12: a board of appeals “shall adopt rules, not inconsistent with the provisions of the zoning ordinance or by-law[,] for the conduct of its business... and shall file a copy of said rules with the city or town clerk”



Zoning Regulation

INTRODUCTION:

SLIDE 2 OF 4

- G.L. c. 40A, § 9: for special permits, a board of appeals shall “adopt and from time to time amend rules related to the issuance of such permits, and... file a copy of said rules in the office of the city or town clerk”
 - ♦ Applies to any planning board designated as special permit granting authority, too



Zoning Regulation

INTRODUCTION:

SLIDE 3 OF 4

- See also G.L. c. 40, § 33: “[a] copy of all rules and regulations made by town boards or officers for which a penalty is provided by law shall be filed with the town clerk within ten days after they take effect”



Zoning Regulation

INTRODUCTION:

SLIDE 4 OF 4

- Despite the obligatory language of these statutes, they are “merely directory and not mandatory”
- Failure to adopt or file, or both, will not invalidate a board’s actions



Zoning Regulation

SPECIAL PERMITS, VARIANCES, ETC.:

SLIDE 1 OF 5

“The permissible scope of internal operating rules remains unclear; no reported decisions indicate limits.”

Mark Bobrowski, Handbook of Massachusetts Land Use and Planning Law, § 10.02 (4th ed.) (2018).



Zoning Regulation

SPECIAL PERMITS, VARIANCES, ETC.:

SLIDE 2 OF 5

- Rules and regulations are more about procedure than substance; the latter is either statutory or dictated by ordinance or bylaw
- Operating or procedural standards often include:
 - ♦ Form of application required
 - ♦ Required supporting materials, including plan content(s)
 - ♦ Number of copies of documents and plans



Zoning Regulation

SPECIAL PERMITS, VARIANCES, ETC.:

SLIDE 3 OF 5

- Operating or procedural standards often include (cont'd):
 - ♦ Filing procedures
 - ♦ Fees
 - ♦ Payment for publication of notice
 - ♦ Timing of submittal of certified list of abutters, assessor's map(s), etc.
 - ♦ Delivery or referral to other public bodies for review, feedback and recommendations



Zoning Regulation

SPECIAL PERMITS, VARIANCES, ETC.:

SLIDE 4 OF 5

- Where local rules address substance, they might (carefully) include:
 - ♦ Design guidelines
 - ♦ Threshold(s) for studies or reports, e.g. a traffic study
 - ♦ Standards for environmental protection
 - ♦ Landscaping
 - ♦ Lighting
 - ♦ Open space



Zoning Regulation

SPECIAL PERMITS, VARIANCES, ETC.:

SLIDE 5 OF 5

- Absent authorization in the ordinance or bylaw for a board to address these substantive issues, too extensive of regulation(s) will be subject to challenge
- A board cannot by regulation circumvent approval by town meeting or by the city or town council



Zoning Regulation

CHAPTER 40B:
SLIDE 1 OF 3

- G.L. c. 40B, §§ 20-23, a.k.a. the Comprehensive Permit Law, authorizes the adoption of local rules
- Absent such adoption, the EOHLC regulation, 760 CMR 56.05, shall apply to the board of appeals' conduct of business under the Law



Zoning Regulation

CHAPTER 40B:

SLIDE 2 OF 3

- Local rules generally mimic EOHLC's, requiring:
 - ♦ Report on existing site conditions
 - ♦ Preliminary, scaled architectural drawings
 - ♦ Tabulation of proposed buildings by type, size and coverage
 - ♦ Preliminary utilities plan
 - ♦ Copy of the Preliminary Eligibility Letter issued by a subsidizing agency



Zoning Regulation

CHAPTER 40B:

SLIDE 3 OF 3

- Local rules might also address:
 - ◆ Applicant credentials and experience
 - ◆ Environmental impact analysis
 - ◆ Traffic study
 - ◆ Affordability
 - ◆ Local preference
 - ◆ Long-term monitoring of affordability
 - ◆ Waivers or exceptions
 - ◆ Post-permit changes



Zoning Regulation

SITE PLAN REVIEW:

SLIDE 1 OF 2

- Site plan review is “not specifically provided for in G.L. c. 40A” but rather is “entirely the creature of the cities and towns and the judiciary”
- Thus there is no statutory authorization for the adoption of rules and regulations
- Boards nevertheless routinely adopt them



Zoning Regulation

SITE PLAN REVIEW:

SLIDE 2 OF 2

- Site plan review rules and regulations, more so than other types, emphasize the following:
 - ◆ Project design
 - ◆ Orientation
 - ◆ Layout
 - ◆ Scale
 - ◆ Architecture
 - ◆ Materials
 - ◆ Etc.





Subdivision Rules and Regulations

Subdivision Rules and Regulations GENERALLY:

SLIDE 1 OF 5

The Subdivision Control Law, G.L. c. 41, §§ 81K-81GG, requires planning boards to adopt rules and regulations “relative to subdivision control not inconsistent with the subdivision control law or with any other provision of a statute or of any valid ordinance or by-law...”

G.L. c. 41, § 81Q; see also Lyman v. Planning Bd. of Winchester, 352 Mass. 209, 212 (1967).



Subdivision Rules and Regulations

GENERALLY:

SLIDE 2 OF 5

- Adoption is obligatory
- [S]ubdivision control requires detailed codification 'so that owners may know in advance what is or may be required of them.'" Ridgeley Management Corp. v. Planning Bd. of Gosnold, 82 Mass. App. Ct. 793, 799 (2012) (citation omitted).



Subdivision Rules and Regulations

GENERALLY:

SLIDE 3 OF 5

- Simple majority vote is required for adoption, like other rules and regulations
- BUT the vote must occur at or following a public hearing thereon



Subdivision Rules and Regulations GENERALLY:

SLIDE 4 OF 5

- Notice of the time, place and subject matter of said hearing must be published twice, once in each of two successive weeks, the first publication at least 14 days in advance
- Once adopted, rules and regulations may be amended in the same manner



Subdivision Rules and Regulations GENERALLY: SLIDE 5 OF 5

- A true copy must be on-file and available for inspection in the offices of the planning board and the city or town clerk
- A copy must also be filed with the register of deeds and recorder of the Land Court
- Submission is a prerequisite to the Subdivision Control Law becoming effective



Subdivision Rules and Regulations

SCOPE:

SLIDE 1 OF 2

- The powers of a planning board shall be exercised with due regard for:
 - ♦ Provision of adequate access to all lots by ways that will be safe and convenient for travel
 - ♦ Lessening congestion in such ways and in adjacent public ways
 - ♦ Reducing danger to life and limb in operation of motor vehicles



Subdivision Rules and Regulations

SCOPE:

SLIDE 2 OF 2

- The powers of a planning board shall be exercised with due regard for (cont'd):
 - ♦ Securing safety in case of fire, flood, panic, etc.
 - ♦ Insuring compliance with zoning
 - ♦ Securing adequate provision of water, sewerage, drainage, utilities, fire, police, lighting
 - ♦ Coordinating ways with each other and others



Subdivision Rules and Regulations CONTENTS:

SLIDE 1 OF 8

- G.L. c. 41, § 81Q's mandates:
 - ♦ Rules and regulations “dealing with the size, form, contents, style, and number of copies of plans and the procedure for the submission and approval thereof”



Subdivision Rules and Regulations CONTENTS:

SLIDE 2 OF 8

- G.L. c. 41, § 81Q's mandates (cont'd):
 - ♦ Requirements in furtherance of the purposes of Section 81M "with respect to the location, construction, width, and grades of the proposed ways shown on a plan and the installation of municipal services therein"



Subdivision Rules and Regulations

CONTENTS:

SLIDE 3 OF 8

- Technical or procedural requirements may differ depending on the type of application made:
 - ♦ Approval-not-required (ANR) plan
 - ♦ Preliminary subdivision plan
 - ♦ Definitive subdivision plan



Subdivision Rules and Regulations CONTENTS:

SLIDE 4 OF 8

- Included in G.L. c. 41, § 81Q are both mandatory and discretionary substantive topics
- Mandatory is the requirement that the rules identify “the requirements of the board with respect to the location, construction, width and grades of the proposed ways...” quoted above



Subdivision Rules and Regulations CONTENTS:

SLIDE 5 OF 8

- Discretionary topics include:
 - ♦ A requirement of a turnaround at the end of a dead-end roadway
 - ♦ A requirement that underground distribution systems be provided for utilities
 - ♦ A requirement that poles and overhead structures be provided for municipal equipment



Subdivision Rules and Regulations CONTENTS: SLIDE 6 OF 8

- Discretionary topics include (cont'd):
 - ♦ Standards that encourage solar energy
 - ♦ Standards for the orientation of new streets, lots and buildings; setbacks; limitations on the type, height and placement of vegetation; etc.
 - ♦ Restriction of not more than one building per lot



Subdivision Rules and Regulations

CONTENTS:

SLIDE 7 OF 8

- Prohibited content includes:
 - ♦ Referring a subdivision plan to any other board or person prior to submittal
 - ♦ Standards or criteria as to layout, construction, alteration or maintenance of ways that exceed those commonly applied to publicly-financed ways



Subdivision Rules and Regulations CONTENTS:

SLIDE 8 OF 8

- Prohibited content includes (cont'd):
 - ♦ Size, shape, width, frontage or use provisions not required by zoning
 - ♦ Required dedication of land to public use, conveyance to the Commonwealth, county or town, for use as a public way, public park, playground or other municipal purpose



Subdivision Rules and Regulations

WAIVERS:

SLIDE 1 OF 2

“A planning board may in any particular case, where such action is in the public interest and not inconsistent with the intent and purpose of the subdivision control law, waive strict compliance with its rules and regulations...”

G.L. c. 41, § 81R.



Subdivision Rules and Regulations

WAIVERS:

SLIDE 2 OF 2

- No obligation to issue a waiver, generally
 - ♦ “Compelling evidence” is needed to overturn a waiver denial
- Where issued, must be reasonable
 - ♦ No substantial inconsistency with the Subdivision Control Law
 - ♦ Board entitled to “large measure of judgment or discretion”





Non-Zoning Regulatory Authority

Non-Zoning Regulatory Authority GENERALLY

- Rules and regulations are adopted by other public bodies either pursuant to express statutory authority or with presumed authority to administer a statutory scheme
 - ♦ E.g. boards of health (G.L. c. 111, § 31); historic district commissions (G.L. c. 40C, § 10(e))





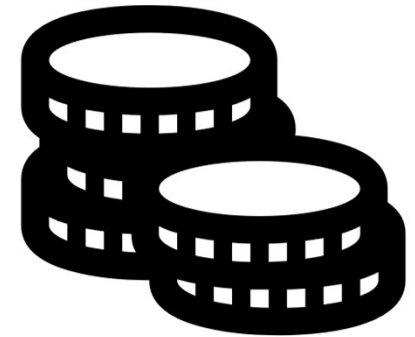
Fee Schedules

Fee Schedules GENERALLY:

SLIDE 1 OF 2

“Any municipal board or officer empowered to issue a license, permit, certificate, or to render a service or perform work for a person or class of persons, may, from time to time, fix reasonable fees for all such licenses, permits, or certificates... and may fix reasonable charges to be paid for any services rendered or work performed...”

G.L. c. 40, § 22F.

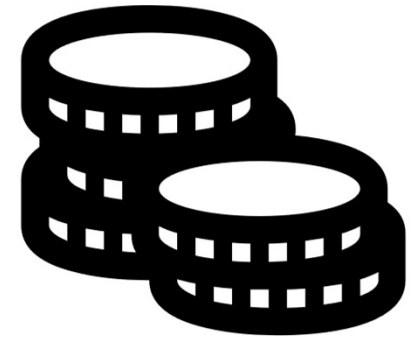


Fee Schedules

GENERALLY:

SLIDE 2 OF 2

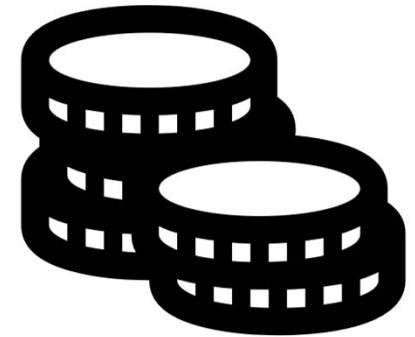
- Massachusetts law
“restricts the amount a locality or local board may charge as a ‘fee’ for a license or permit; ... such a fee... should not be designed to raise additional revenue”
- “At its heart... a fee may only compensate the governmental entity providing the services for its expenses”



Fee Schedules

TYPES OF FEES

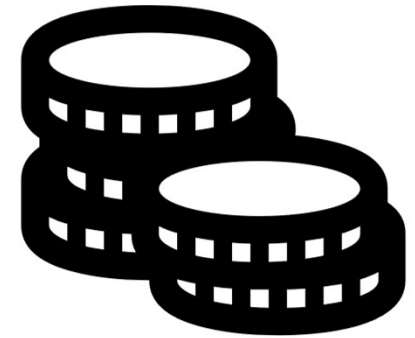
- Boards of appeal and planning boards can and do charge the following fees:
 - ♦ Administrative fees
 - ♦ Fees for notice and publication
 - ♦ Project review fees, i.e. for outside consultants



Fee Schedules

ADMINISTRATIVE AND RELATED FEES

- Administrative fees are meant to compensate the board for costs incurred in the receipt, dissemination, processing of and action on an application
- Notice and publication fees are sometimes included within an administrative fee but are often charged separately

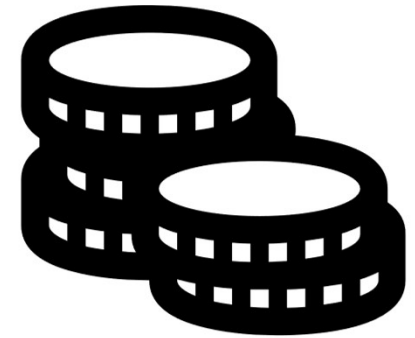


Fee Schedules

OUTSIDE CONSULTANT FEES:

SLIDE 1 OF 3

- G.L. c. 44, § 53G offers boards of appeal and planning boards, among others, the opportunity to charge fees for the employment of outside consultants to assist with project reviews
- Outside assistance may be required due to the size, scale or complexity of a project; its anticipated effect(s); and/or the lack of expertise on the board

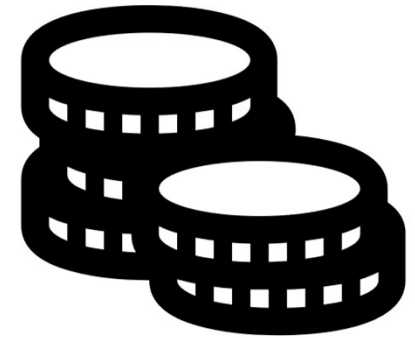


Fee Schedules

OUTSIDE CONSULTANT FEES:

SLIDE 2 OF 3

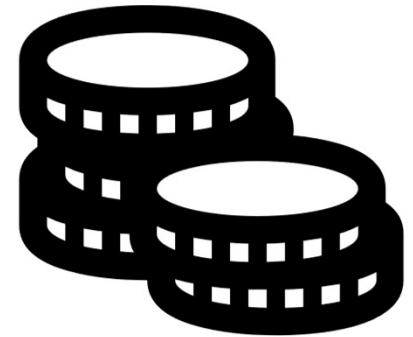
- A special revolving account is established, funded by the applicant, from which qualifying expenditures can be made by the board without further appropriation
- Upon project completion, any remaining balance in the account is refunded



Fee Schedules OUTSIDE CONSULTANT FEES:

SLIDE 3 OF 3

- HOWEVER, to utilize G.L. c. 44, § 53G, a board must first adopt rules permitting the engagement of outside consultants
- Said rules must include a mechanism “for an administrative appeal from the selection of the... consultant” based on:
 - ♦ Conflict of interest
 - ♦ Insufficient qualifications

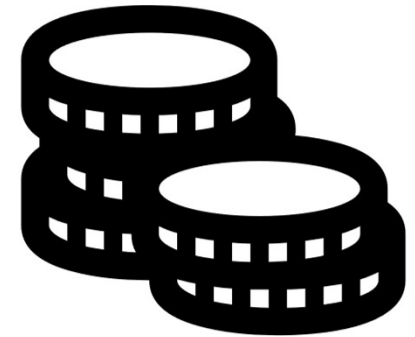


Fee Schedules

FEE VERSUS TAX:

SLIDE 1 OF 2

- Too excessive an application fee may be subject to challenge as an impermissible tax
- “In Massachusetts, towns have authority to collect fees but not to tax beyond property taxes”



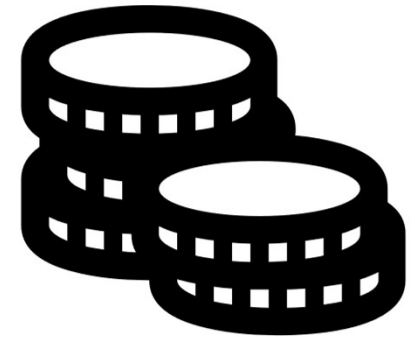
Fee Schedules

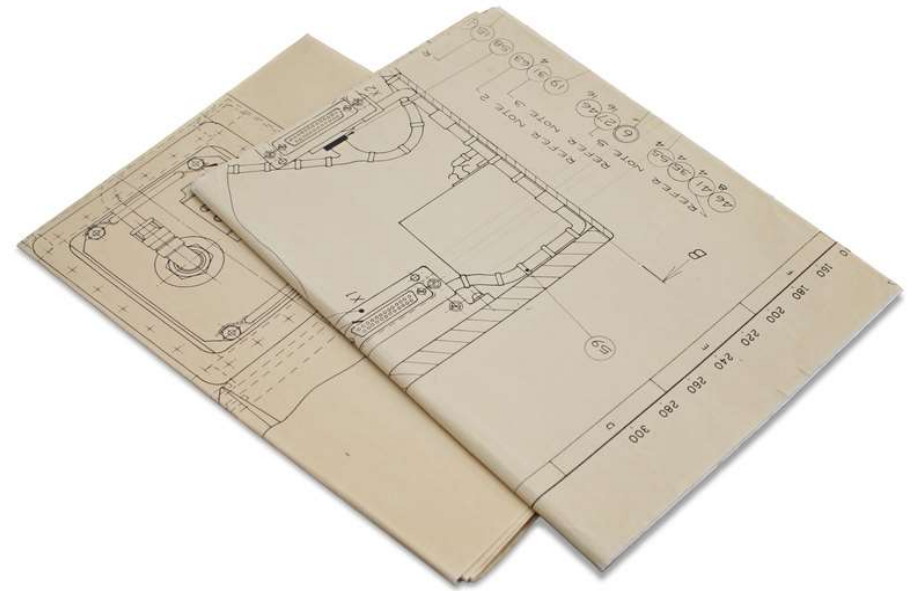
FEE VERSUS TAX:

SLIDE 2 OF 2

That “revenue obtained from a particular charge is not used exclusively to meet expenses incurred in providing the service but is destined instead for a broader range of services, while not decisive, is of weight in indicating that the charge is a tax.”

Emerson College v. City of Boston, 391 Mass. 415, 427 (1984).





Conclusion

Conclusion

ADDITIONAL INFORMATION

For more information, please refer to the Workshop Supplement entitled “Topic: Adopting and Revising Rules and Regulations,” updated through June 30, 2019.

Kindly reference the above Workshop Supplement for a complete bibliography of all statutes, cases and works cited or quoted in the foregoing presentation.

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Questions?



Additional Resources

FURTHER SUPPORT

Citizen Planner Training Collaborative

www.masscptc.org

Executive Office of Housing and Livable Communities

www.mass.gov/eohlc/

Mass Planners List Serve

https://masscptc.org/mailman/listinfo/massplanners_masscptc.org

American Planning Association-Massachusetts Chapter

www.APA-MA.org

Mass. Association of Planning Directors

www.massplanning.org



www.masscptc.org

Thank you!