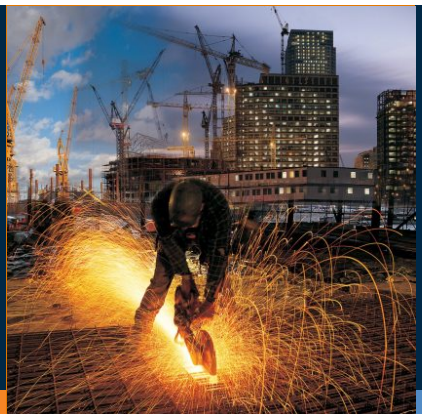
Client Alert: Governor Baker Signs Progressive Zoning Act Changes

By Christopher R. Agostino on February 1, 2021



On January 14, 2021, Massachusetts Governor Charlie Baker signed into law amendments to Chapter 40A intended to facilitate the permitting and development of housing in the Commonwealth. Massachusetts General Law Chapter 40A, entitled "The Zoning Act", is the statutory framework that underlies all local zoning controls adopted across Massachusetts' 350 cities and towns outside of the City of Boston which has its own zoning enabling act. For years, critics have argued that the Zoning Act has throttled development of housing in the suburbs through a combination of antiquated large-lot zoning, e.g., one-acre minimum lot size, etc., and other local zoning controls that have deterred the adoption of multi-family and mixed-use development in areas that could support more dense construction, e.g., close to transportation infrastructure. The recent amendments make modest changes intended to foster multi-family housing opportunities and otherwise create more housing units throughout the Commonwealth.

These amendments can be summarized as follows: 1) force certain communities to increase the gross density of housing near public transportation, 2) encourage communities to voluntarily adopt multi-family and mixed-use districts in eligible locations, and 3) deter abutter appeals that might frivolously delay development that is otherwise ready for construction. The newly adopted legislation now singles out "MBTA Communities", which generally includes all cities and towns that are home to an MBTA mass transit station, and requires that they adopt reasonably sized zoning districts within a ½ mile of public transit that allow multi-family housing as of right. The law defines "as of right" to clarify that permits for multifamily housing in these areas must not be subject to discretionary approval; however, such projects may still be subject to site plan approval. The law sets a minimum as of right density requirement of fifteen units per acre, which may come as a shock to some communities that still have one unit per acre zoning town-wide. MBTA Communities that fail to adopt multi-family housing districts as prescribed will no longer be eligible to receive state funding through MassWorks, the Housing Choice Initiative Program, and the Local Capital Projects Fund. With millions of dollars of state funding at risk, MBTA Communities are sure to act fast to create multi-family housing districts, but it remains to be seen whether as of right projects will be permitted without hinderance in these areas as intended.

In addition to compulsory multi-family housing in MBTA Communities, the Chapter 40A amendments lower the bar for all communities to pass zoning changes that allow multi-family housing and what is traditionally referred to as "smart growth" housing as of right in eligible locations. The term "eligible locations" is loosely defined, but generally encompasses areas with access to transportation, existing town and city centers, and other areas "suitable" for residential or mixed use smart growth development. Instead of the two-thirds town meeting vote previously required to adopt any zoning amendment, zoning

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amendments that provide for multi-family and smart growth housing districts as enumerated in the law now only require a simple majority vote for passage at town meeting if located in eligible locations. Initial publicity surrounding this particular amendment to the Zoning Act did not highlight the fact that only "eligible locations" gain the benefit of the less stringent simple majority voting requirement. Upon closer review it is unclear how town meeting can decide with certainty whether a specific proposal qualifies for the lower voting threshold applicable to eligible locations or whether the traditional super majority requirement applies. This aspect of the revised Zoning Act will surely garner attention in the future as towns are presented with proposed zoning amendments in response to this new feature of the Zoning Act. The supermajority voting requirement for planning board special permit approvals under Section 9 of Chapter 40A was also reduced to a simple majority vote for approval of special permits for multi-family housing, smart growth, and mixed-used development in certain areas. The simple-majority voting requirement is intended to further alleviate constraints on new development where applicants previously had to achieve near unanimous consent for special permit approval.

Lastly, the amendment adds new appeal bond requirements for abutters that seek to challenge certain permits and approvals. Courts now have the discretion to require plaintiffs who appeal special permits, variances, or site plan approvals, to post not more than $50,000 to secure the payment of costs that might be assessed against the plaintiff if the Court finds that the appeal caused harm as a result of delay. Courts are allowed to consider the merits of the appeal and the relative financial means of the plaintiff and defendant. Although largely discretionary, this new bond requirement may serve as a deterrent to some frivolous appeals meant to prevent development through lengthy delays caused by protracted court proceedings. It is worth noting that Chapter 40R, which provides financial incentives for towns to adopt smart growth zoning districts around transportation hubs, was amended to include a mandatory bond requirement for plaintiffs that appeal permits issued under Chapter 40R. The amount of the bond is not discretionary in Chapter 40R related appeals and is tied to *double* the amount of potential delay damages and attorneys' fees that the defendant might incur as a result of the appeal. For those developers that have faced what they believe to be frivolous abutter appeals under Chapter 40A, the new appeal bond requirements of Chapter 40R make the new 40A requirements appear relatively impotent, but welcome relief nonetheless.

There are many nuances, specifics, and qualifiers within this new legislation, which are likely to keep local boards and courts busy as they interpret and apply the new requirements. This summary only outlines in broad terms the main thrust of these amendments, but a careful reading of the many new defined terms is required before drawing any conclusion about how these amendments might affect any specific development proposal. If you believe this new legislation might have implications for your property, please feel free to reach out to a member of RIW's **commercial real estate group** for more information.

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