Governor Signs Bill Making Zoning Changes and Promoting Housing

The Act Enabling Partnerships for Growth that Governor Baker signed (with some specific vetoes) on January 14 has several provisions affecting municipal zoning. Foremost among these are provisions mandating density and the Housing Choice provisions. All of the provisions discussed here are effective immediately.

Zoning Near Transit

The Act requires all "MBTA Communities" to create a multi-family housing district. All the towns for which Anderson & Kreiger is Town Counsel are MBTA communities, including those that do not have MBTA service.

Specifically, each MBTA Community must create "at least one district of reasonable size in which multi-family housing is permitted as of right." The district must allow a minimum gross density of 15 units per acre, although this may be reduced by certain environmental permitting requirements. It must be within a half mile of a transit station, including a commuter rail, subway, ferry, or bus station, if the municipality has such a station. Failing to comply will disqualify the municipality from funds from the Housing Choice Initiative, Local Capital Projects Fund, and MassWorks Infrastructure program. It may also jeopardize municipalities' legal positions if their zoning by-laws or decisions are challenged.

Many issues regarding this requirement remain to be fleshed out. Among other issues, the Act does not define how big the district must be to be of "reasonable size." It directs the Department of Housing and Community Development (DHCD) to promulgate guidelines on that issue. We will stay on top of those guidelines and any other regulatory developments. However, MBTA Communities without a multi-family housing district should begin to plan for one promptly, even before the guidelines are issued.

Housing Choice

The Act makes it easier for municipalities to make certain amendments to their zoning bylaws if they choose to do so.

The heart of Housing Choice – an unofficial term that the Baker administration and media use – is the creation of exceptions to the supermajority requirement to amend zoning bylaws. Under G.L. c. 40A, § 5, amending a zoning bylaw requires a 2/3 vote of Town Meeting. The Act retains that rule in general, but it provides that certain amendments require only a simple majority. Towns do not have to enact any of these amendments, but they must use a simple majority threshold if they do.

Amendments that permit the following now require only a simple majority vote:

- Multifamily housing or mixed-use development in an eligible location, either by right or by special permit. The Act defines "eligible location" vaguely ("areas that by virtue of their infrastructure, transportation access, existing underutilized facilities or location make highly suitable locations for residential or mixed use smart growth zoning districts or starter home zoning districts"). It provides two examples: (1) areas near transit stations, and (2) "areas of concentrated development, including town and city centers, other existing commercial districts in cities and towns and existing rural village districts." However, some of these terms are still vague and will likely be the subject of future litigation. The Smart Growth regulations may provide some additional clarity by establishing two possible benchmarks for "near transit" (either a

half mile or one mile from a station).

- Accessory dwelling units in a detached structure, either by right or by special permit. An accessory dwelling unit (ADU) is a housing unit on the same lot as a principal unit. It must have less than 900 square feet of floor area and less than half the floor area of the principal dwelling. ADUs are subject to all existing dimensional and parking requirements, and municipalities may impose additional restrictions on them.
- Accessory dwelling units within a principal dwelling, by right. Such ADUs must have a separate entrance, either from outside or from a shared entry hall.
- Open-space residential development, by right. Open space residential development is similar to "cluster development," which Chapter 40A currently authorizes. The only substantive difference is that a provision mandating a minimum size of the open land has been deleted. Zoning bylaws may still provide for a minimum lot size for the full development.
- A reduction in the parking required for residential or mixed use development, by special permit.
- An increase in the permissible density or intensity of use of multi-family or mixed use development, by special permit.

The Act also allows the adoption of the following zoning districts by simple majority:

- Transfer of Development Rights (TDR) Zoning or Natural Resource Protection Zoning that promotes concentrated development and does not decrease the total number of housing units. Natural Resource Protection Zoning is a new type of zoning consisting of bylaws "enacted principally to protect natural resources by promoting compact patterns of development and concentrating development within a portion of a parcel of land so that a significant majority of the land remains permanently undeveloped."
- Adoption of a smart growth zoning district or starter home zoning district.

Cities and towns whose councils have fewer than 25 members should be aware of one wrinkle in this process. If such a council tries to enact a zoning amendment by simple majority, the owners of 50% or more of the affected land or of the land "immediately adjacent extending 300 feet therefrom" can file a written protest before final council action. If a valid protest is filed, the Housing Choice rules will not apply, and a 2/3 majority of the council will be needed to enact the amendment.

In a similar vein, the Act also eliminates some supermajority requirements for special permit granting authorities. Special permits for the following uses now require only a simple majority vote:

- Multifamily housing within a half mile of transit stations, including commuter rail,

subways, ferries, and buses. At least 10% of the housing must be affordable to and occupied by households with income less than 80% area median income.

- Mixed use development in centers of commercial activity, subject to the same affordable housing requirement.
- A reduction in the number of parking spaces per residential unit, where the reduced parking requirement will lead to the production of additional housing units. Chapter 40A had not previously authorized these special permits. Another section of the Act allows them if they would serve the public good and the area would not suffer a substantial adverse effect.

These provisions are binding; special permit granting authorities may not reinstitute a supermajority requirement for these uses.

Other Provisions

The Act contains a number of other provisions that affect zoning. None of these requires any immediate municipal action, but they are important to be aware of.

The Act makes it harder for third parties to appeal zoning decisions (whether related to housing or not). When a special permit, variance, or site plan is approved and a third party appeals under G.L. c. 40A, § 17, the court now has discretion to require the plaintiff to post a cash bond or surety of up to $50,000. Bonds were previously required only in appeals from subdivision approvals under the Subdivision Control Law. The bond will "secure the payment of [the defendant's] costs if the court finds that the harm to the defendant or to the public interest resulting from delays caused by the appeal outweighs the financial burden of the surety or cash bond on the plaintiffs." However, an existing provision in § 17, which was not amended, authorizes an award of costs against an appellant only where the appellant "acted in bad faith or with malice." These two provisions appear to establish different standards for requiring a bond and awarding its proceeds to the defendant, so their interplay remains to be fleshed out in litigation. Municipalities still should not expect costs to be awarded in most cases.

The Act makes a number of small amendments to the Smart Growth and Starter Home Zoning District law, Chapter 40R. These include permission for mixed-use development in starter home zoning districts, strengthened requirements for safe pedestrian access to pedestrian destinations, a cap on the number of housing units restricted to the elderly or disabled that qualify municipalities for density bonus payments, and affordability requirements for 25% of housing for the elderly or disabled. Towns that currently have or are planning to create a Smart Growth or Starter Home Zoning District should be aware of these requirements.

Finally, the Act allows contiguous municipalities to enter into agreements "to allocate public infrastructure costs, municipal service costs and local tax revenue associated with" development, either of a specific parcel or generally. The agreement must be approved by a majority of each municipality's legislative body, the mayor or board of selectmen, and the Department of Revenue. These agreements may make development near town boundaries more appealing.