

Zoning Constitutional Law

1. Free Speech/Religion- 1st Amendment
2. Due Process- 5th and 14th Amendments
3. Equal Protection- 14th Amendment
4. Takings- 5th Amendment



First Amendment

- Congress shall make no law respecting an **establishment of religion**, or prohibiting the free exercise thereof; or abridging the **freedom of speech**, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

- Signs

- Adult Use



Fifth Amendment, US Constitution

Due Process Clause

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty, or property, without due process of law**; nor shall private property be taken for public use, without just compensation.”

Fourteenth Amendment

Due Process & Equal Protection

- All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.**
- Extended Due process AND Equal protection (equal application of law) to states

Due Process

5th and 14th amendments

- **Right to a fair process**
- Standards **cannot** be vague
 - “void for vagueness”



Substantive Due Process

- **Regulations must be reasonably related to public purpose**
- **A test against “over-regulation”**
- **Need legal authority (enabling)**
- **Overlaps: Takings AND Equal Protection**
- **Invalidation but NOT compensation for substantive due process**

Substantive Due Process Reasonable Related Test

- **Regulations must be reasonably related to public purpose**
 - Legitimate public purpose
 - Means are reasonable necessary to achieve that purpose
 - Unduly oppressive

Substantive Due Process

Pearson v. City of Grand Blanc, 961 F.ed 1211 (1992)

“...government deprivations of life, liberty or property are subject to limitations regardless of the adequacy of the procedures employed...”

- **Constitutionally enumerated rights**
- **Right to privacy**
- **Right to move**
- **Right to live together as a family**
- **“shocks the conscience”**
- **“arbitrary and capricious” government actions**

Substantive Due Process

Amsden v. Moran, 904 F.2d 748 (1st Cir. 1990)

Procedural

“the manner in which the state act{s} ‘how/when.’

Substantive

“essence of state action

Egregiously unacceptable, outrageous, or conscience shocking.”

Generally, deference to legislatures

Equal Protection 14th Amendment

- **minimum nexus vs. strict scrutiny (protected class)**
- **Petaluma zoning challenge**
- **Mt. Laurel zoning challenges**



First Amendment-- Adult Uses

Andy' Restaurant et. al. v. City of Gary, F3d (2006)

“public indecency...expressive conduct”

- Equal Protection: “A zoning restriction that is designed to decrease secondary effects and not speech should be subject to intermediate and NOT strict scrutiny”
- Content neutrality

FROM

United States v. O'Brien, 391 US 367 (1968)

City of Erie v. Pap's AM, 529 US 277 (2000) plurality

Barnes v. Glen Theatre, 501 US 560 (1991) plurality

Cordi-Allen v. Conlon, 494 F.3d 245, 251 (1st Cir. 2007)

- Equal protection claim-DISMISSED
- Class of one
- “...were the law otherwise, the federal court would be transmogrified into a supercharged version of a local zoning board— a zoning board on steroids...”

Village of Euclid, Ohio v. Ambler Realty, 272 U.S. 365 (1926)

- **“The ordinance is assailed...in derogation of section 1 of the 14TH Amendment to the federal Constitution in that it deprives appellee of liberty and property without due process of law and denies it the equal protection of the law...**
- **“The court below held the ordinance to be unconstitutional and void, and enjoined its enforcement.**
- **“...all similar laws...must find their justification in some aspect of the police power, asserted for the public welfare.”**

Fifth Amendment, US Constitution

Just Compensation/Taking Clause

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.**”

Regulatory Takings/ Adverse Possession

- “Property may be regulated to a certain extent, if **a regulation goes too far it will be recognized as a taking.**” (*Pennsylvania Coal Co. v. Mahon*, 260 US 393 (1922))
- TEST: “tantamount to a direct appropriation or ouster” focus on “**severity of the burden** that government imposes upon property rights.”

Broad Arrow Policy

- 1691 Massachusetts Charter
 - All trees more than 24” in diameter reserved for the crown
 - Trees for masts
 - For all common (not private) land
 - First US conservation policy

Regulatory Takings

Lingle, Governor of Hawaii v. Chevron U.S. A., 125 S. Ct. 2074 (2005)

- **Unanimous** (Hawaii, Act 257, limits rent oil companies charge when leasing service stations).

Four-factor analysis

1. Public Use and Access

TRESPASS=TAKING

- I “Where government requires an owner to suffer a **permanent physical invasion** of her property.” From: *Loretto v. Teleprompter Manhattan CATV Corp.*; AND

2. ALL Economic Use=TAKING

- I “Where regulations completely **deprive an owner of ‘all economically beneficial use’** of her property.” From: *Lucas v. South Carolina Coastal Council* AND

Regulatory Takings

3. Reasonable Economic Use=weighing

- I “Regulation’s {1}economic impact on the claimant, {2} the **extent to which it interferes with distinct investment-backed expectations**, and the {3} character of the government action property.”

From: *Penn Central Transportation Co. v. New York City*; OR

1. Economic impact on the claimant
 1. Non-financial compensation
 2. FUTURE opportunities given little weight. Vested rights are more important.
 3. Generally ALL rights to whole property are the reference point. Focus on what is left instead of what is taken.
2. **Extent to which it interferes with distinct investment-backed expectations**
3. Character of the government action.”
 1. “Average reciprocity of advantage”
 2. Nuisance v. loss of value (v. trespass)

Regulatory Takings

Regulatory Takings restated by: Lingle v. Chevron. (continued)

- 4. *Land-use exaction lacks an essential nexus or is not roughly proportional.*** From: Nollan and Dolan
1. Substantial nexus
 2. Roughly proportional

Substantially Advances Test

- **NOT Takings test**
 - **Not a valid method of identifying compensable regulatory takings.** {It doesn't measure} the magnitude or character of the burden a particular regulation imposes upon private property rights..."
Lingle
- **Remains Substantive Due Process test**

Massachusetts Regulatory Takings

Grove v. ZBA of Chatham, 444 Mass. 754 (2005)

- Chatham bans coastal floodplain construction
- Penn Central and **Lingle** analysis= NO TAKING
 - “{1} economic impact on the claimant
 - {2} the extent to which it interferes with distinct investment-backed expectations
 - {3} character of the government action”
- Substantive Due Process/Equal Protection
 - “This highly deferential test neither involves ‘heightened scrutiny’ nor allows a court to question the ‘wisdom’ of an ordinance”
- Appeals Court (2004)-- 3 weeks before Katrina
- SJC (2005)



Euclidian Zoning

Village of Euclid, Ohio v. Ambler Realty, 272 U.S. 365 (1926)

- **UNIFORM Geometric zones or DISTRICTS**
 - Uses
 - Dimensions
 - Operation
 - Appearance
 - Performance
 - By-right OR discretionary review
- Proactive (New and changed conditions)
 - MOST existing uses “grandfathered”



Zoning

Village of Belle v. Borass, 416 U.S. 1 (1974)

- “A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs.”
- “Police power is not confined to elimination of filth, stench, and unhealthy places, it is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion, and clean air make the area a sanctuary for people.”
- Upheld single-family home only zoning district

Zoning



Source: Feiden

- Prescriptive (a cookbook, e.g., setbacks)
- Performance (a project meets defined community performance standards)

Zoning



- Uses by-right, when standards met
- Uses by Site Plan- Use allowed but board may set conditions related to traffic, landscaping, noise, site layout and related issues
- Uses by Special Permit—Discretionary, based on clear standards

Zoning

- Zoning Districts
AND Overlay
Districts
- Overlays may have additional rules
 - Stricter standards– e.g., sensitive environmental areas
 - More density– e.g., to encourage affordable housing
- Procedurally– little freedom to address state law
- What is regulated and how– great flexibility
- Set how new development shapes community
- 2/3rds vote of legislative body required



Power to Regulate Performance

Standards

- Lighting
- Traffic
- Landscaping
- Environmental
- Etc



ISAT GeoStar 45
23:15 EST 14 Aug. 2003

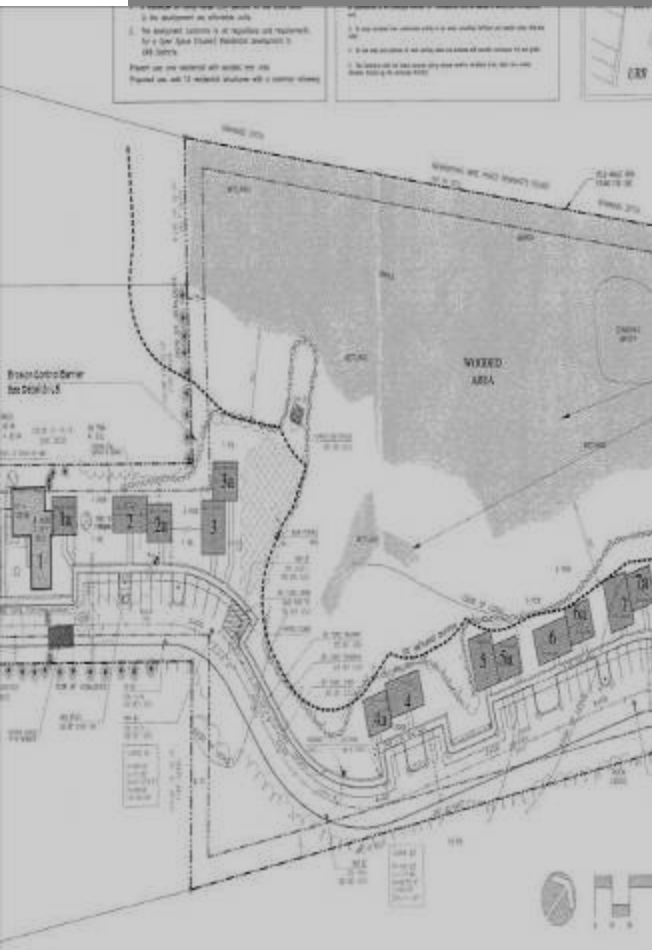
No limit to creative approaches



- Encourage land donations
- Preserve land
- Create affordable housing

Cluster, PUDs & overlays

- | All segments of the marketplace
- | Bonus density for affordable housing
- | More open space preserved



Mixed Commercial/Residential



Mixed Commercial/Residential



neider



Highway Commercial (HB)

Large Retail & Big Box Standards

- Limit maximum size
- Design standards
- Two story minimum OR payment-in-lieu



RETAIL -B
THE SHOPS OF NORTHAMPTON
KING STREET, NORTHAMPTON

Front Porch Setbacks

- Open to air
- Less than 4'
- $\frac{1}{2}$ the setback



Transfer of Development Rights (FFR)

- Tied to preservation of Farms, Forests and Rivers area



Mixed-Use Planned Village (PV)

- Reuse historic buildings by-right
- Planned Village by Special Permit
- Encourage Mixed Use
- Phased development (w commercial)
- Limited dimensional requirements



Accessory Apartment

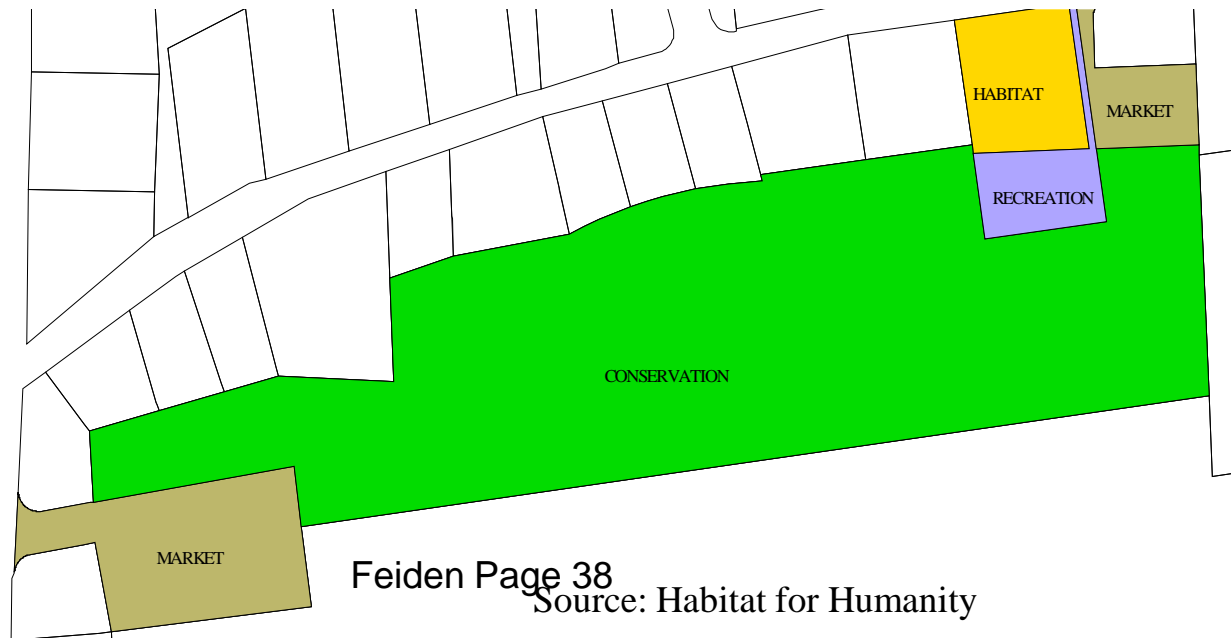


Special Conservancy Floodplain DIFFERENT in Watershed Protection



Comprehensive Permit Affordable Housing AND other goals

- Market Rate Housing
- AND: Housing for 50% of Area Median Income
- AND: Conservation, Recreation, and Landfill
- “Friendly” comp permit- City as applicant



Inclusionary Housing

- Link market rate with affordable housing
- Affordable housing critical to social equity and local economy
- E.g., state goal of **minimum 10%** affordable housing (MGL c 40B, §20-23)



Zoning and Subdivision Measures

Incentive Inclusionary

- **Two-family by-right**
- **Accessory apartments by-right**
- **Reduce minimum lot size**
- **Bonus density**
- **Subdivision waivers**
- **Streamlined administration**
- **Reduced fees**
- **CDBG/other as gap financing**

Inclusionary Housing

- Community fixes deficiencies
- Developer ensures X% in project
- Subordination requirements
- Length of affordability
- Thresholds
- Exemptions



Inclusionary Zoning and Impact Fees

Dacey v. Town of Barnstable (Superior Court, 2000)

- Fees FOR developers of <10 acres and building permit applicants with <10 units
- Fees for affordable housing
- TAX not fee because they don't provide services
- Also unit and lot set-asides (10%) not challenged.
- Court (footnote) “plaintiffs have not challenged set asides...Court offers no opinion”

Zoning-exemptions

Boston College v. Newton (2003)

- Use without restrictions
- Dimensions and Parking requirements must be reasonable
- BUT: Belmont Mormon Church

Restrictions on Timing/Total Development

- **Restrictions on place and manner**
 - Euclid v. Amber and so on
- **Restrictions on timing**
 - Ramapo NY– growth limits tied to infrastructure
 - Sanibel Island Plan– based on ability to evacuate
 - Petaluma– limit growth challenges under equal protection– priority to lower income

Zuckerman v. Town of Hadley MA SJC (2005)

- **Rate of Development Bylaw**
- **No planning**
- **No implementation**
- **No good faith**
- **Unconstitutional**
- **Court left door open**

Fitzgerald v. Town of Templeton, Mass Land Ct. (2007)

- Rate of Development AND Subdivision Phasing Bylaws
- 2001 versions unconstitutional (land court)
 - No time limit
- Corrective version 2005 with 2008 sunset
 - Ongoing planning and infrastructure upgrades
- Land Court– Bylaw ok, reasonable time limits and studies

Spot Zoning

National Amusements, Inc. v. Boston, 29
Mass. App. Ct. 305 (1990)

- “absence of analysis of land use considerations...fig leaves of rationalization...planning study was done”
 - NOT Problem: size of spot
 - Linkage to planning and clear public purpose

Contract Zoning

Durand v. Bellingham, SJC-08942 (2003)

- Zoning for power plant
 - Granted BECAUSE \$8 million dollar donation to town

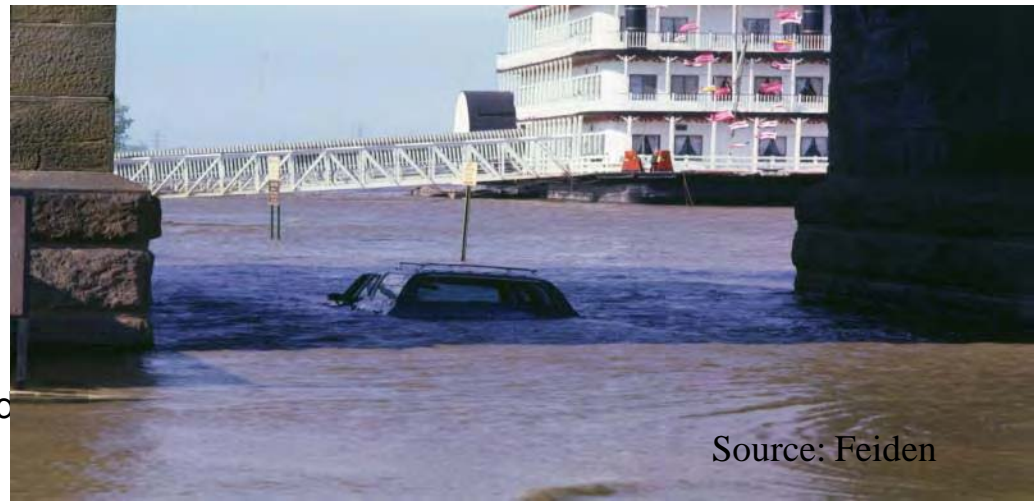
Supreme Judicial Court (Massachusetts)

- SJC: Not arbitrary and capricious
- Rejected extraneous consideration limits legislative action
- “Extraneous consideration” from Sylvania (1962), pre-home rule--Home Rule assumes power
- Gift was voluntary, even if extraneous
- Zoning legislative, due all deference if not in violation of constitution or law and not arbitrary

Massachusetts Home Rule Amendment

1966 Amendment to the Massachusetts Constitution

- “*Article 89, Section 6....Any city or town may...exercise any power or function which the general court has power to confer upon it, which is **not inconsistent with the constitution or laws** enacted by the general court...*”
- Municipalities do **NOT** need specific legislative grant of power.



Feid

Source: Feiden

Massachusetts Home Rule

Durand v. Bellingham (2003)

- SJC emphasized that the Home Rule Amendment--police powers that are not specifically denied or preempted, even absent a specific grant of authority.
- Zoning is legislative matter, due all deference if not in violation of constitution or law and not arbitrary.

Massachusetts Home Rule

- **“local ordinance is inconsistent with a statute...**
 - **an express legislative intent to forbid local activity on the same subject or**
 - **whether the local regulation would frustrate the purpose of the statute so as to warrant an interference that the Legislature intended to preempt the subject...”**
 - **See Town of Wendell V. Attorney General, 394 Mass. 518, 523 (1985), quoting Bloom v. Worcester, 365 136, 155 (1973) ALSO Boston Gas Co. V. City of Newton 425 Mass 687, 699 (1997) citing Boston Gas Co. V. City of Somerville 420 Mass 702, 704 (1995)**

Lovequist v. Conservation Com. of Dennis, Mass.
(SJC 1979)



- **Is wetlands ordinance zoning?**
 - Looks like a duck, it is a duck
 - not land use
 - Does WPA cover the field or prohibit?
 - Inconsistent or fills the gaps

Home Rule Ordinances



- Demolition delay
- Central Business Architecture
- Stormwater

Standing--Zoning

- “To show an infringement...the plaintiff must show that the injury flowing from the board’s action is special and different from the injury the action will cause the community at large”
- **“Standing is the gateway through which one must pass en route to an inquiry on the merits”**

Butler v. City of Waltham, 63 Mass. App. Ct. 435 (2005)

Marashlian v. ZBA of Newburyport, 42 Mass. 719 (1996)

Mass. Zoning: Plaintiff HAS standing

- “Credible” evidence that traffic and parking would damage their business
 - *Marashlian v. ZBA of Newburyport*, 42 Mass. 719 (1996)
- Evidence that congestion and deterioration of abutting dirt road would adversely affect property interests
 - *Rattney v. Planning Board West Tisbury*, 45 Mass. App. Ct. 8 (1998)
- “visual consequences of proposed structure” gives standing even though “generally, concerns about visual impact...do not suffice to confer standing”
 - *Martin v. Church of Jesus Christ of Latter Day Saints*, 747 Mass 141 (2001)

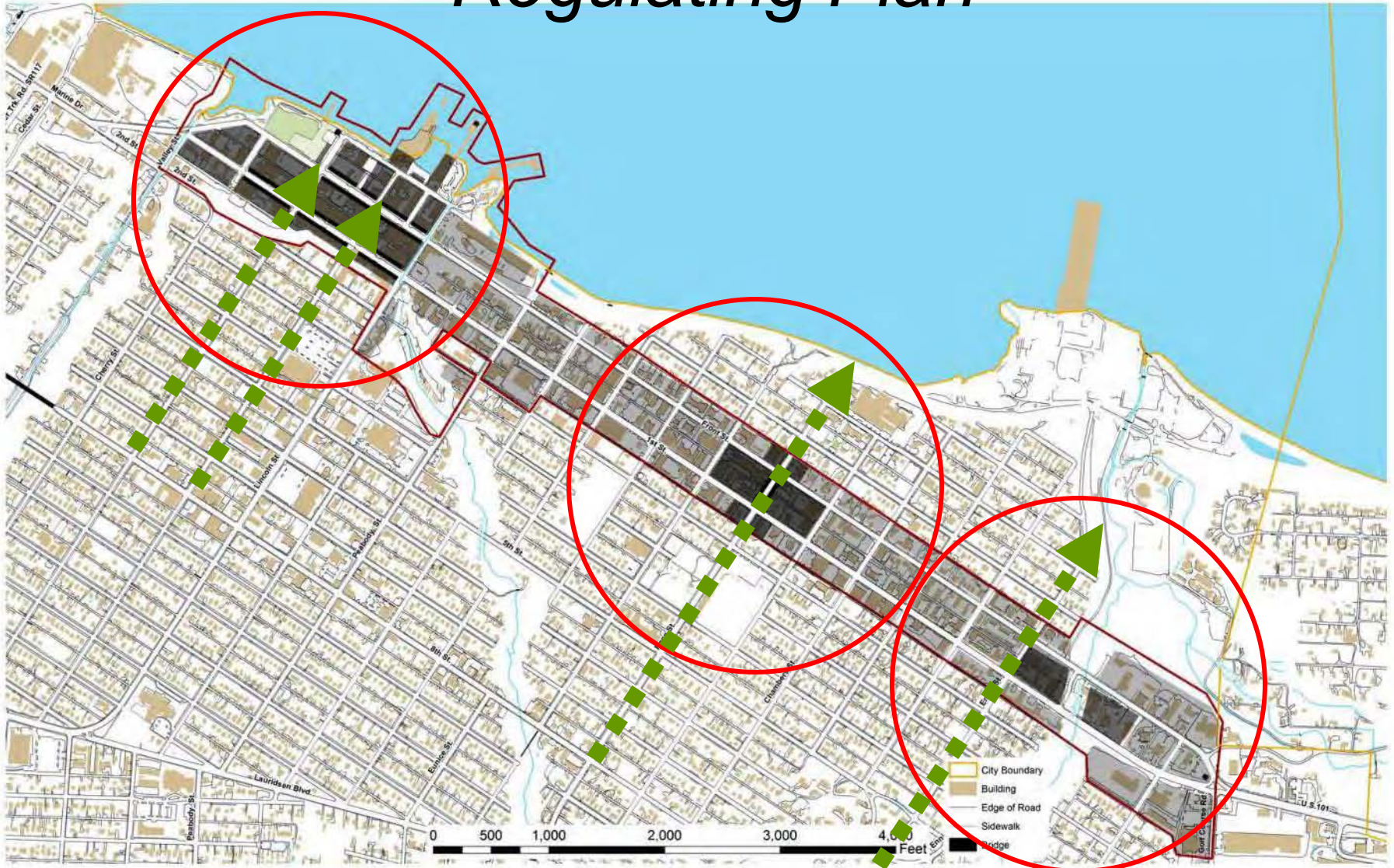
Source: Robert Mangiaratti, 2007

Mass. Zoning: NO standing

- Harm must be particularized. Traffic impacts from Wal-Mart a mile away not unique.
 - Nicherson. V ZBA of Raynham, 53 Mass. App. Ct. 680 (2002)
- Traffic signal 380 feet away would not queue back to Plaintiff's house. Did not show particular harm.
 - Butler v. City of Waltham, 63 Mass. App. Ct. 435 (2005)
- Only unsubstantiated hypothetical claims of possible negative effects.
 - Therrien v. Global Property Developers Corp, WL 2846948 (Mass. Sup. Ct.) (2006)
- Testimony of traffic expert lacked “specificity and numerical certainty”
 - Ajax, Inc. v. Wagner, WL 2805637 (Mass. Land Court) (2006)

Source: Robert Mangiaratti, 2007

Regulating Plan



TYOLOGY DEFINITION

NEIGHBORHOOD ZONE

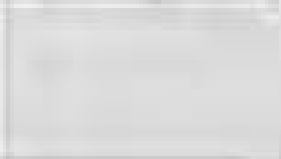
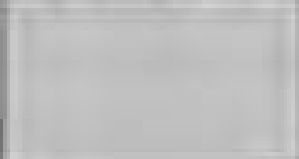
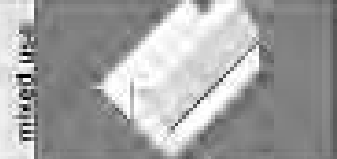
TOWN CENTER

NEIGHBORHOOD CENTER

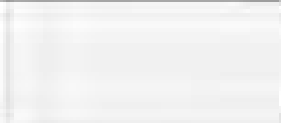
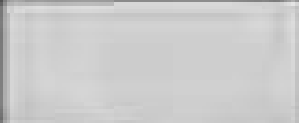
NEIGHBORHOOD GENERAL

NEIGHBORHOOD EDGE

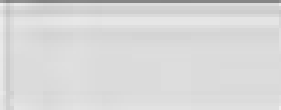
A multi-family typology of small fully detached or row houses or a single building foot print generally supported by concrete, brick, stone, and masonry walls. The ground floor on the street is designed as a storefront entrance for businesses featuring an entrance canopy. The top and bottom level is typically an elevated floor type is proposed only 24-34 foot clear height maximum (minimum height usually over 50 feet)



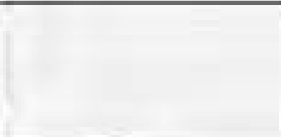
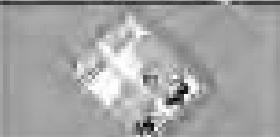
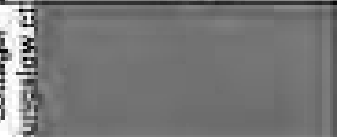
A single-family detached housing type consisting of a dwelling with a ground floor attached to a space reserved for the use of a parking structure, a porch, or a walkway. Two types are defined: one with a front porch to all units from the street and other with direct access from the street and a porch partially open to the street. One type is proposed on a garage of an alley, and has a height of 24-30 foot with lot



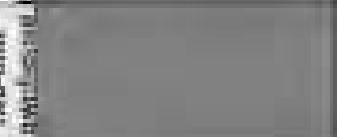
A single-family detached housing type typically located with a porch or covered outdoor porch facing the street and a garage off an alley, and a maximum 18 foot with lot. This form of house often is used to face the street. A double row attached concept is also proposed in a garage of an alley, and has a height of 24-30 foot with lot



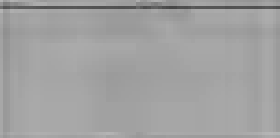
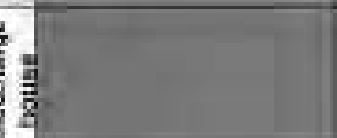
The smallest possible detached single family house type, often used as a dwelling typically located with a porch and a garage facing the street and a garage off an alley, or 20-40 foot with lot. This is used to face the street and a garage off an alley. A detached town in a row of small cottage type houses is also proposed around a courtyard garden



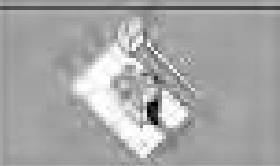
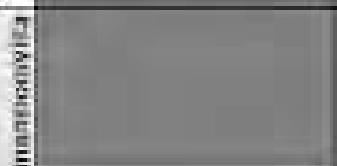
A multi-family, attached bottom row house type with dwelling contained in a row of four houses or attached flats. Designed in the form of a very large single-family house with a porch, and a garage off either a row or a garage off an alley. This type is proposed on 30 foot with lot



A medium detached single family house type typically located with a porch and a garage facing the street, and a garage off either a row or a garage off an alley, or a 24-32 foot with lot. This form of house often is used to face the street. The row house is one type that falls into this category



A very large detached single family house type, typically located with a porch and a garage facing the street, and a garage off either a row or a garage off an alley, or a 24-32 foot with lot. This form of house often is used to face the street. The row house is one type that falls into this category



Building Form Standards



Transect

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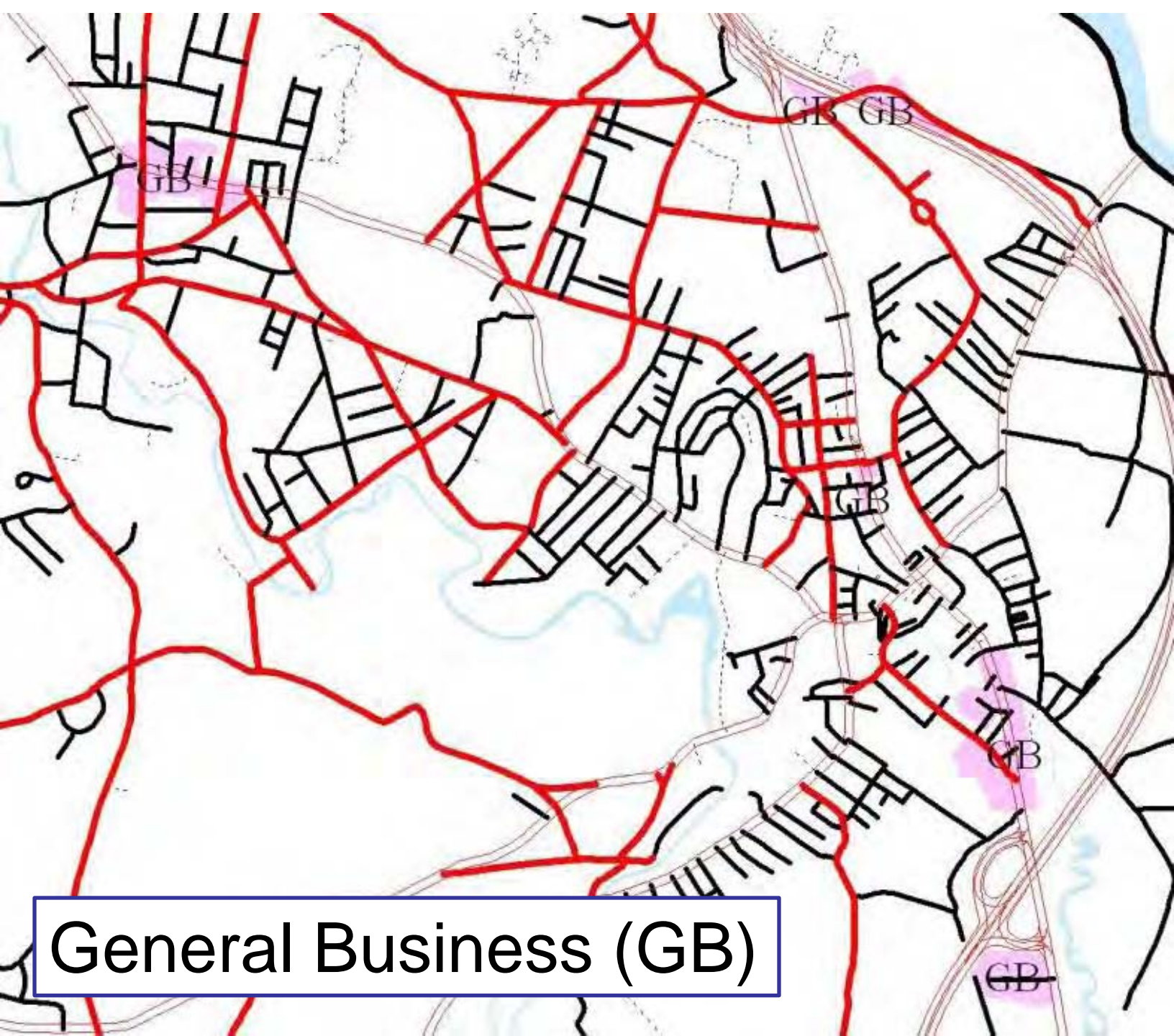
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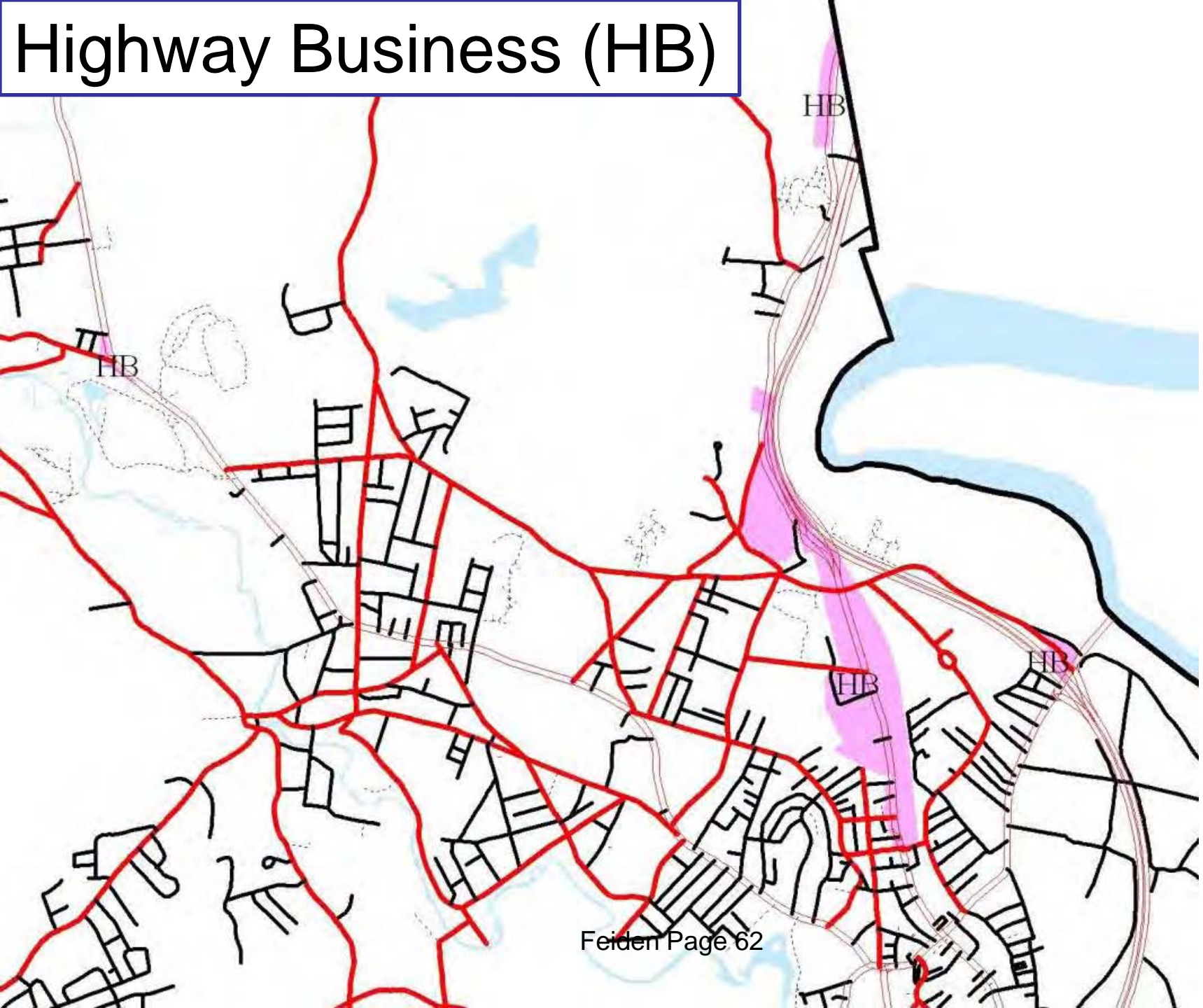
Central Business (CB)



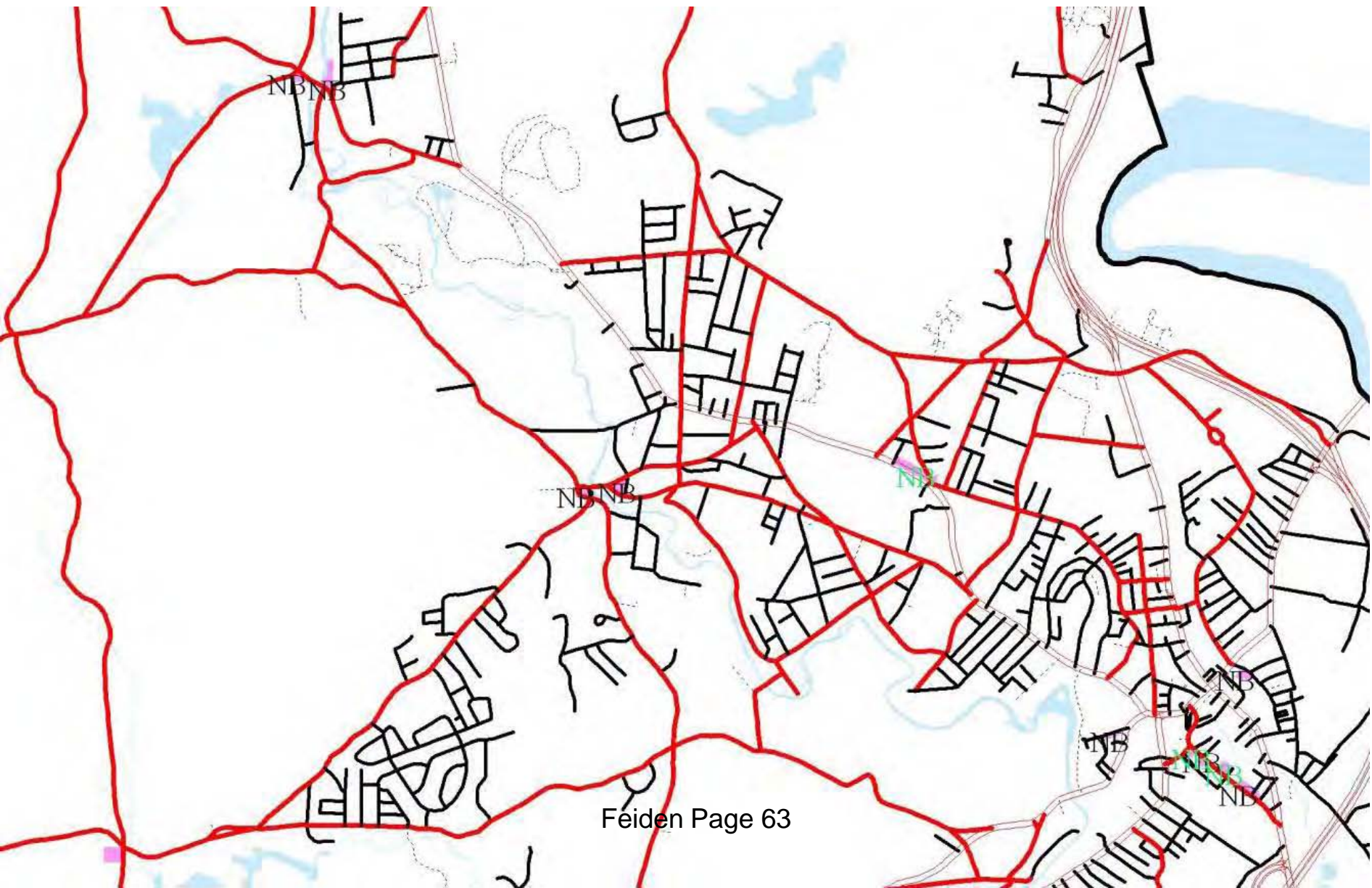


General Business (GB)

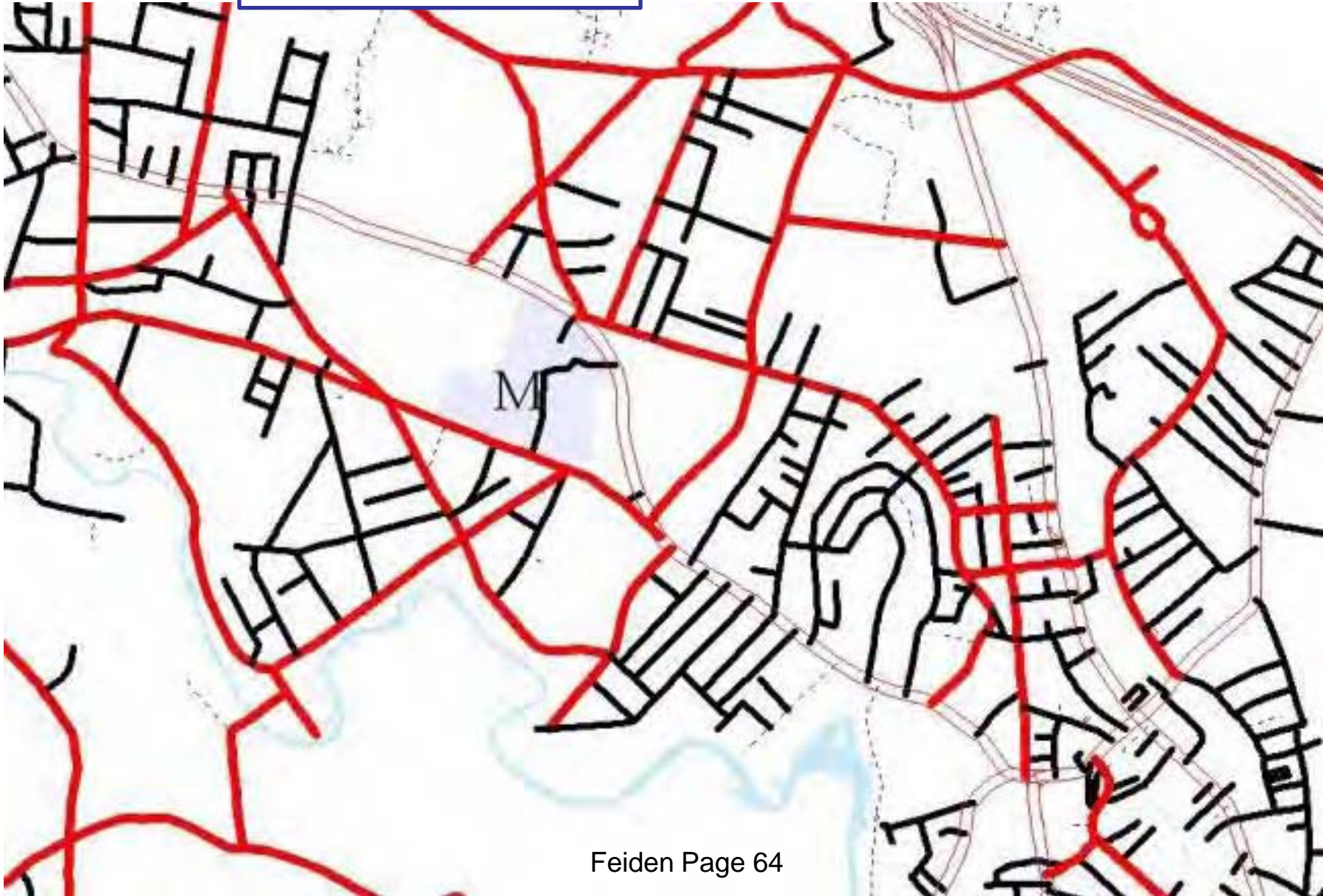
Highway Business (HB)



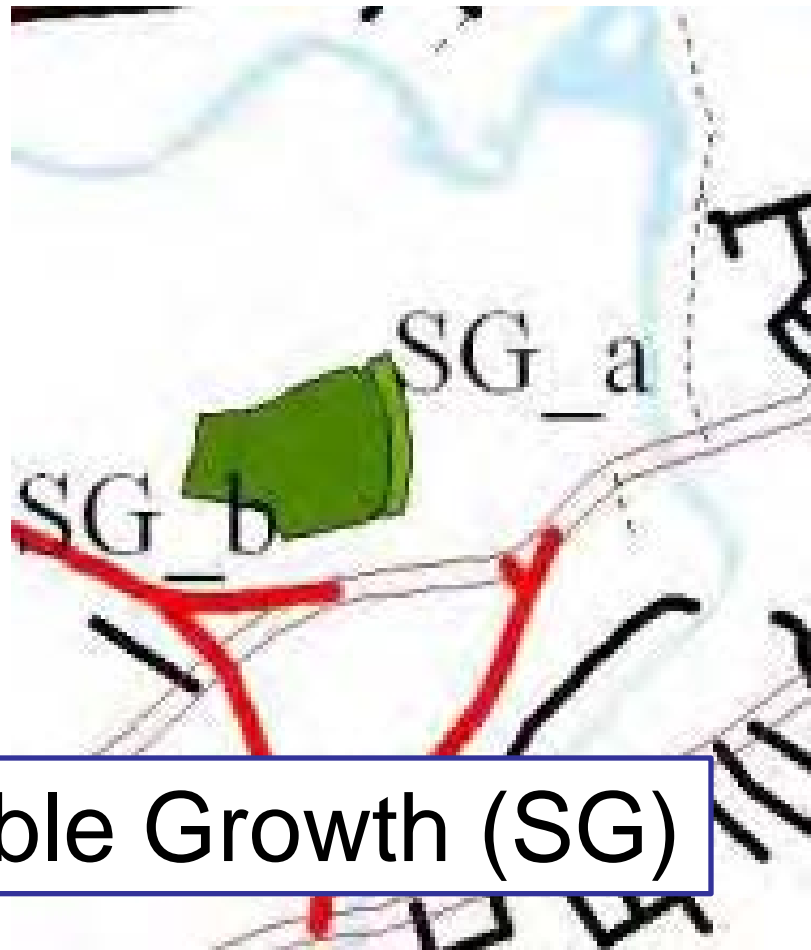
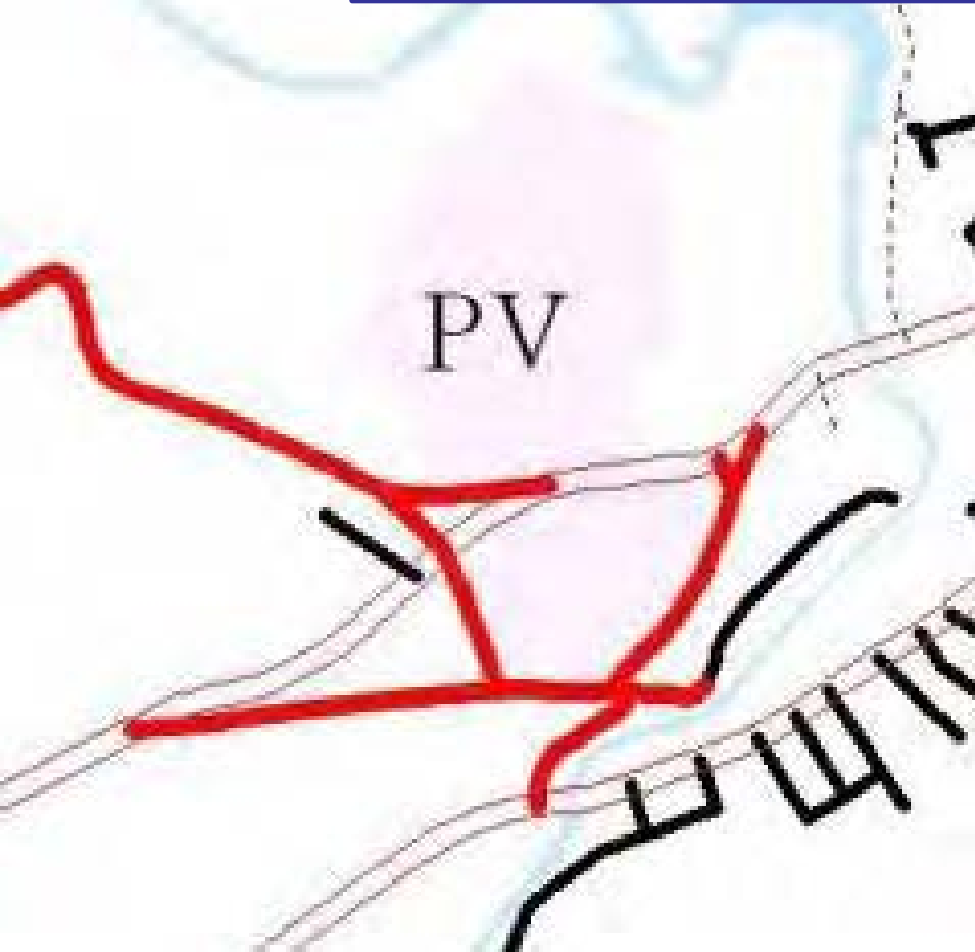
Neighborhood Business (NB)



Medical (M)

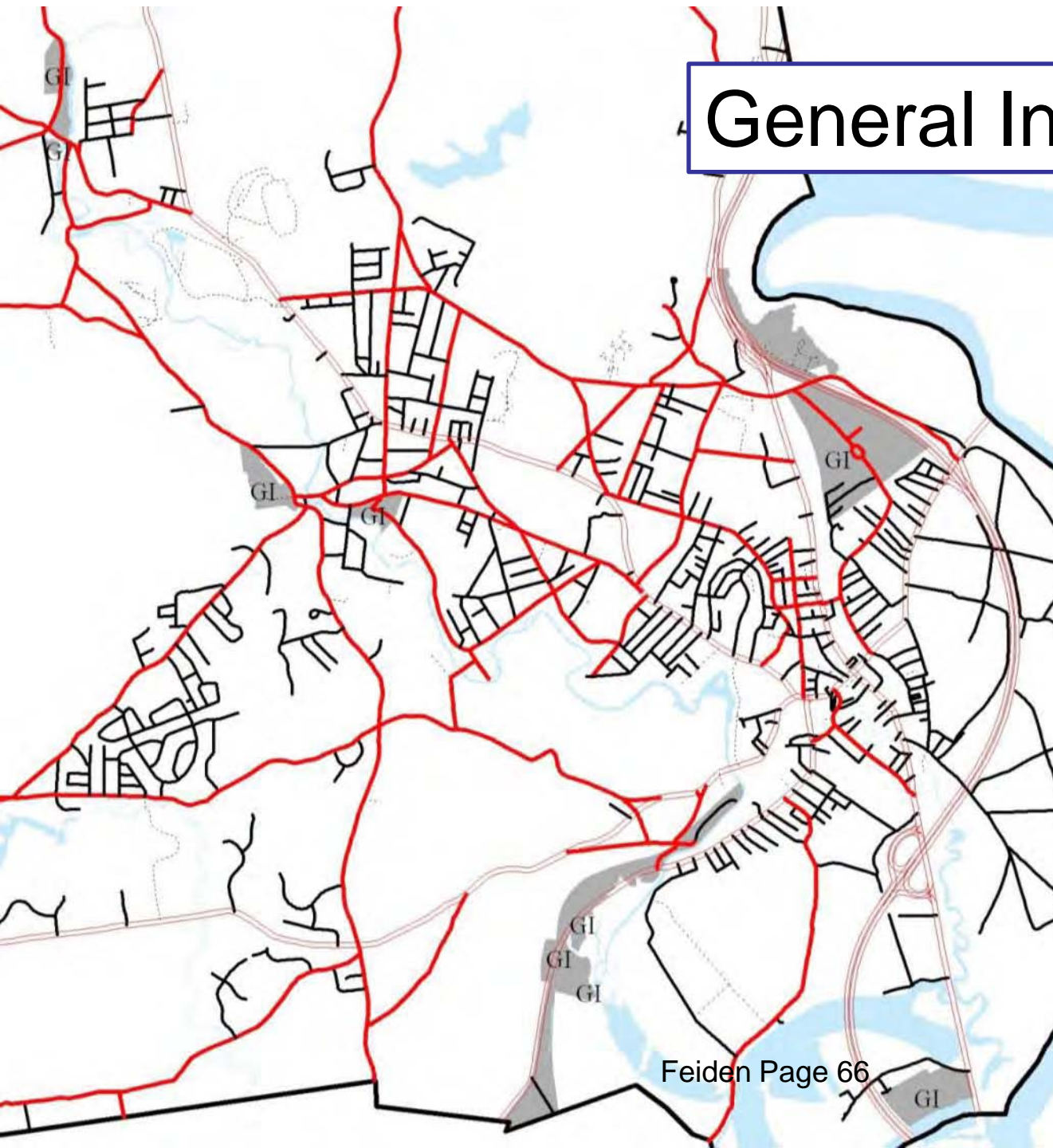


Planned Village (PV)



Sustainable Growth (SG)

General Industrial (GI)



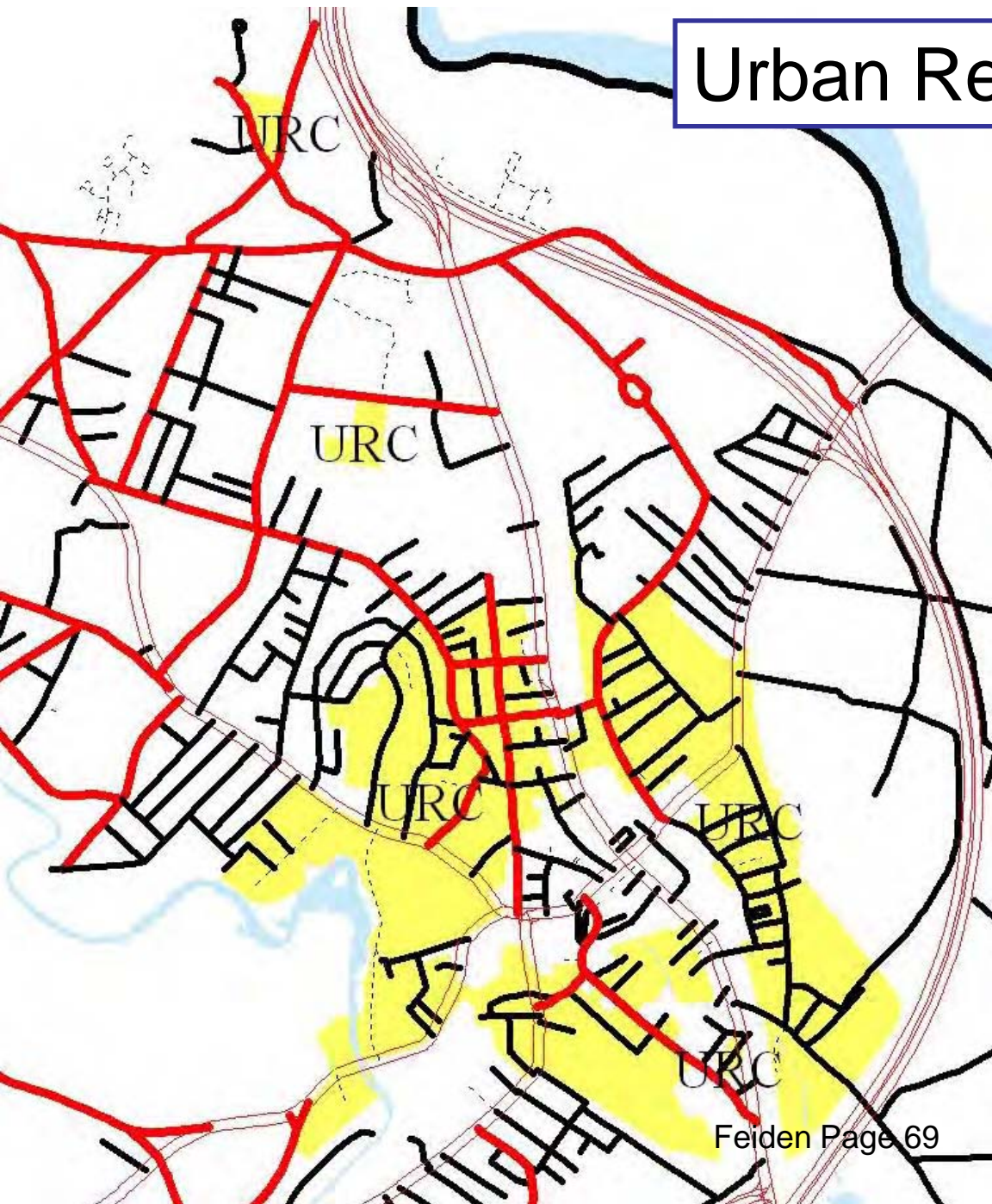
Special Industrial (SI)



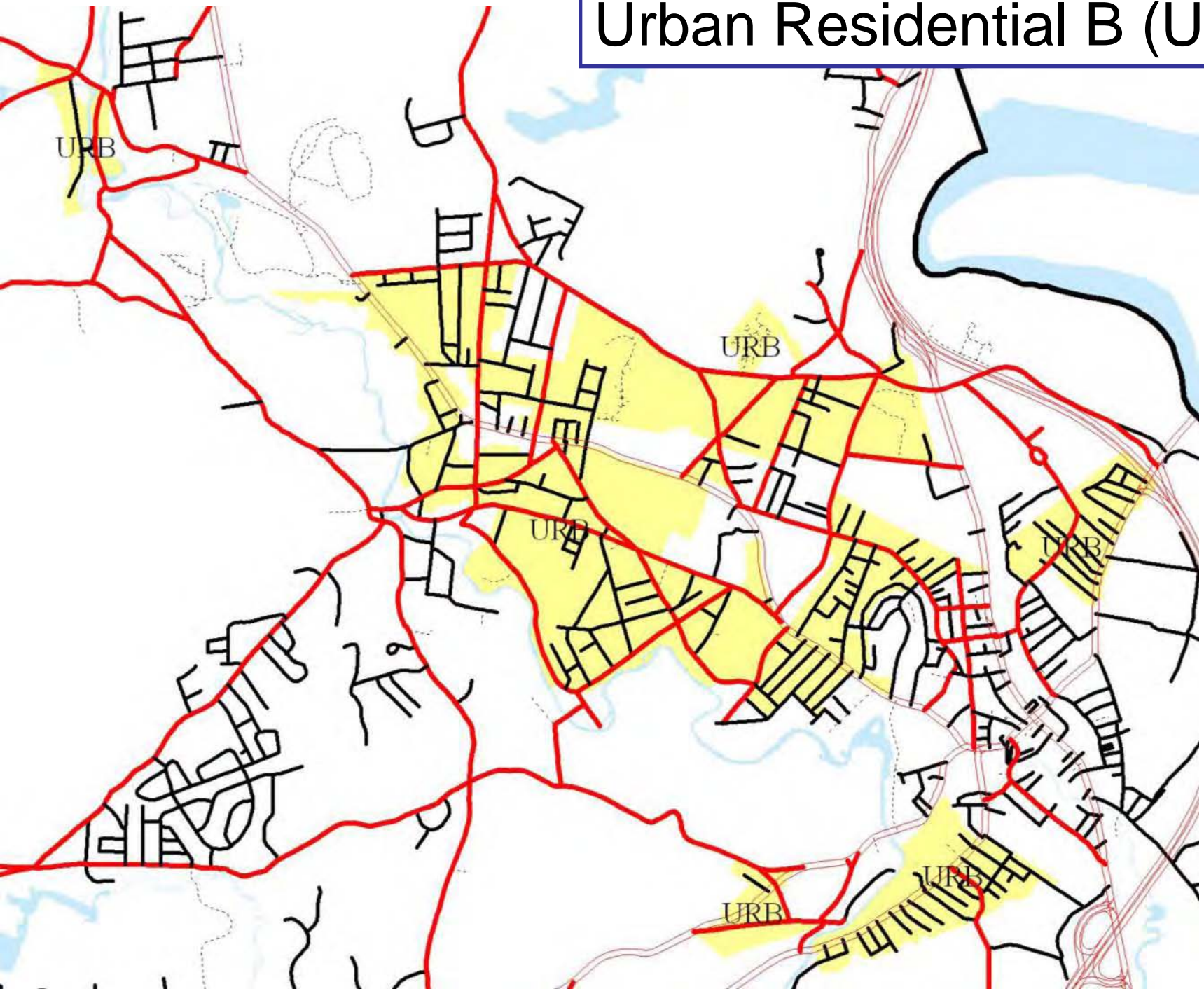
Business Park (BP)



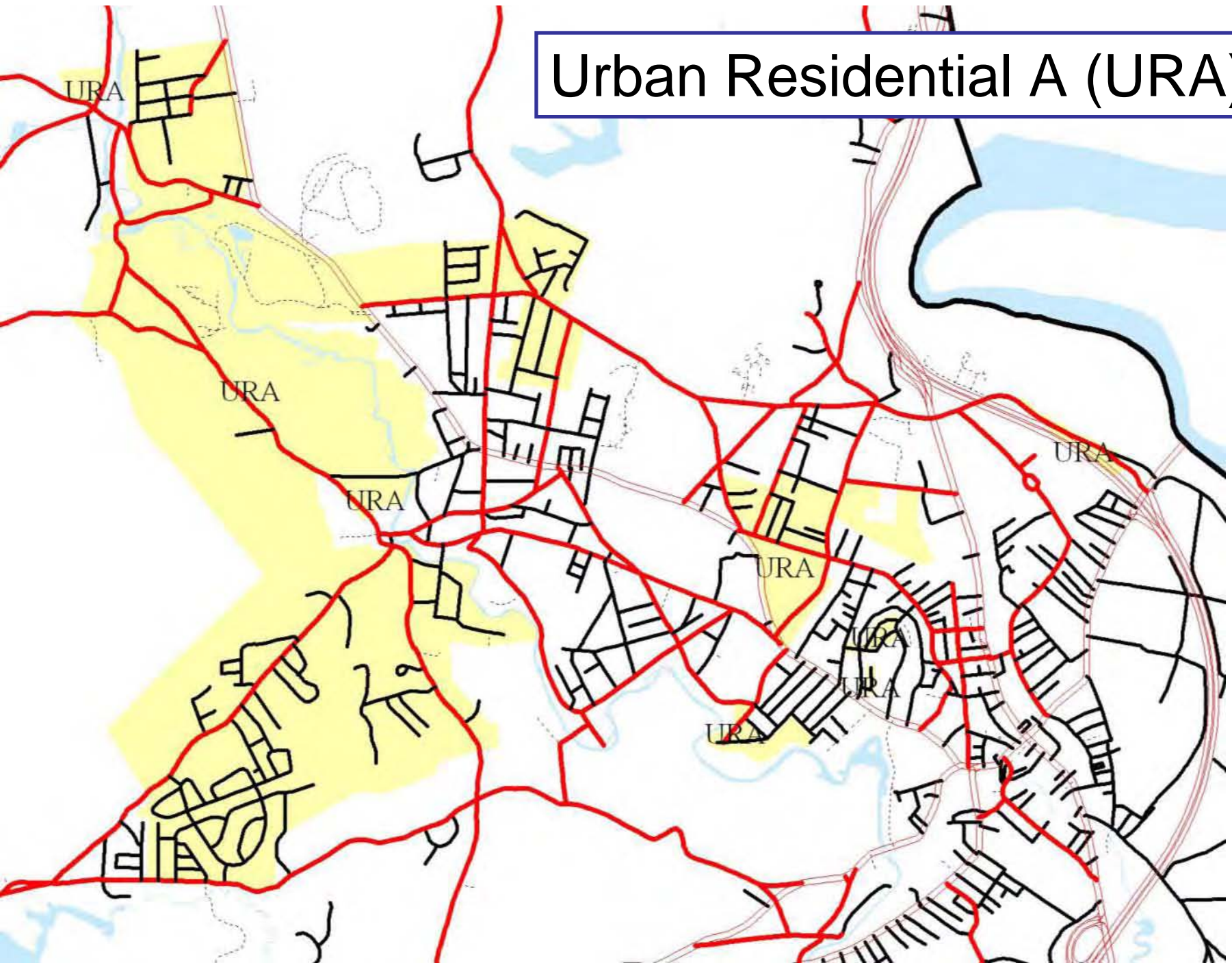
Urban Residential C (URC)

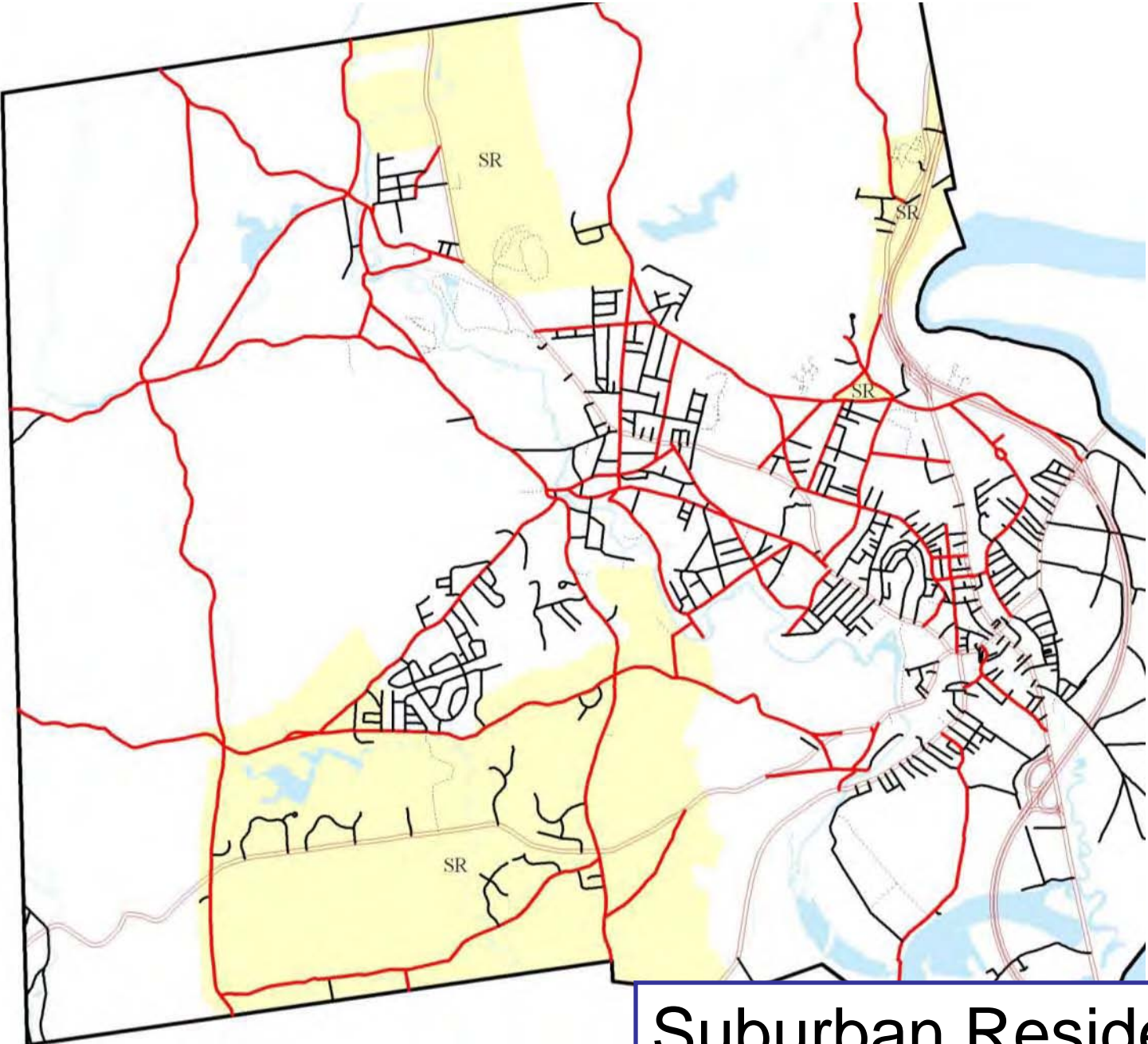


Urban Residential B (URB)

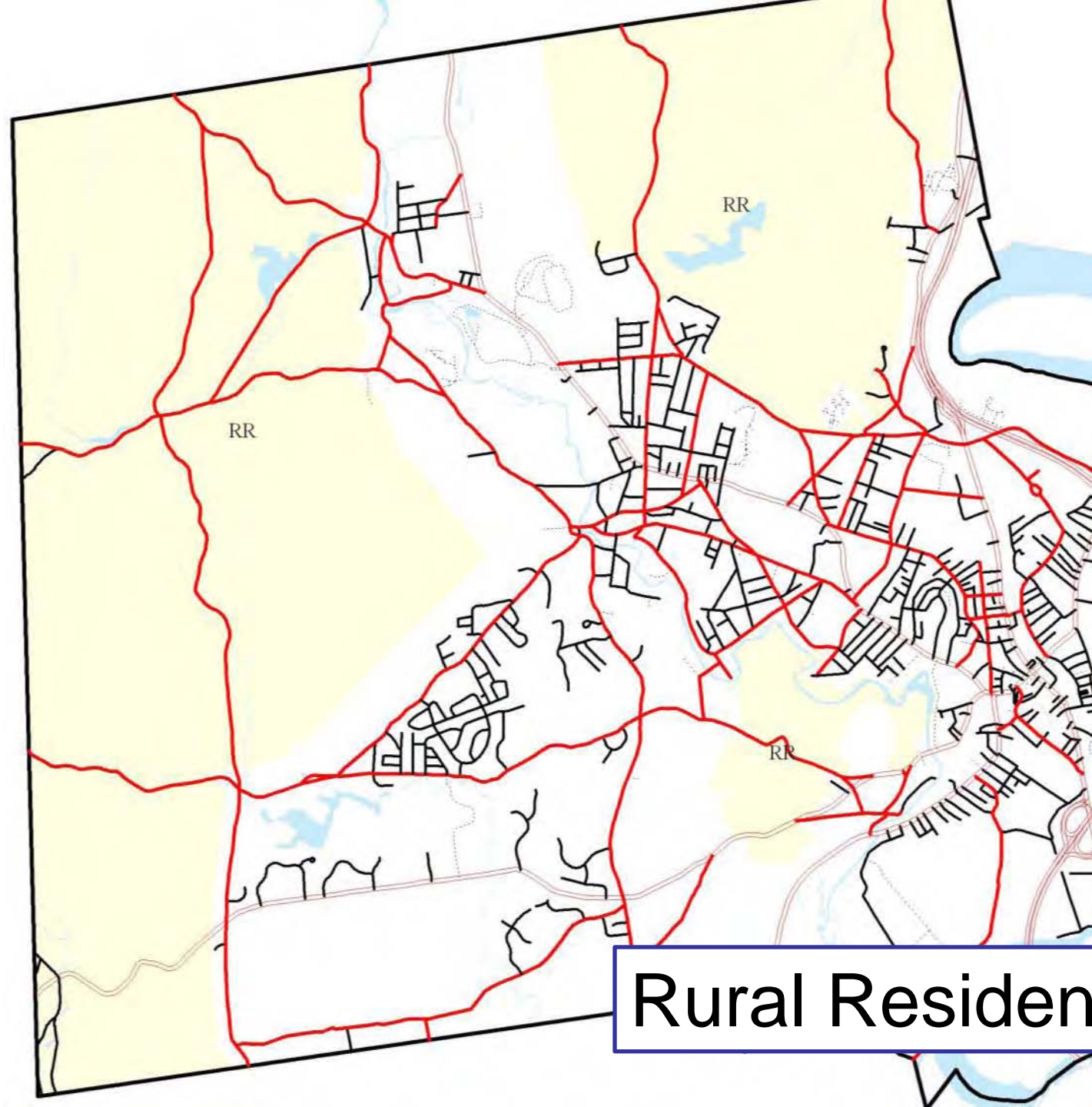


Urban Residential A (URA)



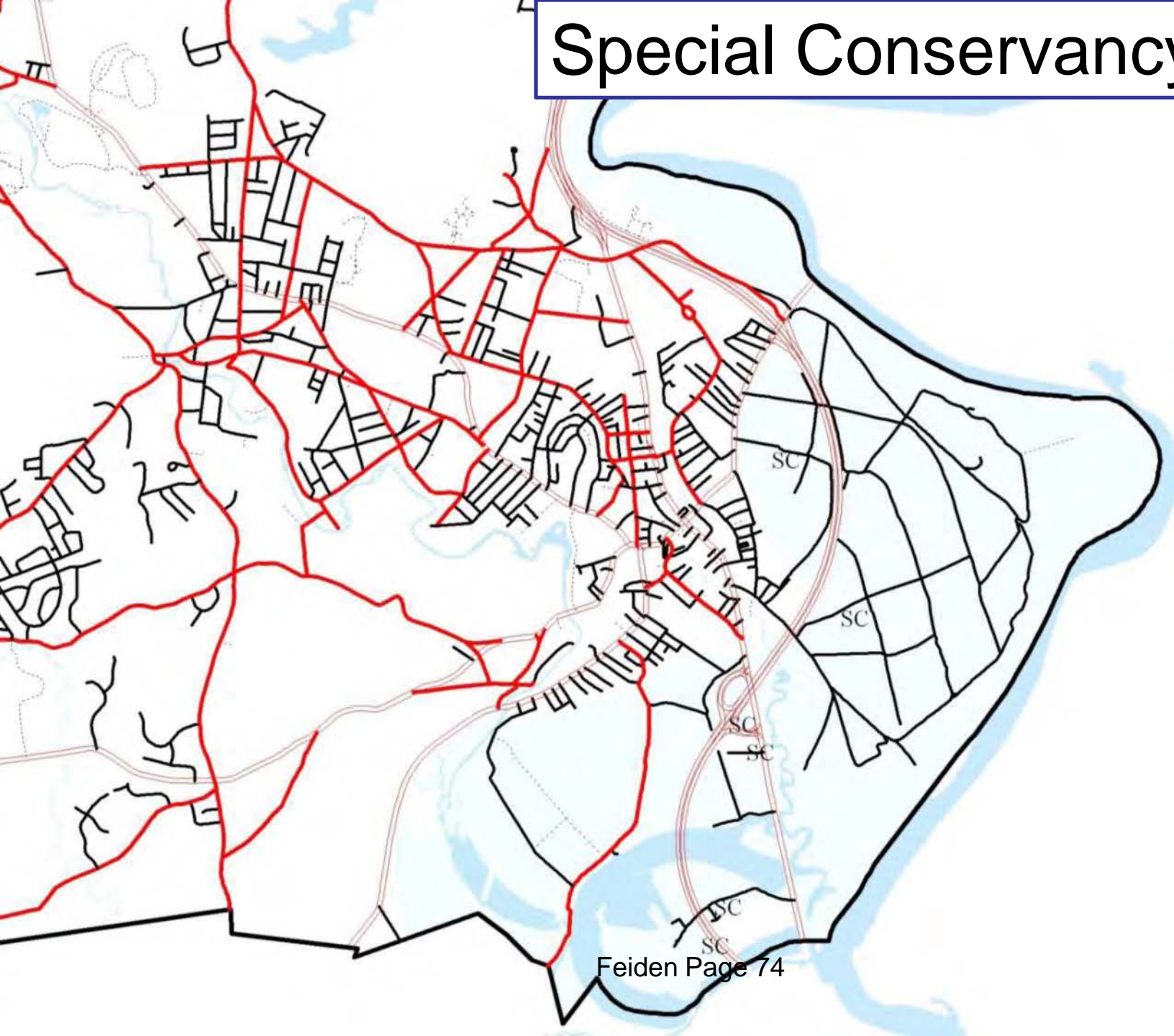


Suburban Residential (SR)

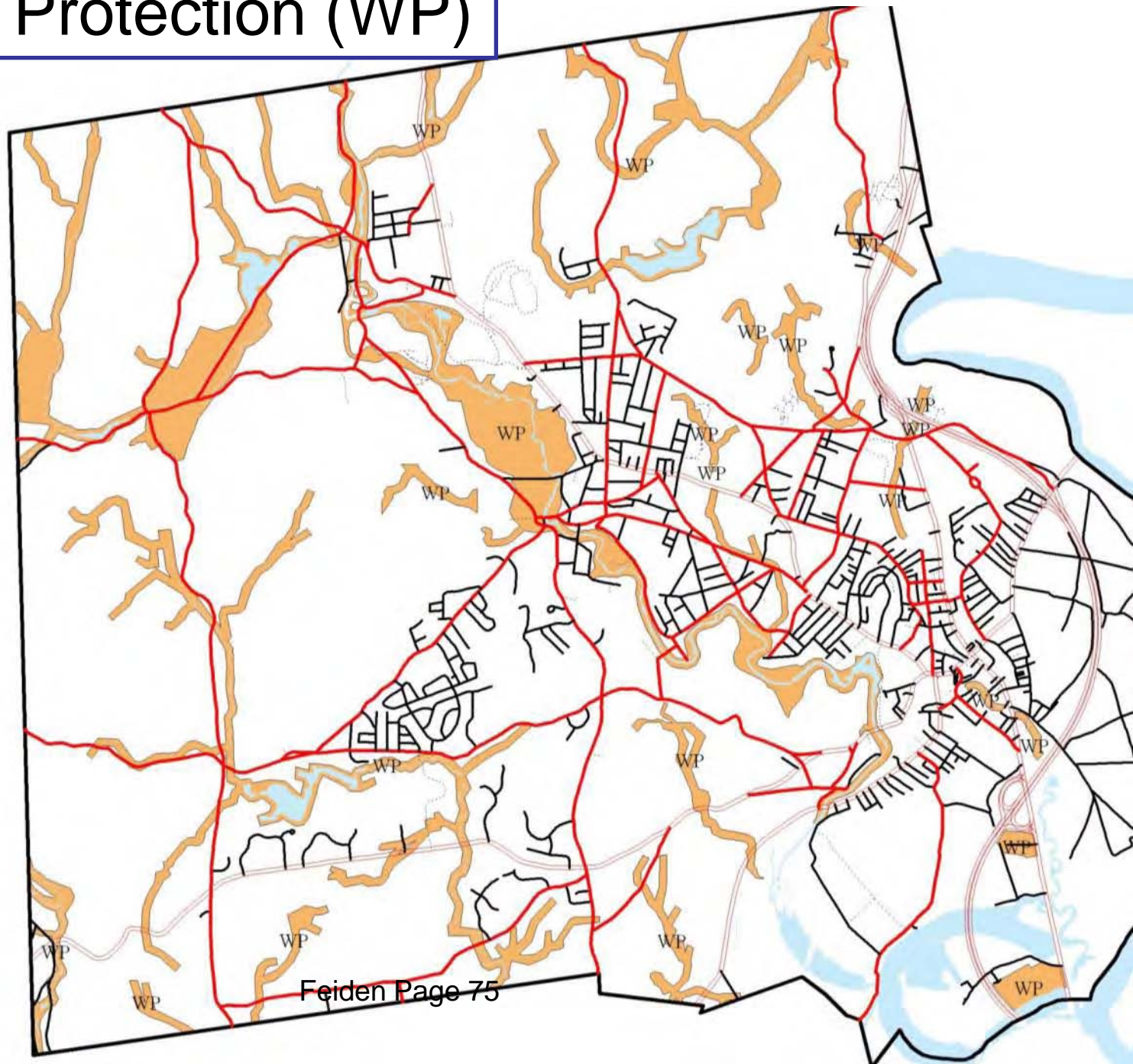


Rural Residential (RR)

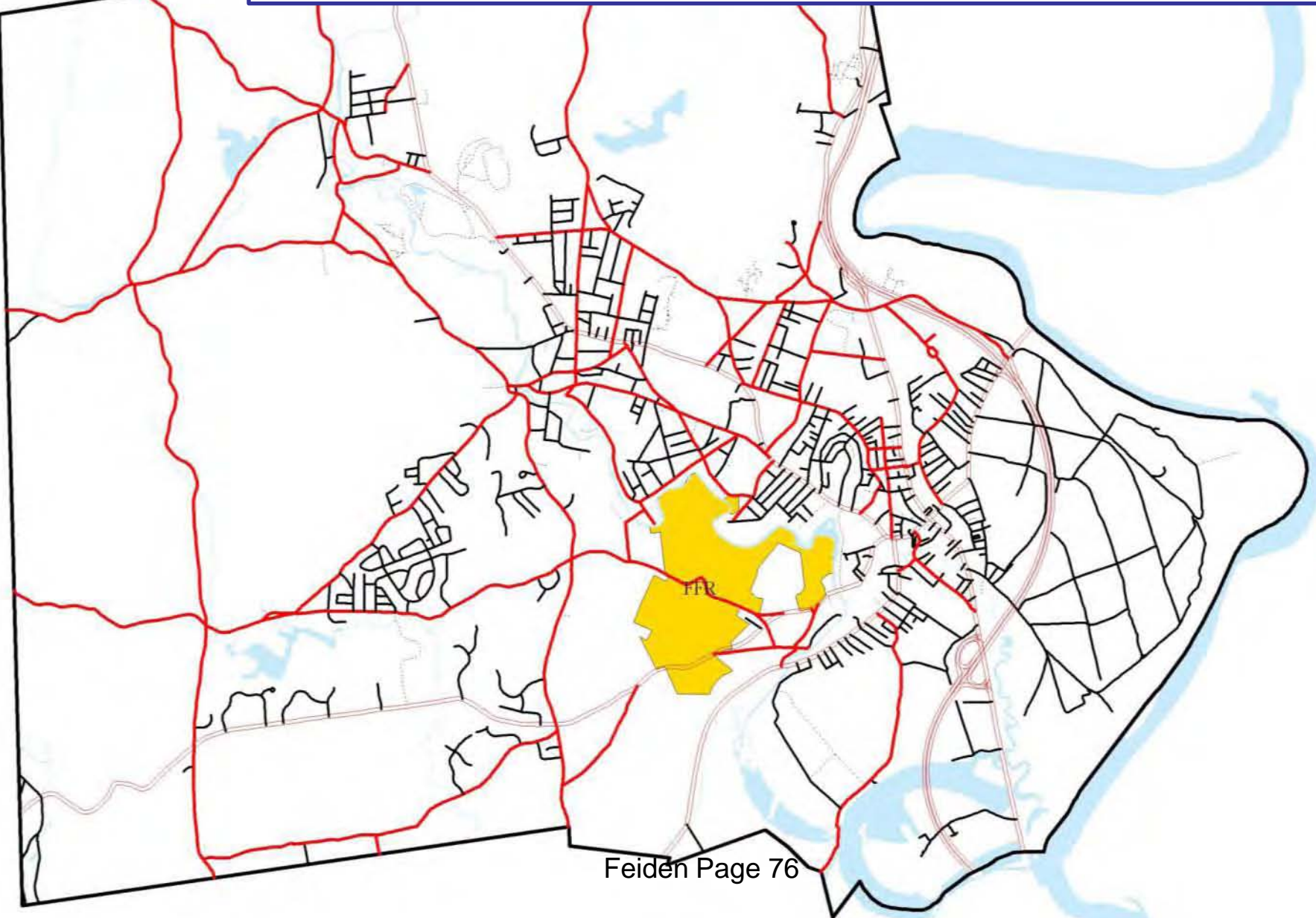
Special Conservancy (SC)



Watershed Protection (WP)

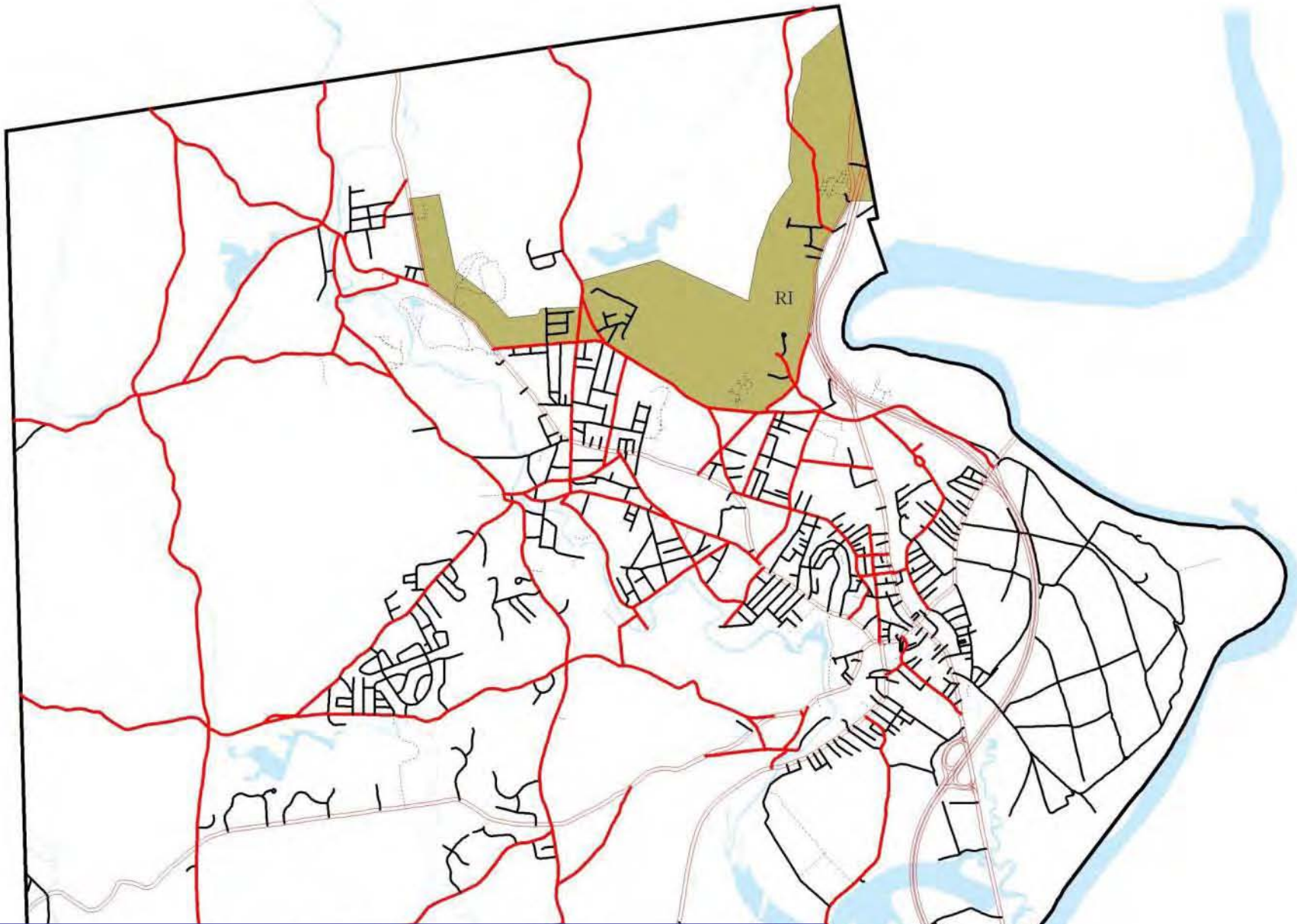


Farms, Forests and Rivers (FFR)

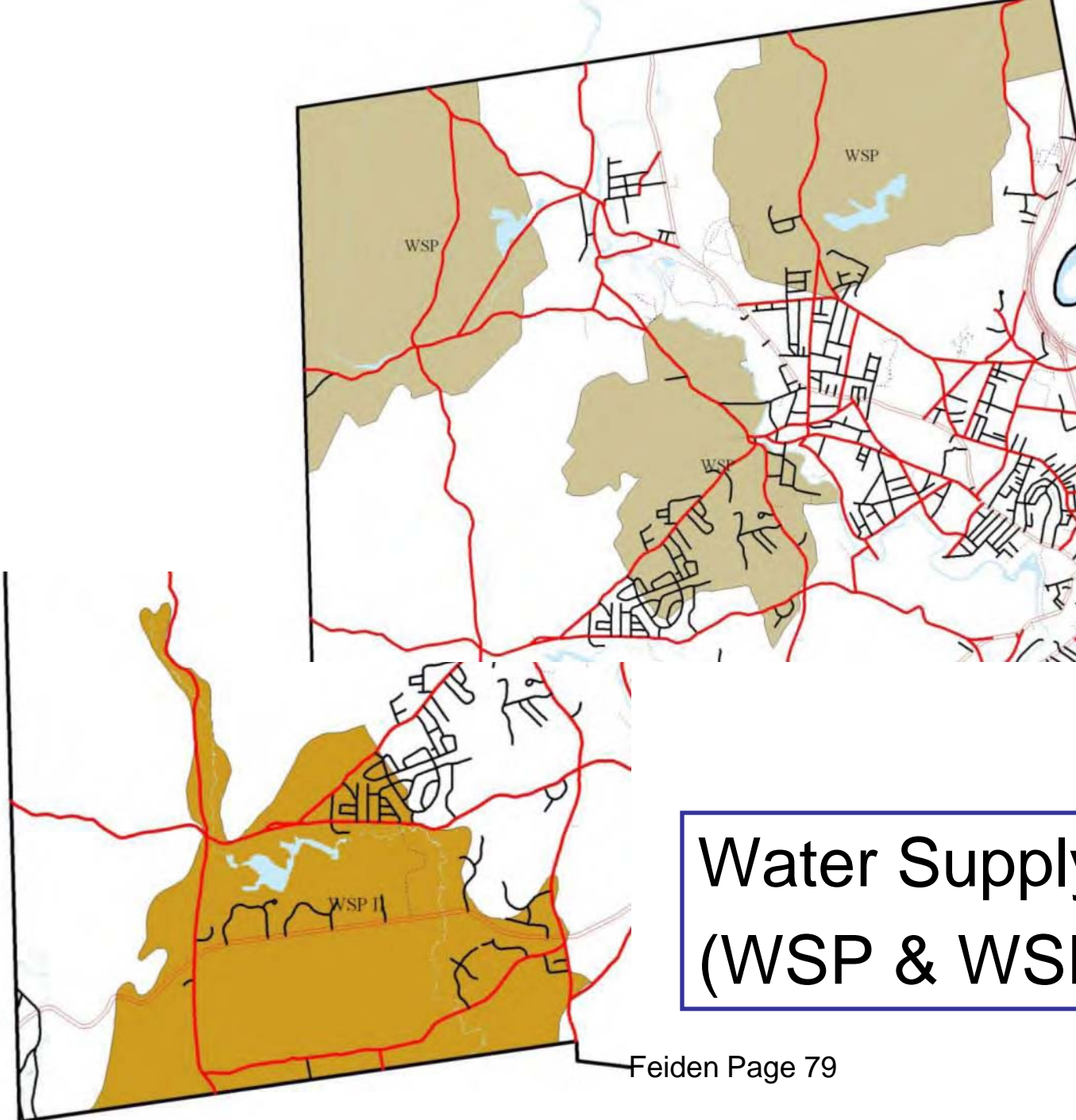


Education Overlay (EU)





Residential Incentive (RI)



**Water Supply Protection
(WSP & WSP II)**

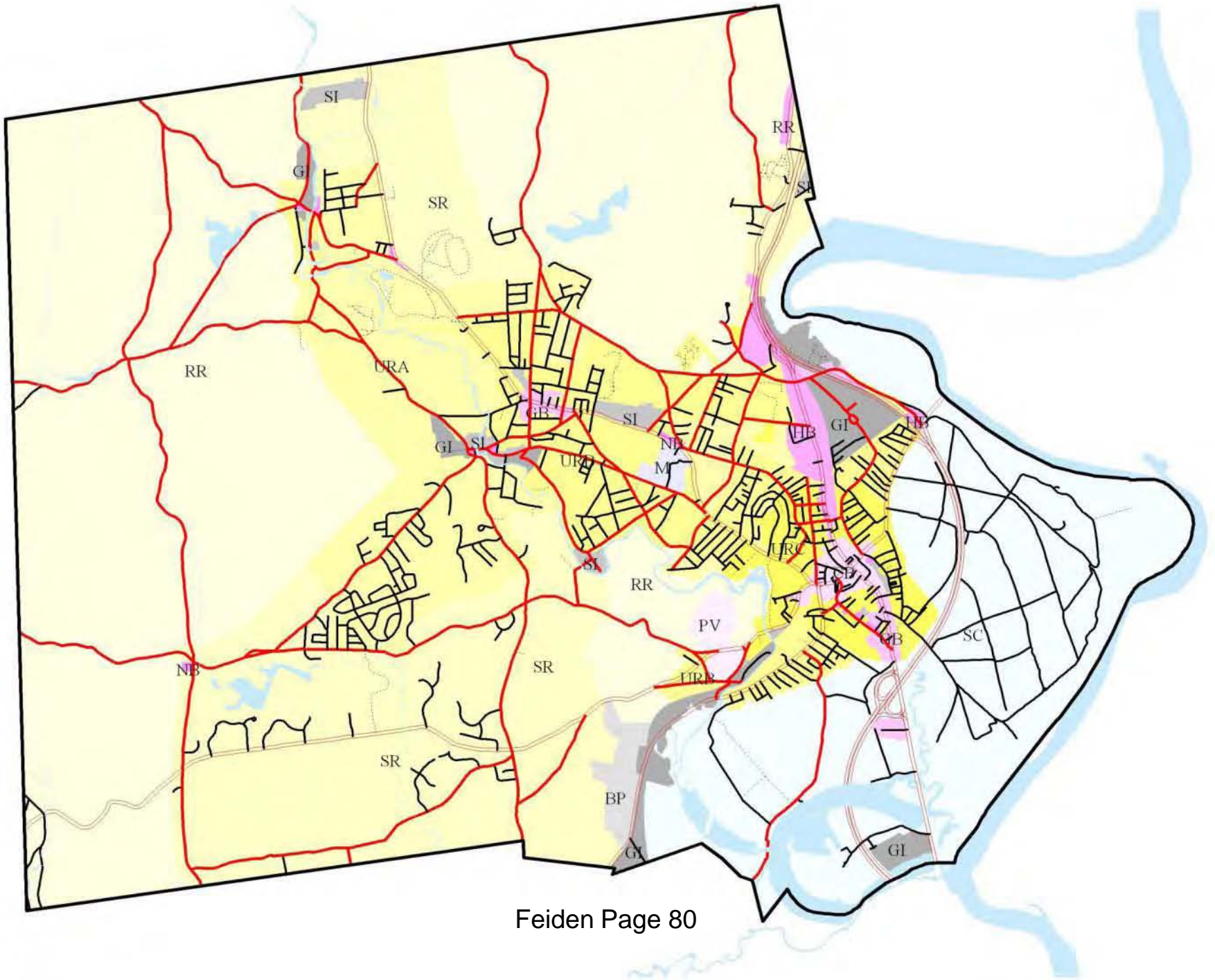


Table of Uses

A Allowed by-right. All uses must be registered with the Building Commissioner and comply with all codes. (Site Plan Approval is often also required for uses above certain thresholds)

PB Allowed by Special Permit from Planning Board

ZBA Allowed by Special Permit from Zoning Board of Appeals

CC Allowed by Special Permit from City Council

Site Allowed with Site Plan Approval from Planning Board

No Not allowed