Hot Topics in Municipal Law

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Recent Developments in Land Use Law

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Land Use Case Law*

G. L. c. 40A

- Maldonado v. Lynn Zoning Board of Appeals, 20 MISC 000529 (Land Court 2022)
  Where an existing house is a lawful nonconforming structure with respect to lot size and frontage, but the change in use of the property to a two-family home is allowed under the ordinance, and the **use will not change or increase the nonconformity** of the structure, **no variance or finding under G. L. c. 40A § 6 was required**.

- Bigamy v. Brookline Zoning Board of Appeals, 21 MISC 000429 (Land Court 2022)
  The Land Court interpreted the provisions of **G.L. c. 40A, §7** adopted in 2016 as extending **lawful nonconforming status** for illegal alterations not only to alterations of structures but also to alterations of lot lines that render an existing house nonconforming. "The court does not read the word 'alteration' so narrowly as to exclude from its coverage alterations not only of the structure itself but alterations of the lot on which it stands that change a structure's relation to its lot lines, its area, or its frontage. There is no practical difference between an alteration to a structure that changes its relation to its lot line, say, by building an addition that moves it closer to its lot line, and an alteration to the lot line itself, that also moves the building closer to its lot line."

- Markham v. Pittsfield Cellular Telephone Co., 101 Mass. App Ct. 82 (2022)
  G. L. c. 40A, § 11, requires notification of a public hearing on an application for a special permit in three ways: by mailing a copy of the notice to each plaintiff, by posting it in the city hall, and by publishing it in a newspaper. Two years after issuance of a decision, abutters challenged the decision of the Pittsfield zoning board of appeals to grant a special permit on the basis that they had not received notice by mail. The Appeals Court upheld the Superior Court's summary judgment decision in favor of the defendants on the ground that the complaint was untimely. Given that there was no dispute that the city had provided notice by the other two methods required by § 11, the lack of notice by mail did not toll the ninety-day limitations period in G. L. c. 40A, § 17, for appealing from a decision granting a special permit.

*These materials do not include all of the land use decisions issued by Massachusetts courts in 2022, but rather highlight those cases which may be of particular interest to municipal officials. Links (in blue) are provided for cases publicly available on no-fee internet sites.

Land Use Case Law

Protected Uses (G.L. c. 40A, §3)

- Hume Lake Christian Camps, Inc. v. Monterey Planning Board, 19 MISC 000386 (Land Court 2022)
  The Land Court found that the **religious exemption** under **G.L. c. 40A, §3** protects use of an RV camp to be used by people attending a religious Family Camp but not for volunteer workers or seasonal staff. The Land Court decision was appealed by Monterey Planning Board to the Appeals Court. The case was transferred to the Supreme Judicial Court (SJC-13365) for its review. Argument is scheduled for February 6, 2023.

- Tracer Lane II Realty, LLC v. Waltham, 489 Mass. 775 (2022)
  Waltham prohibited construction of an access road to a **solar system** on the basis that it would be a roadway to a commercial use through a residential district. The zoning ordinance contained what was characterized as an outright ban of large-scale solar energy systems in all but one to two percent of a municipality's land area, which was found to restrict rather than promote the legislative goal of promoting solar energy. The Court found that in the absence of a reasonable basis grounded in public health, safety, or welfare, **G. L. c. 40A, § 3, ninth par.**, such a prohibition is impermissible under the provision.

- PLH, LLC v. Town of Ware, 102 Mass.App.Ct. 1103 (2022) (unpublished decision), direct appellate review denied
  This case was decided by the Appeals Court after the Tracer Lane decision. PLH sought to invalidate the town's bylaw requiring a **special permit for large ground-mounted solar energy facilities** in certain zoning districts as a violation of the **ninth paragraph of G. L. c. 40A, § 3**. The Appeals Court upheld the Land Court's grant of summary judgment in favor of the Town. The Appeals Court noted that the ninth paragraph does not contain the prohibition on special permits found elsewhere in Section 3 and that the purpose for requiring a special permit furthered a legitimate municipal purpose. The Court also noted that Ware's solar bylaw allows large solar installations on more than seventy-two percent of its land area, either with a special permit or after site plan review.

Land Use Case Law

Zoning Amendments (G.L. c. 40A, §5)

- Scott v. Lakeville Planning Board, consolidated cases 21 PS 000245 and No. 21 PS 000252 (Land Court 2022).
  The zoning bylaw referenced a "Development Opportunities Overlay District" which allowed certain uses on parcels over 25 acres, but no map amendment had been adopted placing the project site or any other property in the district. The Court found that "the adoption of provisions for a new district may be valid, but do not burden or benefit any particular land in a municipality until a **map amendment** or provision designating the land subject to the new zoning provision is adopted."

- Bellingham Massachusetts Self Storage, LLC v. Bellingham, 101 Mass.App.Ct. 1108 (unpublished decision)
  Although the Planning Board supported a zoning amendment submitted by an individual, because the amendment was **not initiated by an authorized party** pursuant to G.L. c. 40A, §5, it was invalid.

- Cogliano v. Norton Planning Board, 101 Mass.App.Ct. 1114 (2022)
  There was no violation of the **notice requirements** of G.L. c. 40A, §5 when (1) the zoning amendment hearing notice provided the correct hearing date but identified it as a Wednesday instead of a Tuesday since that error did not qualify as "misleading", and (2) notice of the hearing was properly published in newspaper and was not required to be mailed to individual property owners.

Land Use Case Law

Marijuana Establishments

- Bask, Inc. v. Taunton, 490 Mass. 312 (2022)
  The city council denied a special permit for recreational marijuana establishment citing concerns about traffic, economic impact, utilities, health and safety, location of the proposed project, and the general welfare of inhabitants. The Land Court judge issued an injunction prohibiting the city from holding hearings on other license applications; and also found that denial of the special permit was arbitrary and legally untenable as the city council had no substantive basis for the cited concerns. The SJC found that the Land Court judge had exceeded its authority is issuing the injunction, but upheld the finding that the denial of the special permit was arbitrary, capricious and legally untenable.

- Haven Ctr., Inc. v. Bourne, 490 Mass 364 (2022)
  The Supreme Judicial Court considered whether that town's vote to ban recreational marijuana establishments by way of a general bylaw amendment rather than a zoning bylaw amendment was lawful and effective. The SJC concluded that the language of Section 3(a)(2) of the Cannabis Statute expressly authorized such an approach and upheld the bylaw.

- Benevolent Botanicals LLC v. Malden, 22 Misc. 000076 (Land Court 2022)
  Plaintiff sought to amend its complaint to seek a declaratory judgment that the buffer zones and other locational restrictions in the cannabis bylaw are unreasonably impractical as "there are no properties that are available for sale or lease in the city upon commercially reasonable terms and conditions that would not require at least one zoning variance in order to open and operate a marijuana establishment" and are, therefore, in violation of the cannabis statute (G.L. c. 94G). The court noted that "there have yet to be judicial decisions discussing and applying the 'unreasonably impracticable' standard". The city sought to have the case dismissed on the basis that the plaintiff did not have standing. The Court ruled that the plaintiff does have standing and allowed the amended complaint. This case is still pending at the Land Court.

Land Use Case Law

Chapter 40B

- [Milton ZBA v. HD/MW Randolph Ave., LLC, 490 Mass. 257 (2022)]
  The Milton ZBA challenged the authority of the Housing Appeals Committee (HAC) to modify or remove conditions that render a **G. L. c. 40B** development "substantially more uneconomic" when the project would provide less return on their investment from the outset. Milton also challenged the standard as so vague as to be arbitrary. The Court found that when developers are prepared to proceed with less return on their investment, the HAC "is authorized to eliminate conditions that effectively prevent such projects by rendering them significantly more uneconomic." The Court further found that the standard is not so vague as to be arbitrary.

- [Marengi v. 6 Forest Road LLC, Slip Op. SJC-13316 (December 14, 2022)]
  The **bond provisions in G. L. c. 40A, § 17**, apply to appeals under **G. L. c. 40B §21**, but "the court should only order a bond if the judge finds that a plaintiff's appeal appears so devoid of merit that it may be reasonably inferred to have been brought in bad faith."

MBTA Community Zoning

G. L. c. 40A §3A

- State website: Multi-Family Zoning Requirement for MBTA Communities
- Section 3A requires that each of the 175 "MBTA Communities" defined in G. L. c. 161A adopt a zoning ordinance or bylaw that provides for at least one district of "reasonable size" without age-restrictions, allowing minimum gross density of 15 units per acre and located within 0.5 miles of a transit station.
- The Department of Housing and Community Development was tasked by the statute with developing Guidelines. The final Guidelines were issued in August 2022 and revised in October 2022.
- Communities that do not comply will not be eligible for state funds specified in the statute, including the Local Capital Projects Fund (Section 2EEE of Chapter 29), and Housing Choice Initiative and MassWorks infrastructure grants. The Guidelines state that compliance may also be taken into account when communities apply for other discretionary grant programs.
- Deadlines have been established to remain in compliance. The next deadline is January 31, 2023, when "Action Plans" must be submitted on the form provided by DHCD. The following deadlines to adopt a qualified zoning ordinance or bylaw depends on your community's designation: 12/31/23 for "rapid transit communities"; 12/31/24 for "commuter rail" and "adjacent" communities; and 12/31/25 for "adjacent small towns".

MBTA Community Zoning

G. L. c. 40A §3A

Current Status

- Housing Authority Funding. A small number of communities did not comply with the first interim compliance deadline of May 2, 2022 to submit an MBTA Community Information Form. Housing Authorities in those communities were notified that they would no longer be eligible for Local Capital Projects Funds. These are funds that have been appropriated in the state budget for the past few years for a portion of the funding fpr housing authorities. DHCD has stated that it has made a legal determination has been made that housing authorities may be subject to loss of funds if the MBTA Community in which they are located do not remain in compliance. Requests have been made to DHCD by various parties for the opportunity to discuss their legal determination as to the legal status of housing authorities and the policy rationale for withholding funds from housing authorities who provide low-income housing to some of the neediest in their communities.
- Local Challenges. A group of 10 residents of the Town of Rockport have brought a lawsuit in Essex Superior Court which, among other claims, challenges Section 3A as unconstitutional and a violation of the Home Rule Amendment. This lawsuit is currently pending in Essex Superior Court.
  Kolackovsky, et al v. Town of Rockport, Dept. of Housing and Community Dev., Attorney General, Essex Superior Ct. Docket No. 2277CV00947.

Housing Choice – (Quantum of Vote)

G. L. c. 40A, § 5 & § 9

- Chapter 358 of the Acts of 2020 amended certain provisions of G. L. c. 40A to lower the required vote for certain zoning amendments from 2/3 to a majority vote and certain special permits from a supermajority to a majority vote.
- The state has drafted a guidance for local officials on determining voting thresholds. The guidance can be found here (Voting Threshold Guidance), but local officials are advised to review any determination as to the appropriate voting threshold with their municipal counsel.
- The Attorney General's Municipal Law Unit (MLU) has issued a number of decisions related to the question of "quantum of vote". Those case are publicly available on the MLU website at: MLU Decision Lookup. To find the decisions that discuss vote requirements, click on the "Topic" box at the bottom of the form and choose "Housing Choice".
- In response to a challenge the Municipal Law Unit received to the constitutionality of the reduced voting requirement applied to certain zoning amendments adopted by the Town of Rockport, its decision, issued December 12, finds in part:

  "First, nothing in the housing choice amendments to G.L. c. 40A, § 5 "overrules" local zoning by-laws. The amendments simply authorize a lower quantum of vote for certain zoning by-law amendments if a municipality itself chooses to adopt such amendments.

  Second, the municipal power to adopt zoning by-laws has always been cabined by state law. The change effected by the Home Rule Amendment (HRA) was simply that, pre-HRA, towns could only adopt zoning by-laws specifically authorized by the Legislature.

  …The Legislature had authority to require the two-thirds vote for zoning amendments when it was adopted in 1933. (See St.1933, c. 269, § 1, inserting new section 27 in predecessor statute G.L. c. 40)). By the same token, the Legislature had authority to reduce the required quantum of vote in 2020 by adopting Chapter 3 58 of the Acts of 2020, and town zoning bylaw amendments must be consistent with this requirement."

Article 97 Rules
Chapter 274 of the Acts of 2022

Link to Act: Chapter 274 – An Act Preserving Open Space in the Commonwealth

- Since February 19, 1998, the Executive Office of Environmental Affairs had in place a policy entitled "EOEA Article 97 Land Disposition Policy", which provided guidance on the disposition of so-called "Article 97 land" and set forth the conditions under which EOEA or its agencies would or would not support an Article 97 disposition. These conditions included a requirement that real estate of greater or equal monetary or use value be provided as part of the transfer.
- Various bills had been filed over the years to codify certain aspects of Article 97 dispositions.
- While such bills were pending, the Appeals Court, in August 2022, issued its decision in *Amaral v. Gloucester.* The Court found that the Legislature had properly approved a transfer of 2.7 acres of recreation land for school purposes where 2.8 acres of replacement property were provided. But importantly, the Court also noted in reference to the EOEA policy, that "policy statements do not have the legal force of a statute or regulation".
- On November 17, 2022, Bill H5381 signed into law by the Governor as Chapter 274 of the Acts of 2022, An Act Preserving Open Space in the Commonwealth. According to the conference committee report, Chapter 274 codifies the "No Net Loss" policy of the Commonwealth by requiring, among other things, "that replacement land be of comparable size, value, location, and natural resource value." The Act also "allows for a cash payment in lieu of replacement land provided that the moneys are no less than 110% of the value of the land which must be deposited into a fund dedicated to the purchase of Article 97 land that is of equal natural resource value and acreage." If the cash payment is made, the funds must be spent within 3 years.

Stretch Code

Link to the Commonwealth's website with information, slide and webinar recording, and technical guidance:
Stretch Energy Code & Specialized Municipal Opt-in Code

The 2023 Stretch Energy Code Update includes a specialized municipal opt-in code. Per the summary: "all compliance pathways under the Specialized Code are designed to ensure new construction that is consistent with a net-zero Massachusetts economy in 2050, primarily through deep energy efficiency, reduced heating loads, and efficient electrification."

The Specialized Code defines "*Net-zero building*" as:

A building which is consistent with achievement of MA 2050 net zero emissions, through a combination of highly energy efficient design together with being an all-electric or Zero Energy Building, or where fossil fuels are utilized, a building fully pre-wired for future electrification and that generates solar power on-site from the available Potential Solar Zone Area.

Since the specialized code is "opt-in" it must be adopted by a city council or town meeting vote.