

# Three Small Housing Reforms with Outsized Potential in Mass.

Speed Zoning Litigation, Give Towns a Shot Clock and Relax the Variance Standard

BY DANIEL DAIN, DOUGLAS TROYER AND NICHOLAS SHAPIRO

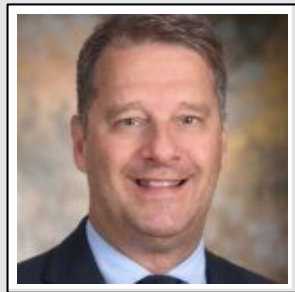
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Dan Dain

Solving the major housing crisis confronting the commonwealth will require bold and big solutions. Some good ones have been discussed and debated to try to spur housing production – should multifamily housing be allowed in every zoning district? Should minimum lot size requirements be capped, allowing the development of smaller lots which can support more overall units?

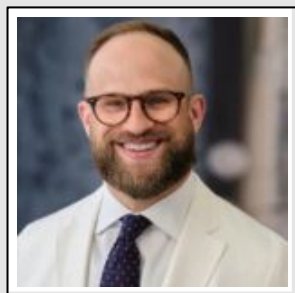
The challenge of potentially transformative ideas, of course, is they often face entrenched and widespread resistance.



Douglas Troyer

How about looking for seemingly minor ideas that could have an outsized effect on housing production? Maybe instead of focusing on substantive impediments to housing production, we should examine procedural impediments.

Indeed, the question of whether excessive permitting processes have constrained the supply of new housing has been the subject of a trilogy of recent books: “[Abundance](#)” by Ezra Klein and Derek Thompson, “[Stuck](#)” by Yoni Appelbaum and “[Why Nothing Works](#)” by Marc Dunkelman.



Nicholas Shapiro

This was the challenge presented by the Real Estate Bar Association’s leaders to the co-chairs of its Litigation, Legislation and Land Use and Zoning sections – the three of us. The bar association leadership knew that its members wanted the organization to support legislative initiatives to spur housing production.

As three lawyers who practice zoning law, could we collaborate to draft amendments to the commonwealth’s Zoning Act, General Law Chapter 40A, which governs municipal zoning in every city and town except Boston, to make the process of securing development permits more efficient and effective? Our directives: respect home rule; increase local discretion to allow more housing; no mandates.

What we came up with has become House Bill 2317, sponsored by Rep. Brian Murray of Milford, and currently under consideration by the Joint Committee on Municipalities and Regional Government. We principally focused on three areas of the zoning process that seem ripe for streamlining.

## Speed Up Litigation, Decision-Making

First, we wanted to make zoning litigation faster and less expensive.

The Zoning Act currently provides for what is called “de novo review” of permits that have been appealed by someone opposed to a municipal board’s zoning decision. Under this process, where all the evidence to support or to overturn the decision must be presented anew in the trial court, litigation can take years and cost hundreds of thousands of dollars.

But there is a faster and less costly model already in place for appeals of state-level permits called record review, where a court simply reviews the permitting record, perhaps supplemented by any necessary consultant reports, without a formal trial with witnesses.

We propose using the state process of record review for appeals of municipal zoning decisions. Second, we sought time standards on municipal zoning decision making.

Often housing proposals are made more costly or ultimately die entirely, through municipal inactivity on pending applications. We proposed reasonable time periods within which local boards must act on applications, unless the applicant voluntarily agrees to an extension.

### **Consider Project’s Benefits, Not Just Harms**

Finally, we believe the standard to secure a variance from the strict compliance with zoning requirements is due for updating.

The current impossible-to-meet variance standard has long been justified on the ground that variances undermine consistency and predictability in how our communities grow and therefore should be difficult to secure.

But that sentiment only made sense when underlying zoning requirements reflected our needs as a society. And in the 1960s, 1970s and 1980s, a period when the city of Boston was in decline, communities across the commonwealth underwent what has been referred to as “the great downzoning,” when municipalities forbade most multifamily housing and mandated large lot sizes.

We now have had several decades to see the consequences of these policies in the form of housing shortages, suburban sprawl and clogged highways.

We’d love to see municipalities embrace up-zoning to meet our needs as a society today, but the battles over the recent MBTA Communities law alone illustrate just how difficult a political process that is.

Instead, we suggest relaxing the variance standard, affording municipalities flexibility to allow greater density where and when they deem it appropriate. Our revised language will let municipalities consider the benefits, not just the detriments, of a proposed project.

House Bill 2317 will not solve the housing crisis. But any gain in process efficiency will help make the production of housing less expensive and that will benefit us all.

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