Client Alert: Massachusetts' New Economic Relief Bill – What Enabling Partnerships for Growth Means for Local Zoning

BY MARISSA • JANUARY 27, 2021

On January 14, 2021, Governor Baker signed the Act Enabling Partnerships for Growth (the "Act"). Although Governor Baker vetoed specific parts of the Act, it includes a number of provisions that affect local zoning.

COURTS CAN REQUIRE A BOND FOR APPEALS UNDER M.G.L. C. 40A, § 17

Opponents of special permits, variances or site plans may have a harder time maintaining appeals. The Act amends M.G.L. c. 40A, § 17 to provide that the Court may require a plaintiff appealing a decision to approve a special permit, variance or site plan "to post a surety or cash bond in an amount of not more than $50,000 to secure the payment of costs if the court finds that the harm to the defendant or to the public interest resulting from delays caused by the appeal outweighs the financial burden of the surety or cash bond on the plaintiffs." The requirement to post a bond is not automatic and in deciding whether to require a bond or surety, the Court can consider the relative financial means of the plaintiff and the defendant. The amendment to Section 17 does not apply to an appeal by an applicant appealing from a denial of its application. This provision may be an effective tool to help curb frivolous appeals, if the Courts are willing to impose a significant bond or surety in appropriate cases including appeals by business competitors or appeals with little merit instituted solely to slow down a project.

However, it is unclear how this new provision will interact with an existing provision within Section 17, which provides that "[c]osts shall not be allowed against the party appealing from the decision of the board or special permit granting authority unless it shall appear to the court that said appellant or appellants acted in bad faith or with malice in making the appeal to the court." While the threshold standard for the Court to require the posting of a bond or surety may be lower, it remains to be seen if a developer that successfully defends an appeal will still need to meet the higher standard of bad faith or malice to be awarded costs from the bond or just demonstrate harm resulting from the delays caused by the appeal.

MULTI-FAMILY DEVELOPMENT & TRANSIT-ORIENTED DEVELOPMENT

The Act does not just encourage but requires all so-called "MBTA Communities," as defined the Act, to create at least one zoning district "of reasonable size" that permits multi-family housing by-right with a minimum gross density of 15 units per acre (subject to certain environmental permitting restrictions). The district must "be located not more than 0.5 miles from a commuter rail station, subway station, ferry terminal or bus station, if applicable." The multi-family housing cannot be age-restricted and must be "suitable for families with children."

The Act provides that the Department of Housing and Community Development ("DHCD") will promulgate guidelines to determine compliance. If a municipality fails to comply, it will lose its eligibility to receive funds from the Housing

Choice Initiative, Local Capital Projects Fund and MassWorks.

HOUSING CHOICE

The Act makes it easier for municipalities to amend their zoning bylaws and ordinances to allow for an easier pathway for multi-family or mixed-use development, and amends M.G.L. c. 40A, Section 9 to allow easier approvals of certain developments.

Amendments to Zoning Ordinances and Bylaws

Usually, amendments to Zoning Ordinances and Bylaws require a 2/3 vote of City Council or Town Meeting. For most zoning amendments, that will continue to remain the case. However, the following types of zoning amendments will now only require a simple majority in order to be enacted:

- Amendments that allow by-right: multi-family housing or mixed-use development in an eligible location (as defined in the Act), accessory dwelling units, either within a principal structure or detached on the same lot, or open-space residential development;
- Amendments that allow by special permit: multi-family housing or mixed-use development in an eligible location, increase in the permissible density of population or intensity of a use in a multi-family or mixed use development, accessory dwelling units in a detached structure on the same lot, or reduction in required parking for residential or mixed-use development;
- Amendments that allow for Transfer of Development Rights zoning or natural resource protection zoning to promote the concentration of development in areas the municipality deems most appropriate, so long as it does not result in a reduction in the maximum number of housing units that could be developed;
- Amendments that modify regulations concerning the "bulk and height of structures, yard sizes, lot area, setbacks, open space, parking and building coverage requirements to allow for additional housing units beyond what would otherwise be permitted under existing zoning regulations"; and
- Amendments adopting a smart growth district or starter home zoning district in accordance with M.G.L. c. 40R, Section 3.

Amendments to M.G.L. Chapter 40A – Certain Housing Permitted by Majority Vote

The Act also expressly changes the voting requirements from a super-majority to a simple majority for certain types of developments. The Act amends the voting requirements of Section 9 of Chapter 40A to provide that the following developments now only require a simple majority vote, instead of the previously required super majority vote, in order to grant a special permit:

- multifamily housing that is located within 1/2 mile of a commuter rail station, subway station, ferry terminal or bus station, so long as not less than 10 percent of the housing is affordable for at least 30 years;
- mixed-use development located in centers of commercial activity, including town and city centers, or other commercial or rural village districts, so long as not less than 10 percent of the housing is affordable for at least 30 years; and
- reduced parking space to residential unit requirements so long as the reduction results in an increase in additional housing units.

The Act also makes certain additional amendments to M.G.L. Chapter 40A which allows zoning bylaws or ordinances to:

- Create "open space residential" developments (similar to cluster developments but without the minimum open space requirement or the option for open space to be conveyed to a corporation or trust controlled by the owners of the residential units) and allowing for zoning ordinances or bylaws to permit them by-right; and

- Allow for zoning ordinances or bylaws to allow reductions in parking space and residential unit ratio requirements upon a finding that the public good would be served and no substantial adverse effect would result to the area.

Smart Growth

The Act makes some changes to Chapter 40R – Smart Growth Zoning and Housing Production. It allows for proposed smart growth or starter home zoning districts to allow for mixed use developments (subject to DHCD limitations). However, in a starter home zoning district, a mixed use development is only permitted if the proposed density is a minimum of 4 units per acre. The Act also imposes limits on the number of units restricted "exclusively for the elderly, the disabled or for assisted living."

INTER-MUNICIPAL PUBLIC INFRASTRUCTURE & DEVELOPMENT AGREEMENTS

In a further effort to aid development, the Act amends M.G.L. c. 40, Section 4A to allow contiguous cities and towns to enter into agreements to "allocate public infrastructure costs, municipal service costs and local tax revenue associated with the development of an identified parcel or parcels or development within the contiguous communities." Any such agreement is required to be approved by a majority vote of the "legislative bodies" and by the mayor, board of selectmen or other chief executive officer and must also be approved by the Department of Revenue.

All of these provisions discussed above are effective immediately.

