

# NAIOP Government Affairs Roundup

Robert A. Fishman, Esq.

[rfishman@nutter.com](mailto:rfishman@nutter.com)

December 7, 2016

**Robert A. Fishman**

*Partner*

Nutter McClennen & Fish LLP



# Zoning Changes Adopted in 2016

## **Governor's Economic Development Bill**

**(Chapter 219 of the Acts of 2016, effective August 10, 2016)**

### **Special Permits and Building Permits**

- Amends G.L. Chapter 40A, Section 6 to extend from 6 months to 12 months the time within which construction must commence to preserve a permit zoning freeze (Section 29).
- One consequence of this change is the strengthening of the permit freeze protection under G.L. Chapter 40A, Section 6, by giving the permit holder a longer time from permit issuance to commence the work and diligently to prosecute the work to completion.
- Amends G.L. Chapter 40A, Section 9 to authorize municipalities to amend zoning ordinances or bylaws to allow special permits to be valid for not more than three (3) years instead of current two (2) years (Section 30). Note: this change would appear to require local adoption.

# Zoning Changes Adopted in 2016 (con't)

## Protection for Non-Complying Structures

### (Chapter 184 of the Acts of 2016, effective November 8, 2016)

- Existing law has (i) a 6 year statute of limitations against removal and cessation for both uses and structures if they began pursuant to a building permit, and (ii) a 10 year statute of limitations against enforced removal of a structure if no building permit can be found.
- The law was unclear about the legal status of a non-complying structure if 10 years elapsed without a challenge being filed. Since not fully grandfathered, in the event of a fire or a casualty, the structure could not be rebuilt except in compliance with current zoning.
- **Chapter 184 creates more certainty and protection for such non-complying structures over 10 years old by providing that they shall be treated as legal non-conforming structures under Section 6 of Chapter 40A.**
- This new status affords the owner of such a structure the opportunity to seek a Special Permit/Finding from the local special permit granting authority (SPGA) that a proposed change or alteration to the structure is not substantially more detrimental to the neighborhood than the existing structure.
- The new protected status applies to both existing and future structures.

# Major Zoning Changes Proposed But Not Adopted in 2016

## **An Act Promoting the Planning and Development of Sustainable Communities – Proposed by the Smart Growth Alliance (the “Bill”)**

### **General Background**

- Despite its title, this bill represented a significant amendment of Chapter 40A, the State Zoning Act.
- As originally filed, there was no housing production component and many technical deficiencies.
- Industry and Smart Growth Alliance meetings in Spring, 2016, under the auspices of David Sullivan, Counsel to the Senate President.
- Technical working sub-group on certain sections where consensus seemed most promising but was not achieved - site plan approval; variance standards; impact fees.
- Ultimately, SB 2327 passed the Senate by a vote of 23 -15, but died in the House when the legislative session ended on July 31, 2016.
- Unclear what versions of the bill will be refiled.
- NAIOP will continue to participate in the legislative process.

### **As Originally Filed - A bill drafted mostly by planners, not by municipal officials or developers**

- No involvement by Mass. Municipal Association or by any real estate organization.

### **Development Impact Fees**

- Additional, ad hoc mitigation requirements would still be allowed.
- Fees could be used to address existing deficiencies in infrastructure.
- Payable at time of site preparation.

### **Inclusionary Zoning**

- Mandatory inclusionary housing requirements without a density bonus or other financial incentive.

### **Elimination of ANR Plans**

- To create frontage lots.
- To effect a 3-year zoning use freeze.

### **Significant Reduction in the 8-Year Plan Freeze Protection**

- Limited to the particular subdivision plan, not to the land shown on the plan.
- Filing would have to occur prior to the first notice of the Planning Board hearing on the proposed zoning change, rather than up until the later, final legislative vote. The availability of filing a less expensive preliminary subdivision plan also would be eliminated.

### **Opt-In Provisions - Enhanced Zoning Powers for Certain Municipalities that Adopt Certified Plans**

- Further reduced zoning freeze from 8 to 5 years.
- Broader impact fees.

## **Certain Positive Changes in the Bill Were Made as a Result of NAIOP's Engagement and Advocacy Work**

- Meetings with individual Senators to educate them about the Bill.
- Required density bonus and other concessions (e.g., reduced parking) for inclusionary housing requirements; however, no "cash out" or offsite construction options.
- More accessory dwellings.
- A required multi-family housing district in each municipality.
- Permit freeze to be triggered by application submission, not permit issuance.
- Some restoration of current provision on plan freezes, but still not as good as current law. Still required filing prior to the earlier Planning Board hearing public notice, not the later legislative vote.
- Some improvements to site plan approval provision for uses allowed by right, e.g., more limited off-site conditions.
- Some improvement in development impact fee provision – what funds could be used for; when payment required; who can perform the work; refund unspent funds to developer if not timely used.
- More flexible standard ("practical difficulty") for dimensional variances; longer life; longer extensions.
- Posting of bonds for certain appeals (but only for \$15,000).
- Easier transfer of cases to the Permit Session of the Land Court.

# Final Industry Statement dated June 1, 2016 on Senate Bill 2144

## **Some of the Provisions the Industry Supported**

- Training of local officials.
- More accessory dwelling units.
- Improved quantum of vote for special permits (simple majority).
- Optional mediation process for land use disputes.
- Bond requirement for appeal of special permits, variances and site plan approvals (but only \$15,000). Suggested adoption of the Chapter 40R bond requirement of twice the net carrying costs and attorney fees.
- Certiorari standard of review for appeals of subdivision decisions.
- Easier transfer of cases to the Permit Session of the Land Court.

## Final Industry Statement dated June 1, 2016 on Senate Bill 2144 (con't)

### **Some of the Provisions the Industry Could Support with Further Improvements or Revisions**

- The requirement of a district in which multi-family housing is permitted by right.
- The by right cluster development requirement.
- The zoning freeze provisions, e.g., restriction of when subdivision plan can be submitted. Restore current law.
- The site plan approval provision for as of right uses, e.g., prohibit third party appeals.
- A more flexible standard for dimensional variances ("practical difficulty"); retain use variances running with the land.
- The development impact fee provision (the industry suggested specific criteria from other states).

# Final Industry Statement dated June 1, 2016 on Senate Bill 2144 (con't)

## **Some of the Provisions the Industry Opposed**

- Certified (Opt In) communities with enhanced regulatory powers.
- Simple majority vote for zoning amendments.
- Mandatory inclusionary housing requirements.
- Minor subdivision approval process in lieu of ANR process in communities that elect such a process.