REBA News

The Newspaper of the Real Estate Bar Association for Massachusetts

Elevating the Practice of Law for over 150 years

Affordable Homes Act Brings Big Changes to 40A

Tuesday, August 13, 2024

By Daniel P. Dain and Jesse D. Schomer

The Governor's press release touting the signing of the Affordable Homes Act on August 6th called it "the most ambitious legislation in Massachusetts history to tackle the state's greatest challenge – housing costs." The press release describes the "historic legislation" as authorizing "$5.16 billion in spending over the next five years along with 49 policy initiatives to counter rising housing costs caused by high demand and limited supply."

This statement is an important acknowledgment that rising housing costs are tied to limitations on the supply of housing, and, by implication, barriers to new housing production. Among the 49 policy initiatives contained in the new law are changes to the state's Zoning Act, and General Law Chapter 40A (which applies to 350 municipalities in Massachusetts, excluding Boston). The change to the Zoning Act getting the most attention is a provision making accessory dwelling units allowed as of right, though subject to reasonable dimensional restrictions, in all single-family residential districts. But three other changes, while seemingly mundane, also promise to open up more lots for residential development and limit the ability of neighbors to make housing production more unpredictable and costly through long drawn-out appeals. These changes are to the merger doctrine, to the ability of courts to impose a bond on a plaintiff as a condition of proceeding with an appeal of the grant of a zoning entitlement, and to the burden on plaintiff project-opponents to establish an injury (prove standing) caused by the decision being challenged. (There are two other material changes to 40A that do not address housing production – new rules for approval of outdoor restaurant table service and for the adoption of preferences for veterans in inclusionary zoning – that this article does not discuss.)

For housing advocates, more liberal allowance of accessory dwelling units (sometimes called granny flats) has long been a priority. Recent surveys showed that even in those municipalities that permitted accessory dwelling units, they were often subject to restrictions and limitations that made their production unpractical – such as the need for discretionary special permits, parking and dimensional requirements, and requirements that the ADU be occupied only by family members

related by blood. As a result, few such units have ever been built in Massachusetts – certainly not enough to make a dent in housing prices.

The new rules in the Affordable Homes Act seek to change that balance by allowing one accessory dwelling unit (which may not exceed half the floor area of the principal dwelling or 900 square feet, whichever is smaller) as of right on all lots in single-family residential districts (outside of Boston), subject only to "reasonable regulations", including site plan review, dimensional requirements, and restrictions on short-term rentals. Municipalities may not require more than one parking space per ADU in most locations and they may not require any additional parking where the ADU is located within a half mile of a transit station. The statute now also provides for a special permit to allow more than one ADU on a single lot.
This is a significant breakthrough in advancing housing production, but two considerations counsel caution. First, the allowance of site plan review for ADUs, as was also allowed for MBTA Communities projects, is disappointing. Site plan review is not governed by the Zoning Act, the process varies widely across municipalities, and the application typically requires that those proposing an ADU retain an engineer, architect, attorney, and/or other consultants. While municipalities generally may not deny approval of a site plan, reviewing authorities do have broad discretion in their imposition of conditions, and local site plan review procedures frequently do not impose mandatory time limitations. This is a lot of time, expense, and process for a single unit that cannot exceed 900 square feet. Second, due to historic down-zonings across the Commonwealth, many homeowners who might be interested in adding an ADU currently live on a lot that is undersized or in a house that is at or near its FAR limit, and thus these proponents would need to seek a Section 6 finding or variance for a proposed ADU, further burdening the process. Thus, we will have to wait and see whether this change in rules will unlock enough new production as to make a material difference in the housing market.

Another long-frustration for housing advocates is how so many undeveloped lots around the Commonwealth have been rendered unbuildable through judicially-created merger doctrine case law that developed based on the premise that over time, lawfully pre-existing non-conformities, created through municipal down-zoning efforts to discourage density in housing, should be eliminated by requiring undeveloped parcels to "merge" with adjacent non-conforming developed parcels where both are jointly owned and the merger would eliminate or ameliorate the non-conformity. While the new language in the Zoning Act leaves the merger doctrine in place, it carves out an exception for lots in zoning districts that allow single-family residential use that contain at least 10,000 square feet of area and 75 feet of frontage. Houses built on these lots may not be used as seasonal homes or short-term rentals, may not exceed 1,850 square feet of "heated living area", and – curiously – must have at least three bedrooms.

On its face, this provision seems intended to promote "missing middle" housing and starter homes. However, the restriction of the exemption to only small lots limit the reach of this provision, and, in a Commonwealth with high construction and land-acquisition costs, the restriction to small year-round homes (but with at least three bedrooms) may make construction on lots saved from merger financially unviable.

Changes to the provision of the Zoning Act that governs zoning appeals (Section 17) are meant to address the ability of plaintiffs with dubious claims to standing or unrealistic chances of overturning a decision on the merits to nevertheless tie up development through protracted litigation that adds to the cost and uncertainty of development (and, when these costs are added to a pro forma, kill a certain percentage of proposed projects even before the litigation concludes). In 2020, the General Court amended section 17 to add a bond provision of up to $50,000 "to secure payment of costs." That provision was then rendered largely ineffective by the Supreme Judicial Court in the 2022 case of *Marengi v. 6 Forest Road, LLC*, which mostly limited the "costs" to be secured by the bond to taxable litigation costs (which are usually modest and exclude attorneys' fees, carrying/delay costs, and lost profits) and conditioned the imposition of a bond on a finding of "bad faith or

malice," a nearly impossible standard to prove, particularly at the outset of a case. The Affordable Homes Act's changes to the bond provision effectively overrule much of the holding in *Marengi*, by adding the language that such a bond is to "secure the payment of and to indemnify and reimburse damages and costs and expenses incurred in such an action…" and that such a bond is not conditioned on a finding of bad faith or malice. The new language is closer to the bond provision under St. 1956, c. 665, § 11, applicable in Boston, which may provide guidance on interpreting the new language in chapter 40A. See the recent *Shoucair v. Board of Appeal of Boston*. The revised provision also increased the bond cap to $250,000.
The most interesting language here is the added words "indemnify and reimburse." One of the arguments for limiting bonds to taxable costs was that, in most cases, those are the only post-litigation expenses that a defendant can recover against a plaintiff absent a counterclaim (which is rarely brought in zoning litigation because of the Anti-SLAPP statute) – the bond amount should not be more than a defendant is able to recover post-disposition, so the argument went in part. But the new language might promise more post-disposition. The bond amount is meant to indemnify and reimburse – indicating it will be released in full to the defendant upon an outcome successful to the defendant – in an amount that would include "damages" from the litigation and other "expenses" beyond what was already encompassed within "costs", probably including delay/carrying costs, such as property taxes, property insurance, and interest on construction loans incurred while a project is on hold during litigation. The full scope of this new bond provision will probably have to wait for further court guidance.

Finally, the right to appeal a zoning entitlement under Section 17 has always been limited to "person[s] aggrieved" (those with standing) by a local decision, the contours of which have been developed by five decades of Zoning Act jurisprudence. The insertion of a single new sentence in the first paragraph of section 17 would appear, at a glance, as a simple summary of that existing standing jurisprudence – plaintiffs have the burden to prove a special and different injury by credible evidence. But a closer examination of the language indicates a change that is much more far-reaching. Let's parse those parts of the new language that constitute changes or clarifications to existing case law. First, the standing burden falls on "each plaintiff." This is a change – currently, if any one plaintiff has standing, then all named plaintiffs have standing. Why is this important if you only need one plaintiff to prosecute a zoning appeal? Because the court-made rule makes settlement of zoning appeals with multiple plaintiffs much harder if every plaintiff, even those with little claim to standing (who, in many zoning appeals, are funding the litigation), must approve a settlement. Thus, this simple change to the rule makes settlement of zoning appeals easier. Second, the burden on a plaintiff to "sufficiently allege and … plausibly demonstrate" an injury is irrespective of the plaintiff being a party-in-interest under section 11 of the Zoning Act. Before, any plaintiffs who were entitled to a hearing notice enjoyed a rebuttable presumption of standing (this comes from *Marotta v. Bd. of Appeals of Revere*), which met their pleading burden, and imposed a burden of production on the defendant project-proponent. The new language appears to eliminate the presumption of standing for abutters, abutters to abutters, and those who live directly across a street from the subject lot. Third, standing must be based on a "measurable injury." This language tracks from the Supreme Judicial Court's 2011 decision in *Kenner v. Zoning Board of Appeals of Chatham* that standing requires demonstration of an actual injury, not just impact (e.g., simply hearing noise or seeing a building versus actually suffering an injury from such noise or sight). Finally, the language requires that the injury will "likely flow" from the decision. To date, courts have been inconsistent in requiring that a plaintiff demonstrate causation or nexus between the decision (as opposed to the building) and the alleged injury. For example, if the zoning relief is only to parking requirements, must the injury be limited to parking? The new language indicates yes, there must be a nexus, and the nexus must be "likely," not merely plausible. These all appear to be significant changes or at least significant clarifications to existing standing law and should help eliminate appeals from those with more tenuous claims to standing.

There currently are few impediments to a project-opponent tying proposed new housing up in court for years. The changes to the Zoning Act seek a rebalance, preserving the right to appeal to those who will suffer a demonstrable injury and with a valid argument on the merits, while more quickly screening out the frivolous and nuisance cases.

The authors respectively head up the litigation and affordable housing development practices at Dain, Torpy, Le Ray, Wiest & Garner. Dain Torpy also worked with NAIOP Massachusetts: The Commercial Real Estate Development Association to help draft the language that made it into the final version of the changes to G.L. c. 40A, § 17 described in this article.

Dain Torpy is a REBA Law Firm Sponsor.

Co-chair of the Association's Affordable Housing Section, Jesse's legal practice focuses on Massachusetts real estate development, land use, and zoning/permitting. He primarily represents developers, entrepreneurs, and landowners in the context of residential and commercial land use permitting, development, and construction. Jesse can be contacted at jschomer@daintorpy.com.

A co-founder of what is today Dain, Torpy, Le Ray, Wiest & Garner, PC, Dan Dain Co-chairs the Association's Litigation Section. He is also president and chairman of the firm which is the premier boutique law firm for the commercial real estate industry in Massachusetts. He has authored A History of Boston, published in 2023. Dan's email is ddain@daintorpy.com.