

Legislature approves zoning changes, new housing program

By Benjamin Fierro III

For more than a dozen years, a coalition of planners, municipal officials and environmentalists has been lobbying for an ambitious bill to rewrite the state's Zoning Act. This year, as in the past, their efforts were for naught. While rejecting a complete overhaul of the Zoning Act, state lawmakers did approve several targeted, but meaningful, amendments that will benefit property owners and developers. In addition, the Legislature passed an important amendment to the Smart Growth Zoning and Housing Production Law to encourage the production of so-called "starter homes."

Zoning Act (G.L. c. 40A, §7)

On August 4, Governor Baker signed into law *Chapter 184 of the Acts of 2016, An Act Relative to Non-Conforming Structures*. Drafted by the Boston Bar Association, this amendment to the Zoning Act legitimizes certain structures after a period of continuous use.

G.L. c. 40A, §7 specifies when a violation of either the Zoning Act or a local zoning bylaw, ordinance, variance or special permit, can lead to a "non-complying" structure being ordered removed, altered or relocated. However, a municipality is prohibited from taking any enforcement action more than six years after the commencement of the alleged violation where the structure was used and improved in accordance with the terms of an original building permit, or more than ten years after commencement of the alleged violation where no building permit was issued or the terms of a building permit were violated.

While this provision ensures that such a structure may remain and continue to be used, it does not render it a valid non-conforming structure. *See Bruno v. Board of Appeals of Wrentham*, 62 Mass. App. Ct. 527, 537 ((2004); *Cumberland Farms, Inc. v. Zoning Board of Appeals of Walpole*, 61 Mass. App. Ct. 124, 127 n. 9 (2004). Consequently, if such a structure is destroyed after the statute of limitations has run, any future building and use must be in accordance with then current

zoning requirements.

Chapter 184 amends §7 to provide that when real property has been improved by erecting or altering one or more structures, and the structures or alterations have been in existence for at least 10 years and there has been no notice of any enforcement action within 10 years from the commencement of an alleged zoning violation, then the structures shall be deemed, for zoning purposes, to be legally non-conforming. Importantly, its owners may then avail themselves of the provisions of G.L. c. 40A, §6 and any local ordinance or bylaw to seek a special permit to change, extend or alter a non-conforming use or structure.

According to testimony before the Legislature's Joint Committee on the Judiciary by Michael Fee, co-chair of the Boston Bar Association's Real Estate Law Section, the new law would give older "non-complying" structures a recognized status under zoning. Qualifying structures will no longer be considered zoning violations that are merely immune from being contested, but rather deemed to be in actual compliance with zoning. This will give greater protection to owners and developers of improved real estate.

It is important to note that Chapter 184 provides that the provisions of the law are applicable regardless of whether the structure was erected prior to or after the effective date of the act. It also contains language that gives municipalities an additional 6 months to take action on non-complying structures that were erected or altered not more than 10 and not less than 9 years before the effective date of the act. Chapter 184 will become effective on November 8, 2016.

Zoning Act (G.L. c. 40A, §6, §9)

When Governor Baker approved an omnibus economic development bill last month as *Chapter 219 of the Acts of 2016, An Act Relative To Job Creation And Workforce Development*, scant attention was given to two provisions that amended the Massachusetts Zoning Act. These provisions made changes relative to building permits and special permits that had long been sought by the residential and commercial real estate industry.

The Zoning Act (G.L. c. 40A, §6) provides that if construction pursuant to a building permit or a special permit is begun within 6 months after issuance of the permit, the structure is protected from any subsequent changes in local zoning. To qualify for this zoning “freeze” protection, construction must be continued through to completion as continuously and expeditiously as is reasonable.

In *Alexander v. Building Inspector of Provincetown*, 350 Mass. 370 (1966), the Supreme Judicial Court held that preliminary work such as demolition and site preparation did not constitute "construction." Actual construction of the foundation for the structure for which the permit was issued is widely agreed to be required. See *Murphy v. Bd. of Selectmen of Manchester*, 1 Mass App. Ct. 407 (1973).

In many instances, 6 months from the issuance of a building permit or special permit is not sufficient time to secure financing and begin construction. Section 29 of *Chapter 219* amends G.L. c. 40A, §6 to extend from 6 months to 12 months the time a permit holder has to start construction under a building permit or to begin exercising the rights granted by a special permit, in order to secure zoning “freeze” protection for their project.

Section 30 of *Chapter 219* amends G.L. c. 40A, §9 to enlarge the term of special permits from 2 years to 3 years. Having an additional year to begin to use a special permit will be particularly helpful to businesses and developers during economic recessions and down real estate markets.

An emergency preamble attached to Chapter 219 made Sections 29 and 30 effective immediately upon the governor’s signature on August 10.

Smart Growth Zoning and Housing Production Law (G.L. c. 40R)

Sections 37 through 54 of *Chapter 219* amend G.L. c. 40R, the Smart Growth Zoning and Housing Production Law, to encourage municipalities to adopt local zoning ordinances and bylaws that permit the construction of smaller single-family homes on smaller lots, so-called "starter

homes.”

The Legislature enacted Chapter 40R in 2004 to provide financial incentives to cities and towns to create "smart growth zoning districts" where mixed-use and higher density housing could be developed near transit stations and areas of concentrated development as a matter of right. While the law has had some success in producing mixed-use and multi-family developments, it has failed to spur needed single-family housing. The amendments to Chapter 40R allow communities to take advantage of the financial incentives offered by the state through that law to facilitate the production of smaller homes [maximum 1,850 sq. ft.] on smaller lots [maximum 1/4 acre] that are affordable to entry-level buyers of average means.

As is the case under Chapter 40R, communities would receive zoning incentive payments ranging from \$10,000 to \$600,000, depending upon the size of the "starter home" zoning district, as well as housing production payments of \$3,000 for each unit of housing built. The law also requires that 20% of the units be set aside for sale to persons and families earning no more than 100% of area median income. There is also an open space requirement.

Although Massachusetts has seen an increase in housing production in the past several years, most of that production has been multi-family housing, with much of it high-end, luxury units. Single-family housing production continues to lag far behind what is needed to meet demand and to moderate pricing pressures on the inventory of existing single-family homes.

Unlike the conflict, controversy and complications attendant to revamping the entire Zoning Act, the "starter home" program had broad support in the Legislature. Section 140 of *Chapter 219* establishes an effective date for the “starter home” program of January 1, 2017. The Department of Housing and Community Development is expected to promulgate regulations to implement the program in the coming months.

Reprinted from:
Massachusetts Lawyers Weekly
Monday, September 26, 2016