

BANKER & TRADESMAN

THE REAL ESTATE, BANKING AND COMMERCIAL WEEKLY FOR MASSACHUSETTS

A PUBLICATION OF THE WARREN GROUP

DEAD-END STREET

IS THE CURE WORSE THAN THE DISEASE?

PROS AND CONS OF ZONING REFORM



BY STEVE ADAMS | BANKER & TRADESMAN STAFF

The 1975 law that governs how housing is built in Massachusetts is a holdover from an era when predominant development patterns consisted of Colonials and split-levels in the suburbs.

Attempts to overhaul Chapter 40A, however, have gained little traction on Beacon Hill in the past decade despite widespread acknowledgement of its flaws. Smart-growth advocates say their repeated attempts at zoning reform are an antidote to sprawl and a formula for accelerated housing production in a state that sorely needs more of it.

Real estate developers argue the reform proposals are even worse, and would discourage home construction through overregulation and higher costs. Communities could impose new conditions that would make development more difficult and expensive, opponents say.

“Builders and property owners aren’t going to give up the few protections they have in exchange for a promise that municipalities will do the right thing,” said Benjamin Fierro, a Boston attorney who represents the Home Builders and Remodelers Association of Massachusetts.

Continued on Next Page

MASSACHUSETTS ZONING REFORM

WHO’S AGAINST IT

- Home Builders and Remodelers Association of Massachusetts
- NAIOP Massachusetts, the Commercial Real Estate Association
- Massachusetts Realtors Association
- Greater Boston Real Estate Board

WHO’S IN FAVOR

- Massachusetts Smart Growth Alliance
- Metropolitan Area Planning Council
- Boston Society of Architects
- Conservation Law Foundation
- Cape Cod Business Roundtable

Reprinted with permission of Banker & Tradesman.

This document may constitute advertising under the rules of the Supreme Judicial Court of Massachusetts.

Last year's bill, co-sponsored by Sen. Daniel Wolf and Rep. Stephen Kulik, contained several provisions that were anathema to developers:

Inclusionary zoning: Communities could require that all residential developments contain a percentage of affordable units, or contribute to a fund promoting affordable housing. Unlike the existing Chapter 40B, which remains popular with developers because they can build high-density multifamily projects, there would be no "density bonus" in exchange for the affordability requirement. Developers say it would just raise the cost of market-rate homes to subsidize the price-restricted ones.

Elimination of "approval not required" lots: Developers have the right to build homes on a public way as long as the lot meets minimum frontage and local lot regulations. Smart-growth advocates say the "ANR" regulation is a recipe for sprawl in an age when communities should be encouraging cluster-style developments. The legislation would have eliminated ANR lots and required developers to apply for "minor subdivisions" subject to approval by planning boards.

New impact fees: Currently, communities can require developers to pay fees to offset new infrastructure costs generated by their projects, such as increased sewer capacity. The bill would have allowed impact fees for new categories such as open space, parkland and recreation facilities. Towns also could require up to 5 percent of land in subdivisions be set aside for parkland.

Locking in zoning: Currently, once a preliminary subdivision plan is filed, the parcel's existing zoning is frozen for eight years and not affected by amendments or moratoriums. Under zoning reform, subdivisions only would be protected from zoning changes if they were filed before the first public notice of a proposed zoning amendment, rather

than its final approval.

Real estate sources say the ability to lock in zoning for years is important, because it gives developers the flexibility to ride out the ups and downs of the market. But the process is sometimes abused by developers who submit vague preliminary plans to preserve their rights, said Andre Leroux, executive director of the Massachusetts Smart Growth Alliance and one of the principal authors of the bill.

Municipalities, for their part, sometimes try to rezone land after a preliminary plan is filed to block a controversial development.

"There's an element of gamesmanship involved, and it's not a rational system," Leroux said.

The bill also would make it harder for commercial developers to change plans after they're filed, drawing the opposition of the Needham-based industry group NAIOP Massachusetts.

"If a proposed project is initially designed to serve as a retail use and retail demand evaporates, a developer needs to have the flexibility to change its plan. This bill would eliminate a developer's ability to respond to a changing market," NAIOP Senior Vice President Tamara Small wrote in a letter to legislative leaders this summer.

Builders argue that local land-use boards have a built-in bias against development because of pressure from existing residents and abutters, and predict the reform proposals would give communities even more tools to discourage growth.

"These regulations raise the cost of housing and raise the barriers of entry, so only the national developers can afford the lawyers and the consultants and they're not going to be building the entry-level housing," Fierro said. "It's the Legislature's job to be concerned with the commonwealth and the broader impacts on our competitiveness when individual communities erect barriers."

Dispute Resolution Not Addressed

Gary Lilienthal has seen both sides of the picture as a real estate attorney representing developers, as well as serving as a long-time member of local land-use boards. Zoning reform, he said, attempts to add new mechanisms to achieve goals that are already attainable through programs such as Chapter 40R, which gives state aid to communities that approve high-density development.

What the reforms don't address, Lilienthal said, are new dispute resolution options. Legal challenges of approvals can tie projects up in court for years, spotlighting the need for mandatory arbitration or a new zoning court to hear appeals.

"The economy and construction market is so fragile in timing, and a lot of these lawsuits are started as leverage for a payout," said Lilienthal, an attorney at Berkopf Goodman in Boston. "What screams to be fixed is the appeal process."

The Smart Growth Alliance's Leroux said a bill containing many of the same elements as this year's is expected to be filed again by Dec. 31 by Wolf and Kulik. So far there's been no discussion between the real estate industry and planners about working together on a compromise bill.

"I have not heard from the Smart Growth Alliance," said Small, the NAIOP executive. "Our position is we support whatever moves forward something that advances production of housing, and to date we don't feel those proposals have gotten there."

Leroux said the Smart Growth Alliance repeatedly has tried to engage the real estate lobby without success.

"I'm hoping this session they will come to the table with some language that we can work with them on," he said. ■

Email: sadams@thewarrengroup.com