

Budget bill brings seismic changes to state's Zoning Act

Drafters sought to respect home rule

Kris Olson//August 3, 2026//

With a stroke of her pen, Gov. Maura T. Healey recently sent the standard by which local zoning boards assess requests for variances out into uncharted waters.

Whether attorneys think that is a good thing depends on if they represent developers or municipalities.

The Legislature included significant revisions to the state's Zoning Act, G.L.c. 40A, in the budget bill that Healey signed into law on July 9. Courtesy of an emergency preamble, those changes took effect immediately.

Of the changes, the most impactful is the overhaul given to §10, which governs variances, attorneys agree. Previously, local permitting authorities were instructed to grant variances only if a failure to do so would “involve substantial hardship, financial or otherwise, to the petitioner or appellant.” Their inquiry was also confined to the “soil conditions, shape or topography” of a lot. Decades of court decisions helped flesh out those key criteria.

Now, the permitting authority's task is far different. Gone is the term “substantial hardship.” In its place is a lower standard: “practical difficulty.”

In addition, zoning boards are now required to “weigh the benefits to the appellant or petitioner and to the public interest, including the interest in supporting the production of housing against the detriment to the public health, safety and welfare of the neighborhood.”

Beyond the major change to the variance standard, another revision to §10 entitles applicants to request use variances — explicitly prohibited under many local zoning bylaws — if the use they are seeking is a residential one.

Meanwhile, there are also changes to §6 of the Zoning Act. One allows preexisting nonconforming structures to be altered as of right, if the alteration still complies with dimensional regulations regarding height, stories and setbacks.

Zoning freeze protections have also been beefed up, not only by extending the freeze period from 12 to 24 months but by tolling the 24-month period while an applicant is actively seeking or obtaining other necessary permits. One goal of the

changes is to thwart efforts to enact impromptu zoning changes when residents want to stop a controversial project.

The process that led to the recently enacted changes in the Zoning Act began in late 2024, when Real Estate Bar Association Executive Director Peter Wittenborg convened a committee to hatch ideas to encourage housing production.

Boston lawyer Daniel Dain was tapped as chair and joined by fellow Boston lawyer Nicholas P. Shapiro and Douglas A. Troyer of North Andover.

“This was shortly after the MBTA Communities [Act],” Dain said. “We’d seen how much pushback there was, so we wanted to do something that would be significant and material but was more process oriented as opposed to a mandate.”

They also wanted to respect “home rule,” Dain added.

“We thought that this needed to be a process where the municipalities still felt that they were in charge,” he said. “We didn’t want to take away municipal discretion to make their own land use planning decisions.”

The package of reforms went on “a year-and-a-half journey through different committees and subcommittees and hearings,” with the bulk of the proposals making it into the budget bill, according to Dain.

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— *Nina L. Pickering-Cook, Boston*

But while REBA and its lobbyist had the Legislature’s ear, municipal lawyers and organizations such as the Massachusetts Municipal Association were cut out of the loop.

The zoning reforms “took a lot of folks by surprise,” said Boston attorney Nina L. Pickering-Cook, who serves as town counsel in Acton, Bedford and Dover.

“From what I have been hearing from planners and municipal lawyers, they didn’t have an opportunity to get their two cents put in here, and now they’re kind of scrambling to make sense of some of this that, if they had had a seat at the table, could have been hashed out in the normal legislative process,” she said.

A clean slate

At this early stage, no one knows how the courts will interpret “practical difficulty” or assess whether a zoning board properly executed the balancing test.

“We’re talking about basically gutting 50 years of case law that interpreted the variance standard,” said Boston land use and zoning attorney Gerry D’Ambrosio. Land use lawyers long ago accepted the fact that if one of their clients was denied a variance, there was no point in even filing an appeal. Even successful variance petitions were very vulnerable to abutters’ challenges, so long as they could establish standing.

“In 30 years of doing land use litigation, I’ve had one variance that’s been affirmed on the merits,” Dain said.

Now, the landscape has changed seismically, attorneys agree.

“In my mind, this is completely game-changing legislation,” said Worcester land use and real estate lawyer Joshua Lee Smith.

With a greater chance that variance requests will be approved and that denials will be reversed on appeal, “it might encourage a little bit bolder applications for these variances, so we might see more creative projects getting proposed,” said Lee Smith’s colleague, Joseph Duquette of Southborough.

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Without question, variances will be easier to obtain than they were a few weeks ago, but the changes are not exclusively favorable to developers, said Boston land use attorney Valerie A. Moore.

“There’s also language in there that gives an opportunity for advocates on the other side to raise new issues that a [zoning] board previously hadn’t considered,” she noted.

Boston land use attorney Karla L. Chaffee, a member of a zoning board herself, said she is encouraged that the amendments now make explicit that zoning boards can consider financial hardship of the applicant.

“Although that was something that could be considered previously per case law... that can be a debate of whether or not it’s a permissible factor,” Chaffee said. “It’s easier for an applicant to now argue that, ‘in order to make this development

financially feasible, we need to go up an extra story. We're justified in requesting a five-story building where your zoning may only permit four.'"

Lee Smith and Duquette have already had a chance to test drive the new law, getting a zoning board to completely change its tune on their client's variance application once the changes to Chapter 40A were spelled out for them.

Other clients, who had been seeking changes in local zoning bylaws, are now rethinking their strategy, Lee Smith said. The process to enact zoning changes is an arduous one that can stretch out for months and become heavily political, he said.

At least two of his clients have now decided to set their sights on variances instead, he reported.

More discretion, less certainty

On the municipal side, lawyers are already busy scheduling training sessions for the bewildered volunteers who serve on local zoning boards, said Boston attorney Amy E. Kwesell, whose firm represents several cities and towns across the state.

"We're just letting them know what the changes are," she said. "At this point, we can't even give them examples, like 'the Land Court held in this case that this variance was upheld.' We don't have much to give them."

Adjusting to the changes in law is not just an issue for zoning boards, Kwesell added. Some of the changes, particularly with respect to preexisting non-conforming structures, will be handled by building departments, she said.

In attempting to discern what "practical difficulty" means, municipal attorneys can look to a limited degree to the zoning codes in Boston or other states, which incorporate similar concepts. But the legislative history makes clear that fostering housing production is a paramount concern animating the changes to Chapter 40A, while that may not have been true in other states, Kwesell said.

Zoning boards are "going to have to just look at the facts and see if the facts come to some kind of practical difficulty until we get some kind of guidance from the courts," Kwesell said.

The changes to Chapter 40A will put more pressure on zoning board members, Pickering Cook said.

“When things are black and white, it’s easy — ‘this variance application has nothing to do with shape and topography; you have to deny it,’” she said. “Now, they’re going to be in a much harder position of making these judgment calls.”

Under the prior regime, abutters had far more power and leverage to shape development of neighboring lots if someone needed a variance, Pickering Cook noted. That leverage has now shifted to the zoning board.

“It gives the ZBA a lot of discretion to say we don’t think that strict application of our zoning bylaw is fair or makes sense for this property for whatever reason,” she said.

The changes to §6 dealing with preexisting nonconforming structures are welcome and should make the rules less complicated for applicants and municipalities alike, Pickering Cook added.

However, it may take some time before cities and towns make much use of changes to §§5 and 11 of Chapter 40A, which allow for notices of public hearings to be sent by email.

Applicants are still required to get their certified list of abutters from a municipality’s most recent tax roll, and at least for now, those lists will not have email addresses on them because cities and towns do not collect them, Kwesell explained.

The changes to 40A are coming on the heels of several other significant changes to zoning rules, including the passage of the MBTA Communities Act and the state law giving homeowners the right to build accessory dwelling units, Pickering Cook noted. On behalf of her municipal clients, she pleaded for patience.

“Cities and towns feel a bit like there are an awful lot of changes coming down from on high very quickly, and they’re not getting a ton of time and support to adjust to them,” she said.

Finding the sweet spot

In addition to monitoring litigation to see how courts interpret the changes to Chapter 40A, lawyers will be watching to see what impact they have in the real world.

The changes may accelerate the conversion of vacant office and commercial properties into residential uses, Worcester attorney Brian R. Falk suspects.

“Now, if you’re in a zoning district where you’ve got an underutilized office building or commercial building, but the zone doesn’t allow residential use, you

might be able to demonstrate that practical difficulty and go seek a use variance, which wasn't previously available," he said.

If a town has an entire commercial district that it wants to rezone, that town should still go through Town Meeting, Dain said. But if there is a particular parcel in that commercial district that a municipality thinks would be a good site for an apartment building, the zoning board of appeals can grant a variance without rezoning the entire district.

"It gives municipalities another tool they can use to encourage housing production in places where the municipality wants to put it," he said.

Finding the "sweet spot" where the law is simultaneously pro-home rule and pro-development is not an easy task, Shapiro noted.

"This was one of the things where we thought this will actually confer greater discretion, more power on local officials, but by and by, I think it will end up equating with a not inconsequential marginal increase in real estate development," he said.

The governor and lieutenant governor deserve credit for being willing to sign on to such a plan — and in an election year no less, D'Ambrosio said.

"They are putting their money where their mouth is," he said. "They're doing something about the problem, trying to make it more affordable so that we don't have such a large exodus of our younger population leaving the state due to affordability issues."