Zoning and 40B Subcommittee

By Mark Kablack, Esq., Chair

At the close of the 2016 legislative session, there were positive developments to report on zoning matters affecting builders and developers. First, we are pleased to report that Senate Bill 2144, the so-called zoning reform bill, which would have resulted in a substantial re-write of M.G.L. c.40A (the Zoning Enabling Act) and c.41 (the Subdivision Control Law), was not advanced. We previously reported on efforts by HBRAMA to educate legislators and regulators about the negative impact of this proposed legislation, and we are pleased that we were successful in stopping its passage. We do expect that the bill will be refiled in one form or another in the next legislative session, and we will be reporting on this in the months ahead.

On a more positive note, Governor Baker's omnibus economic development bill was passed into law with much fanfare in August 2016 (Chapter 219 of 2016) and contained several positive zoning initiatives that will have a direct impact on housing production. The first and most prominent of these is the Starter Home Initiative, which will encourage the production of smaller single family homes, on smaller lots, as a component of M.G.L. c. 40R (the state's smart growth initiative). HBRAMA previously reported on the scope of this pending legislation in the last edition of *Bay State Builder*, and HBRAMA is currently participating as part of a work-group with the Department of Housing and Economic Development (DHCD) to draft regulations for implementing this new program.

The economic development bill also contained two amendments which, procedurally, will offer greater vesting rights to builders and developers. The first of these amendments regards M.G.L. c. 40A, Section 6, which previously provided that work under a building permit, or special permit, must be commenced within 6 months of permit issuance, in order for work under the permit to be grandfathered from any subsequent zoning change. Under the newly revised law, the 6 month period has now been extended to one year. The second of these amendments regards M.G.L. c.40A, Section 9, which previously provided that a use under a special permit must be commenced within two years of permit issuance. This time period has now been extended to three years. In both cases, the added time to commence construction and subsequent use under a permit will allow for greater flexibility in the planning, financing and construction of projects, all of which are especially important for larger projects or during periods of volatile economic conditions.

CHAPTER 40B

The Massachusetts Appeals Court decision in the case of *Eisai, Inc. v. Housing Appeals Committee,* 89 Mass App Ct. 604 (2016), provides further insight into the balancing test between legitimate local needs, valid concerns for health, site design and space, and the recognized state-wide need for affordable housing. The case is particularly noteworthy given recent changes to the 40B regulations that recognize and include provisions for municipal planning as a safe-harbor tool.

Under 40B, once a developer establishes a prima facie case that its proposal complies with generalized standards for meeting health and safety requirements, there is a rebuttable presumption that housing needs outweigh local needs, and the burden shifts to the municipality to demonstrate a compelling local issue. In this case, the Town of Andover argued that its long standing municipal planning and economic development strategies, as codified in its Master Plan, were a legitimate reason to deny a multi-family rental proposal in an industrially zoned district. On appeal of the project's denial, the Housing Appeals Committee (HAC) articulated a multi-pronged test of its analysis of a municipal master plan, and whether such a plan is sufficient to overcome the rebuttable presumption of affordable housing needs.

First, the HAC will look to determine whether a master plan itself appears legitimate: i) is it *bona fide;* ii) does the plan promote affordable housing; and iii) has the plan been implemented. Second, the HAC will look to a flexible four-factor test to determine whether a master plan is effective and whether a project as proposed is consistent or inconsistent with the master plan:

i. does the plan conflict with the project;
ii. can the goals of the plan, or conflicts between the plan and the project, be quantified;
iii. what is the quality of the plan and does it give adequate weight to affordable housing; and
iv. how much affordable housing has the plan produced, if any.

In this case, the HAC found that Andover's Master Plan failed the four factor test, finding that it was "generally implemented" and of "moderate quality" but did little to promote affordable housing. The HAC ruled in favor of the builder/developer, resulting in a series of appeals, eventually reaching the Massachusetts Appeals Court. The Appeals Court decision in Eisai upheld the HAC test factors and its scrutiny of municipal planning concerns, proving that at least under the realm of 40B, municipalities must not only enact master plans, but they must implement them effectively, and zone accordingly.

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