



REFA Education Program Zoning Practice Outside of Boston

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PRELIMINARY CONSIDERATIONS FOR ASSISTING A BUYER/DEVELOPER

- **Understand the business context, goals and constraints before undertaking a zoning and permitting analysis. Relationship to land control documentation.**
- **Understand the political context**
- **Understand concerns of abutters, neighborhood groups, advocacy groups, adjoining cities and towns**



PRELIMINARY PERMITTING CONSIDERATIONS FOR A SELLER

- **What permits does buyer need?**
- **How difficult to obtain?**
- **How much time is reasonable for buyer to obtain them?**
- **Will land control allow for prosecuting or defending appeals?**
- **Impact of deposit/land control payment structure on timing and likelihood of a successful closing**



PRELIMINARY PERMITTING CONSIDERATIONS FOR A LENDER OR INVESTOR

- Many of the same considerations as a seller, except that there are additional considerations since a lender or investor could become the owner if a default occurs.
- Understand the basics of what the zoning allows, prohibits or allows only by a discretionary permit.
- Is the existing use or structure non-conforming? Implications for rebuilding following a casualty? A future expansion?
- Cost or operational considerations of all permit conditions – both on-site and off-site. Is the project budget adequate?
- Has there been opposition or litigation?



PRELIMINARY PERMITTING CONSIDERATIONS FOR A LENDER OR INVESTOR (CONT.)

- **How discretionary are any permits to be obtained post-closing?**
- **Risks of closing before all appeal periods have expired.**
- **Understand all private development-related agreements with third parties.**



UNDERSTAND THE ORGANIZATION OF THE LOCAL GOVERNMENT

- **City form of government vs. town form of government.**
- **Differences between seeking zoning approvals in each type of municipality. Centralized vs. decentralized decision-making, especially for major zoning changes.**
- **Key local boards and offices**
 - Building Inspector
 - Planning Board
 - Board of Appeals
 - Conservation Commission
 - Board of Selectmen and Town Meeting
 - Open vs. representative Town Meeting
 - City Council or Board of Aldermen and Mayor
 - Strong or weak Mayor form of local government
 - Understand the local political culture – where does power reside?



BASICS OF A ZONING BYLAW OR ORDINANCE

- Chapter 40A – The State Zoning Act (applies to all municipalities except Boston)
- The Zoning Bylaw (town) or Ordinance (city)
- The Zoning Map
- Table of Uses
- Table of Dimensional Controls
- Table of Parking and Loading Controls
- Other Requirements (e.g. signage, landscaping)
- Separate Local Bylaws or Local Ordinances, e.g.
 - Wetlands
 - Earth Removal
 - Hazardous Waste
 - Signage



TYPES OF ZONING RELIEF

- **As of Right**
- **Amendment to the Zoning Map**
- **Amendment to the Zoning Bylaw or Ordinance (text)**
 - Process in a town
 - Process in a city
 - Required vote
 - Attorney General approval of town bylaw actions
- **Special Permits**
 - Public hearing
 - Required vote
 - Time lines
 - Appeals, standard of review
 - Proceeding at risk per 2006 permit reform legislation (amended G.L. c. 40A §11)



TYPES OF ZONING RELIEF (CONT.)

- **Variances**
 - Use (if allowed by municipality)
 - Dimensional
 - Public hearing
 - Required vote
 - Time lines
 - Appeals, standard of review
- **Site Plan Approval**
 - Different types and appeal procedures



TYPES OF ZONING RELIEF (CONT.)

- **Reconstruction, Alteration or Expansion of a Non-Conforming Use or Structure**
 - Findings
- **Possible applicability of the 2010 Permit Extension Act, as most recently amended in 2012**
 - Four (4) year automatic extension for most municipal, regional or state permits, including zoning approvals (except 40B approvals), “in effect or existence” between August 15, 2008 and August 15, 2012. Does apply in City of Boston
- **Statutes of Limitation**
 - 6-year
 - 10-year



VESTING RIGHTS TO EXISTING ZONING

- **Plan “freezes” for existing zoning**
 - 3-year Approval Not Required (ANR) plan freeze (use only)
 - 8-year definitive subdivision plan freeze (use and dimensional)
- **Special permit freezes and building permit freezes**



ZONING APPEALS

- **Types of Appeals**
 - To local ZBA
 - To Superior Court
 - To Land Court (Permit Session)
- **Declaratory Judgment**
- **Certiorari**
- **Standing**
 - Jurisdictional
 - Standard for “aggrievement” – a plausible claim of a definite violation of a private right, a private property interest, or a private legal interest, supported by credible evidence
 - Injury different from that suffered by the public generally



APPEALS

- **Time Frames for Taking Appeals**
 - Time to appeal is jurisdictional
- **Timeframes for Litigating Appeals**
 - Mediation/Arbitration/Settlement
- **Land Court Permit Session**
 - Threshold of 25 or more dwelling units or the construction or alteration of 25,000 s.f. or more of gross floor area, or both
 - Jurisdiction over a broad range of claims affecting real estate projects
 - Single judge
 - One of three time tracks to trial and to decision



CHAPTER 40B/COMPREHENSIVE PERMITS (G.L. c. 40B §§ 20-23 AND IMPLEMENTING REGULATIONS AT 760 C.M.R. §31.00)

- **Chapter 40B/Comprehensive Permits**
 - Create 10% of local housing stock as affordable
 - Comprehensive permit issued by local ZBA in lieu of multiple local approvals. Availability of waivers.
 - Consistent with local needs
 - Uneconomic conditions
 - Appeal to Housing Appeals Committee (HAC) if local denial or unacceptable conditions
 - Problem of conflicting appeals to HAC (by applicant) and to Court (by third parties)



CHAPTER 40R SMART GROWTH OVERLAY DISTRICTS; CHAPTER 40S (G.L. c.40R AND IMPLEMENTING REGULATIONS AT 760 C.M.R. §59.00)

- **Chapter 40R Smart Growth Overlay Districts; Chapter 40S**
 - Interplay between 40B and 40R regarding affordable housing. 40R gives municipality more control over location and quality of such housing.
 - Encourages dense housing with affordable component as of right in smart growth type locations. “Eligible locations” definition.
 - Incentive payments from state: (1) upon adoption, and (2) upon issuance of building permits.
 - Encourages early negotiation of project specifics and mitigation.
 - Build political support for local legislative vote.
 - Design standards.
 - Development Agreements – infrastructure, mitigation, community benefits.
 - Assistance with school costs (40S).
 - Role of DHCD.
 - 120 day Plan Approval.
 - More difficult for opponents to appeal – more difficult standard of judicial review; plaintiff may have to post a bond.