

# Constructive Approval and Plan Freezes Part II

By MARK A. KABLACK

Recently, I devoted my article to two pending cases before the Massachusetts Supreme Judicial Court (SJC) (*MassBuilder*, 4Q08). *Krafchuk v. Planning Board of Ipswich* and *Kitras*



*v. Zoning Administrator of Aquinnah* both dealt with the statutory provisions of constructive approval (M.G.L. c.41, Sections 81U and 81V) and plan freeze

protection (M.G.L. c.40A, Section 6). While each case had complicated factual records and proceedings, the main issues on appeal to the SJC were critical to the interests of land owners, developers and builders. The Home Builders Association of Massachusetts (HBAM) was so concerned about the outcome of these cases, HBAM filed an *amicus* brief with the SJC in order to clarify and enumerate issues from the perspective of the home building community.

The SJC recently ruled on both cases, and while the result is mixed for the appealing parties, the cases highlight the protections afforded by statute in regard to subdivision plan filings. The recently reported decisions are: *Krafchuk v. Planning Board of Ipswich* (*Slip Opinion*, April 7, 2009) and *Kitras v. Zoning Administrator of Aquinnah*, 453 Mass. 245 (2009).

In the *Kitras* decision, the SJC carefully analyzed the provisions of the Subdivision Control Law to determine when constructive approval applies relative to a town clerk's issuance (or non-issuance) of a certificate under 81V. Constructive approval occurs when a reviewing board, such as a planning board, fails to act on a properly filed application within a defined period of time. Under the Subdivision Control Law, constructive approval of a definitive plan will occur if the planning

board fails to render a decision within one hundred thirty-five (135) days (ninety (90) days in the event a preliminary plan is also filed), unless such period is extended by mutual consent of the board and the applicant (Section 81U). Section 81V provides that under such circumstances a town clerk shall issue a certificate evidencing constructive approval. The town clerk certificate can then be recorded with the definitive plan, in much the same way as a planning board endorsed plan is recorded. According to the SJC's analysis, constructive approval becomes final, once the period of time lapses under Section 81U, and no appeal is taken. "The town clerk's act of issuing the certificate memorializes that the constructive approval has become final, but does not, itself, confer finality." *Kitras*, 254-255. Furthermore, a town clerk has a "mandatory obligation" to issue a certificate evidencing final approval, when a planning board fails to act within the prescribed period. Therefore, issuance of a certificate is not fatal to a determination of constructive approval.

According to the SJC's decision in *Kitras*, however, a town clerk certificate under Section 81V is critical to the timing of plan freeze protection afforded under the Zoning Enabling Act. The SJC has specifically endorsed the concept that a town clerk certificate of constructive approval acts as the "functional equivalent" to a planning board's endorsement of a plan. *Id.* at 254. Under M.G.L. c.40A, Section 6, the period of plan freeze protection from subsequent zoning amendments (8 years under a definitive plan) does not commence until a plan is endorsed, or in the circumstances of constructive approval, a town clerk certificate is issued under Section 81V. A land owner, developer or builder must secure a certificate under 81V if it wants to take full advantage of the statutory protections that are afforded under plan freezes. Pursuant to the SJC's guidance, a developer must seek a *writ of mandamus* against a recalcitrant town clerk in order to force the issue and gain

full protection of its plan. Unfortunately, for the plaintiff in *Kitras*, the land owner took an unreasonable period of time (15 months) to commence a *mandamus* action, and a final adverse decision was issued against the plaintiff on this procedural ground. As a result, the plaintiff in *Kitras* was left without statutory plan freeze protection afforded under M.G.L. c.40A, Section 6, which would have protected the land from zoning amendments imposed by the town for eight (8) years.

In the *Krafchuk* case, the SJC used identical reasoning to examine issues regarding constructive approval under the Subdivision Control Law and plan freeze protection under the Zoning Enabling Act. Fortunately, for the home building community, however, the result in *Krafchuk* was more favorable to the land owner. While no town clerk certificate was issued under Section 81V, and the period of plan freeze protection never commenced, the land owners in *Krafchuk* successfully secured what is described as a process freeze. A process freeze, derived from equitable principles and specific statutory language, recognizes the preservation of *status quo* conditions whenever an application or appeal is pending, in order to avoid the adverse impact that would result from the lapse of time associated with permitting and court delays. "[W] here the deliberative process between a planning board and an applicant regarding a timely filed definitive plan results in a disapproval decision, but progresses in a continuous fashion, wherein the applicant (1) timely files an appeal from the board's decision; and (2) submits within a reasonable time an amended plan that addresses the reasons for disapproval; the process freeze provision[s]...continu[e] to apply to the land that is the subject of the plan." *Krafchuk* (*slip op.*). By meeting these procedural standards the owner successfully protected the land from zoning amendments imposed by the town, allowing for the submission of plan modifications under the initial zoning requirements.

The *Kitras* and *Krafchuk* decisions provide guidance to the home building community on critical statutory provisions of constructive approval, plan freezes and process freezes. These decisions will be particularly helpful when appearing before adversarial boards and when facing zoning amendments. The decisions also exemplify how procedural

issues can have a severe impact on the outcome of a case. The land owners in each case fared very differently based upon actions taken during and after constructive approval. It is important to navigate these procedural issues carefully in order to retain the full protections and benefits of the law. ◆

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