The Exceedingly Strange State of the Laws for Planning, Zoning and Subdivision Control in Massachusetts and Why this Effects Everyone

By Glenn Garber, Planning Director

DID YOU KNOW THAT….

- …the various state laws governing zoning, subdivision control and long range planning haven't been revised (with only a few scattered exceptions) in forty (40) or more years and are reflective of another era in their approach to land use, which impedes the state's economic growth and quality of life?
- …these laws contain almost nothing in regard to encouraging or requiring some degree of joint, coordinated action by the various local land use boards, each of which in the present laws remains in its separate permitting silo?
- …special permit and building permit lapse periods are two (2) years and six (6) months, respectively, which many consider unrealistic and an obstacle to good development?
- …only in Massachusetts are *unlimited* frontage lot exemptions allowed, thus facilitating the construction of long streams of new houses hop-scotching along our suburban and rural roads? We call them Approval Not Required lots and they enjoy a complete exemption from municipal subdivision control, provided that the lot or lots being changed or established are located on an accepted public way, a previously approved subdivision road or a street of "acceptable width, grade and construction" (an endlessly debated, vague and variable standard that has led to many a court case). Just about everywhere else, small land divisions are regulated as Minor Subdivisions.
- …the long and well-established practice of site plan review—exercised of necessity under local home rule powers—isn't even mentioned in the statutes?
- …the section covering local master (comprehensive) planning is clearly antiquated and not reflective of today's needs for economic development, transportation, housing and environmental protection?
- …all of the land uses subject to a special permit—meaning those uses that the community desires to locate there but wants to regulate—must obtain approval by the Planning Board or Zoning Board of Appeals (they divide this authority) by a super-majority, which is 4 out of 5 votes in the case of these boards in Bedford? Since the majority of the most creative and flexible zoning tools that a community might establish tend to be regulated by means of a special permit, this plurality only discourages good development, rather than acting as an incentive to it.
- …that newer innovations in zoning, such as form-based code, aren't even allowed by statute?
- …uniquely in the US, Massachusetts requires a 2/3 vote to pass zoning laws and doesn't offer municipalities any options to change that?

- …as leading MA employers frequently confirm, the economy cannot thrive in Massachusetts without offering reasonable housing options to an array of workers and families, yet the Zoning Act contains only limited and outdated provisions to encourage a more realistic slate of housing choices, rather than just very expensive large homes?
- …only in Massachusetts are such *hyper-generous* grandfathering rights granted to existing properties, thus exempting numerous parcels from newer, improved zoning provisions that the town meeting has seen fit to pass, and making it that much harder to control the community's destiny long term? Here are just a few examples; there are more of them in the "infamous" vested rights statute in the Zoning Act, as well as in the Subdivision Control Law:

> If there are any zoning changes whatsoever proposed in a given district, a property owner may, simply by filing a preliminary plan, followed within 7 months by an approvable definitive plan, then the land (not the project) enjoys an eight (8) year freeze from any and all zoning changes? And you don't even have to build the subdivision to get this protection.
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> The endorsement of a simple ANR frontage lot exemption plan throws in a little bonus for the applicant: a three (3) year freeze on allowed uses.
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> Residential lots for one and two family use and held in *separate* ownership are completely exempt from any increased requirements passed by town meeting in regard to lot area or any dimensional setbacks. Residential lots for one and two family use and held in *common* ownership enjoy a five (5) year freeze from the zoning in effect at the time of plan recording (or after January 1, 1976, whichever date is the later). The problem is, numerous lots in most towns date back to a time well before any zoning requirements were established, thus creating confusion about whether or not dimensional zoning changes apply at all, leading to inconsistent court rulings. The statute imposes only an absolute minimum frontage of 50' and a lot area of 5000 square feet.

This list could be longer but these items convey some idea of the magnitude of the problem.

THE ZONING REFORM MOVEMENT AND THE SUSTAINABLE COMMUNITIES ACT

Beginning in 1996, concerned state representatives, practicing planners, attorneys, municipal officials, non-profit groups and others, began a serious dialogue on our inadequate planning, zoning and subdivision statutes. By 1998, these initial meetings had transitioned into a formal initiative to craft legislation to fix and update these laws, which were seen as promoting fragmented, unfair and unpredictable permitting, and as being damaging to the state's economy and its environment.

The Senate Bill 122, An Act Promoting the Planning and Development of Sustainable Communities, sponsored by Senator Daniel Wolf and Representative Stephen Kulik and 57 others, is a consolidation of the major previous bills that were proposed under the rubric of "zoning reform," including the Land Use Partnership Act (LURA), the Community Planning Act and the Comprehensive Land Use Reform Act (CLURPA), which was a negotiated piece of legislation merging two separate and distinctly different bills offered by the zoning reform group and the MA Office of Housing and Economic Development. **A public hearing on Senate Bill 122 is scheduled for September 15 at 10:30 am in State House Room B1, before the Joint Committee on Community Development and Small Businesses.** The Committee chairs are: Senator O'Connor Ives and Representative Ferrante.

The bill takes a very balanced view, narrowing the most extreme and damaging loopholes in the law, while liberalizing other provisions, such as lengthening lapse times for special permits and building permits, and placing the standards for granting variances on a more reasonable basis, in line with the way zoning relief is granted almost everywhere else. In addition to a whole host of reforms addressing the problems cited in the bulleted list above and in regard to many other issues, the bill adds two new major sections to the statutes, Chapter 40X and 40Y.

The new Chapter 40X enables communities—but only those who choose to do so--to handle larger projects, defined as a net gain of at least 25,000 SF of gross floor area or 25 dwelling units, in a process that allows for some concurrency and consolidation in the application and hearing processes between different land use boards. A joint hearing must be held within 45 days after filing, after which the various boards return to their respective procedures as per law and regulation, to finalize their action and decision.

The new Chapter 40Y generally is referred to as the Planning Ahead for Growth Act, which at one time was a separate bill to promote planning and development in designated growth nodes in a comprehensive way, allowing for a balance between job creation, housing opportunity, transportation improvements and environmental/open space protection. The 40Y chapter generally reflects the state's opt-in provisions from the old CLURPA legislation, which can be invoked *only* by local communities that choose to do so. The 40Y chapter encompasses the features that were established by the MA Office of Housing and Economic Development. As incentives for communities to opt-in to this more advanced level of planning and development, there are a number of regulatory and financial bonuses available under this provision, such as priority status for the MassWorks bundle of grants-in-aid; and the ability to employ a slate of advanced zoning techniques mandatorily.

Other features of the Sustainable Communities Act include the following:

- ANR frontage lot exemptions are eliminated, in favor of a minor subdivision process whose structure is mostly established at the local level.
- The lapse period for a special permit is increased from 2 to 3 years, and building permits from 6 months to 2 years.
- The entire section on community master plans is replaced with a modern, streamlined and more flexible version of required content, including sustainability principles, to reflect the realities of

today's world, and zoning also is required to be consistent with such plans. There is also a requirement that requires coordination with the regional planning agency, to assure consistency with broad regional land use objectives.

- The courts are allowed to cite consistency with the master plan (or lack thereof) as grounds for a claim by any party of standing that the local zoning law is invalid, in part or in whole.
- Site plan review is established for the first time in the zoning act, with uniform minimum standards and a two year lapse period..
- The bill stipulates for the first time the right of communities to establish inclusionary housing provisions, to create things like work force or more modestly priced housing in some of the units.
- The 5 year dimensional zoning freeze for up to 3 lots in common ownership is eliminated, as is the 3 year zoning use freeze for ANR's. Minor subdivisions are vested at 4 years. The 8 year freeze for definitive plans is restricted to the project itself, not the land.
- The bill modifies the basis for appeals to the courts to be on the basis of the existing evidentiary record, rather than on new evidence, which could reduce endless litigation.
- A community is allowed the option to pass zoning and/or zoning special permits by a simple majority, if it votes to make this change.
- Zoning variance standards are brought in line with widely prevailing national practice in most states.
- Parks and playgrounds may now be required in conventional subdivisions as a set-aside for up to 5% of the parcel area, where this is now prohibited.

The preceding is far from a complete list of the features of the legislation, but does address some of the key problems cited in this story. The Planning Department is happy to send electronic copies of the full bill as well as helpful summary material, to any interested parties. Please send an email to: csilvestrone@bedfordma.gov if you would like to learn more.

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July 17, 2015

Speaker of the House Robert DeLeo
State House Room 356
Boston, MA 02133

SD 317, an Act Promoting the Planning and Development of Sustainable Communities

Dear Mr. Speaker,

The Bedford Planning Board voted 5-0 at its meeting on July 14, 2015, to enthusiastically endorse SD 317, an Act Promoting the Planning and Development of Sustainable Communities, sponsored by Senator Wolf and Representative Kulik, The state's laws for long-range planning, zoning and subdivision control are antiquated, do not meet standard practice in the US and lead to excessive litigation. The Zoning Act was last updated 40 years ago, and it is much longer for the other statutes and it is time to bring our land use laws into the 21st century. These common sense reforms are important keeping the Commonwealth economically competitive and maintaining the quality of life of the state.

The legislation takes a nicely balanced approach that introduces more certainty and predictability for developers and property owners, while also granting cities and towns the tools necessary to shape the future of their communities. It includes incentives intended to produce better local and regional land use outcomes—jobs and homes particularly in places where people already live and work. in order to encourage new employment, an array of housing choices (lack of housing hurts our economy), strong community planning, public health enhancement, and natural resources protection.

When I was a professor at UMASS, I was commissioned by the MA Department of Housing and Economic Development—in conjunction with the zoning reform movement-- to study land use laws in the rest of the country in certain basic features and practices. The results confirmed in no uncertain terms that our statutes are among the very worst in the country. Please, let's get caught up with the other states and pass this bill. It's long overdue.

The Bedford Planning Board, and thousands of other people, are grateful for any help you can give to make this happen.

Sincerely,

Glenn H. Garber

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Bedford Planning Director
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