

Zoning and 40B Subcommittee

By Mark Kablack, Esq. Chair



GREATER BOSTON HOUSING REPORT CARD-2015

Late last year the Boston Foundation issued its annual report on the state of housing in the Greater Boston area. As we expected, the regulatory barriers to housing production, particularly the ability to develop more dense housing, through either multi-family development or the development of smaller homes on smaller lots, has impeded the pace of

housing starts. The report concludes that we need to increase housing production by thousands of units a year to just make up the shortfall of the past few years. Even more production is required in order to have an adequate supply of housing to approximate housing need. The report calls for aggressive action and suggests the following steps among others:

- Encourage larger housing projects to take advantage of economies of scale in construction
- Encourage zoning for multi-family housing at higher density
- Push for local zoning reform more forcefully Senate Commission on Housing

HBRAM participated in a special housing committee established by the Massachusetts Senate. Formal meetings with Co-chairs, Senator Dorcea-Forry and Senator Chandler. Meetings occurred on a monthly basis, with breakout sessions regarding zoning and housing production issues, more frequently. The Committee issued its final report in February, 2016. The report contains both short-term and long-term recommendations. Under the zoning objective, the Commission recommended mandatory zoning allowances for accessory apartments in residentially zoned areas as well as increased efforts on training members of Planning and Zoning Boards through the Citizen Planner Training Collaborative (CPTC), with goals of increased funding, the establishment of on-line educational sessions, and a mandatory certification component for all sitting board members. Under the production objective, the Commission recommended support of S. 109 which will establish a segregated trust fund to ensure incentive payments to communities that permit housing under M.G.L.c40R and mandatory zoning provision for multi-family housing.

ZONING REFORM

As of this writing, the Senate is currently deliberating the passage of S. 2144, the so-called zoning reform bill that will result in a substantial re-write of M.G.L. c.40A (the Zoning Enabling Act) and c.41 (the Subdivision Control Law). HBRAM has worked tirelessly to educate legislators and regulators about the negative impact of this proposed legislation on the real estate industry. Some of the notable impacts from the proposed bill are as follows:

- The drastic curtailment of zoning freeze protection for subdivisions and the elimination of subdivision approval not required (ANR) lots.

- Allowing cities and towns to impose development impact fees for a broad variety of purposes will drive already historically high housing prices higher.
- Granting the authority to municipalities to adopt rate-of-development zoning by-laws and ordinances.
- Allowing cities and towns to mandate the set-aside of affordable housing units in all residential development through "inclusionary zoning" without also providing a density bonus.

40B

The Massachusetts Appeals Court decision in the case of Reynolds v. Zoning Board of Stow & Another, 88 Mass App Ct. 339 (2015), may cause concern to 40B developers and bolster municipal and abutter resistance to 40B projects. In Reynolds, the Stow Elderly Housing Corporation (SEHC) proposed a 40B project for a 37 unit, low-income, senior housing development. The project was proposed with a Title 5 compliant wastewater disposal system, where, due to the presence of the town's water resource protection district (WRPD), local regulations required enhanced sewage disposal regulations. Despite concerns by an abutter regarding impacts of the 40B development to his drinking water well, the local ZBA approved the permit, waiving additional requirements under the local regulations. The abutter appealed, documenting evidence of enhanced nitrogen impacts to his well, while the SEHC consultant rested on the fact that the waste disposal system was Title 5 compliant. On appeal by the abutter, a Superior Court judge upheld issuance of the Comprehensive Permit, finding that compliance with state regulations (Title 5) was sufficient. On further appeal, the Appeals Court held that compliance with state standards, in light of the nitrogen data, was insufficient; nitrogen levels posed a legitimate local health issue (given the WRPD); and the local health issues outweighed the regional need for affordable housing. The Appeals Court revoked the permit. Application for further appellate review was denied by the Supreme Judicial Court, despite advocacy by HBRAM and others in the real estate industry for review and reversal of this unfortunate precedent.

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