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Real Estate Alert

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Massachusetts zoning changes ease residential variance standards

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Massachusetts Chapter 40A amendments ease zoning variance standards and may help advance housing development across the state.



What's the impact?

- Zoning boards may now consider public housing benefits when reviewing variance applications under Massachusetts Chapter 40A.
- Variance validity periods and zoning freeze protections have been extended, giving housing projects more time and certainty.
- Residential use variances are now available statewide, even where local zoning previously prohibited them.

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Changes to the state-wide variance standard

Amendments to Section 10 of the Zoning Act now allow zoning boards to weigh the public benefits of housing when reviewing a variance application. Previously, petitioners were required to show a significant hardship absent zoning relief based on attributes unique to the property at issue. Now, zoning boards must consider whether the variance provides “benefits to the appellant or petitioner and to the public interest, including the interest in supporting the production of housing against the detriment to the public health, safety, and welfare of the neighborhood.” Zoning boards may continue to consider whether soil conditions, shape, and topography create building challenges worthy of a variance. The amendments also explicitly allow consideration of financial hardship, whether the benefit sought by the appellant or petitioner can be achieved by some other method, and whether the practical difficulty was self-created.

Whether these changes will lead to an increase in variance approvals for housing and other projects remains to be seen, but the 40A Amendments do eliminate a legal standard that, in many circumstances, can be insurmountable.

Use variance available for residential uses across the state

Chapter 40A contained a flat prohibition on use variances unless a local bylaw or ordinance explicitly allowed for the same. The amendments now authorize zoning boards of appeal to grant a use variance for any residential use. Effectively, residential uses may be permitted in every zoning district across the state, so long as the local zoning board finds the use variance is in the public interest, including the interest in supporting the production of housing, and in compliance with the revised variance standard discussed above.

Increased time period for variances

The 40A Amendments extend the period during which variances are valid for from one year to two years, and any time needed to pursue other project entitlements or to await a determination on appeal is excluded from the two-year validity period. It also authorizes zoning boards to extend a variance for a period up to two years (formerly limited to six months).

Additional changes

- / Structures or residential uses that do not conform to zoning because of lot size or shape, frontage, lot coverage, or floor area ratio requirements may be extended or altered by right if current dimensional regulations regarding height, stories, and setbacks are met.
- / A municipality may now choose to adopt a four-year abandonment period for nonconforming uses and structures where the period was previously two years.

- / So-called “zoning freezes” extend from one to two years from the last permit necessary for construction, protecting projects with a building permit from subsequent zoning changes, so long as construction is continued through to completion as continuously and expeditiously as is reasonable. The two-year period is also tolled during any period in which the applicant actively seeks other necessary permits.
- / Projects are protected from zoning changes upon application for a special permit, building permit, or other entitlement, instead of upon issuance.
- / Notice via electronic mail is authorized for special permits and zone-change public hearings in lieu of mailed notice. Newspaper and posting notice requirements remain unchanged.
- / Anti-merger protections are extended from lots used for single- and two-family residential uses to lots for all residential uses.

Conclusion

Governor Healey set a goal of increasing the year-round housing supply in Massachusetts by 222,000 units by 2035. The 40A Amendments may support an increase in the supply of housing by eliminating the challenging variance standard and other reforms designed to extend the validity of project entitlements.

Nixon Peabody’s Real Estate Development and Affordable Housing teams help clients navigate evolving zoning rules and unlock opportunities for housing development across Massachusetts. We advise on entitlements, variances, permitting strategies, and regulatory compliance to move projects forward.

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