



Law

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he new year brings cautious optimism that the national and local economies will continue improving, perhaps jumpstarting economic development projects in many communities. Rather than waiting for and reacting to new development opportunities, the start of the new year may be a good time for municipal managers to take a proactive survey of local laws, regulations and policies to make sure their communities are ready for the types of projects their communities want in 2014 and beyond.

Zoning and Permitting

With spring town meetings approaching and sessions of new city councils underway, the beginning of the new year is an appropriate time to review municipal zoning bylaws or ordinances and consider potential improvements and updates. Cities and towns may want to take a second look at zoning provisions approved prior to the Great Recession and not recently used. A creative but untested overlay district may need some fine-tuning. Now

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Getting Ready for a **Brighter** **Economic Development** **Forecast** in 2014

may be a good time to review zoning provisions designed to promote certain types of development that may not have kept pace with the current real estate market. If the local land use boards have not received a permit application in quite some time, it may be a good idea to make sure published forms and procedures are current, clear and user-friendly.

Communities should also make sure that certain emerging (and sometimes controversial) land uses have been accounted for in the zoning bylaw or ordinance. For example:

- **Solar farms:** Solar energy projects continue to pop up throughout the state, driven by technological advancements and tax incentives. Municipalities may not prohibit or unreasonably regulate the installation of solar energy systems, but they may want to consider how zoning provisions should handle such installations. For example, should solar energy projects be limited to certain zoning districts? Should operators be required to provide reasonable screening to benefit neighboring properties?
- **Medical marijuana dispensaries:** Following passage of a 2012 ballot question allowing medical marijuana dispensaries in Massachusetts, many

communities enacted zoning moratoriums to temporarily ban these operations. Moratoriums provide time to study and plan for a new land use, but they must have a sunset clause. Communities should be aware of their moratorium's expiration date and ensure that the local planning board is on track with its preparation and review of a successor zoning provision. In addition, the Massachusetts attorney general's office ruled in 2013 that municipalities may not prohibit medical marijuana dispensaries, so all towns and cities should consider zoning provisions to accommodate this use in areas acceptable to the community.

New Flood Maps

New flood insurance rate maps from the Federal Emergency Management Agency, set to take effect in 2014, may have a significant impact on property insurance rates and development opportunities in certain areas. The new maps have additional impacts on municipalities, which must adopt and update floodplain zoning restrictions based upon the maps in order to retain eligibility for the National Flood Insurance Program. This could be as simple as amending the date referenced in a local floodplain

overlay zoning district, or as complicated as adopting an entirely new bylaw or ordinance.

Permit Extension Act

Municipal planning and inspectional staff should be aware that the 2010 Permit Extension Act was extended in 2012. As a result, projects left on the back burner may have several years to continue simmering.

The original Permit Extension Act gave projects approved during the early days of the economic downturn an automatic two-year extension beyond their normal expiration dates. Any land use approval (special permit, order of conditions, etc.) in effect between August 15, 2008, and August 15, 2010, remained valid for an additional two years beyond its original date of expiration.

The 2012 amendment to the Permit Extension Act extended the tolling period and the expiration period by an additional two years each. Qualified, unused permits in effect between August 15, 2008, and August 15, 2012, now benefit from an automatic four-year extension. For example, a special permit approved on November 2, 2009, which would have expired on November 2, 2011, remains valid until November 2, 2015.

Expedited Permitting

In 2006, the Legislature enacted Chapter 43D of the General Laws, a local-option statute creating an expedited local permitting process for any property designated as a “priority development site.” Chapter 43D requires that most local land use permits (special permits, variances, site plan approval, wetlands orders, licenses and sanitary permits—but not building permits and subdivision approvals) be accepted, processed and issued or denied within 180 days. A community has twenty business days after receiving an expedited permitting application to notify the developer of the specific permits and approvals that are subject to the 180-day review period. Any permit not decided within the 180-day window is deemed to be constructively approved.

Many communities adopted Chapter 43D when it first became available, hoping to spark development at certain properties. Some priority sites have been developed using this method, but many communities have not yet received any applications for expedited permitting.

Communities that have not adopted Chapter 43D might consider taking an inventory of properties that could benefit from being designated as priority development sites. In communities that have adopted Chapter 43D, the planning staff should make sure it has taken the administrative steps necessary to implement expedited permitting. These steps include:

1. Creating a comprehensive packet of permit application forms and instructions
2. Designating a “single point of contact” to handle expedited permitting applications and to oversee the process
3. Adopting written procedures governing the 180-day review period

Those written procedures should also guide the preliminary review process suggested by the regulations for Chapter 43D (found at 400 CMR 2). The preliminary review process consists of meetings with the developer to identify all applicable permits, and there is no statutory time



restriction for this preliminary review. In addition to benefiting the developer, preliminary reviews are intended to assist the municipal officials in planning for the 180-day review process.

Water/Sewer Regulations and Fees

Communities benefiting from adequate water and sewer infrastructure to handle larger projects should make sure that their regulations and fees will not slow or frustrate economic development goals. Many communities have operated for years using somewhat informal water and sewer connection procedures, but these may be in need of modernization. Water and sewer regulations should be clear, fair and current, and all technical requirements should be consistent with today’s methods and technology.

Communities should also verify that their sewer connection fees are consistent with the Supreme Judicial Court’s decision in *Denver Street LLC vs. Town of Saugus* [462 Mass. 651 (2012)]. In the *Denver Street* case, the SJC upheld a town’s inflow and infiltration (I/I) fee, based largely on the fact that the town was under a consent decree requiring improvements to its wastewater system. The SJC reversed a 2011 Appeals Court decision and found that the town’s I/I fee was permissible and not an illegal tax.

After the Appeals Court decision, some communities stopped charging I/I fees or made quick amendments to their fee structure. The new year may be an appropriate time for cities and

towns to consider whether they should require an I/I fee, as permitted by the SJC decision. The *Denver Street* case, however, is not a blanket approval of I/I fees. Each fee must pass the so-called “Emerson College” test, which requires that fees are:

1. Charged in exchange for a particular government service that benefits the person paying the fee in a manner not shared by other members of society;
2. Paid by choice, in that the person paying the fee has the option of not utilizing the government service and avoiding the charge; and
3. Collected not to raise revenues but to compensate the governmental unit for its expenses in providing the service.

Master Planning

State law (M.G.L. Ch. 41, Sec. 81D) requires the local planning board to maintain a master, or “comprehensive,” plan “that is designed to provide a basis for decision making regarding the long-term physical development of the municipality.” Communities should consider whether their master plans reflect current economic development goals. If a master plan reads like a historic document, based upon past market predictions that have not proven accurate, it may be time for an update. Although time-consuming and sometimes controversial, master planning can bring fresh ideas to entrenched challenges and give the community a common vision for future development. 🌟