Legislative Developments in Massachusetts Real Estate Law: A Panoply of Changes

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Esme Caramello is the Director of the Attorney General's Housing Affordability Unit. Before joining the AG's office in the summer of 2024, Esme was a Clinical Professor of Law at Harvard Law School, where she taught Housing Law and Policy, and served as Faculty Director of the Harvard Legal Aid Bureau.

Esme has over 20 years of experience as a housing lawyer, with a focus on trial and appellate litigation in fair housing, consumer protection, foreclosure, and eviction cases and policy advocacy to promote housing stability and opportunity. She has been a Trustee of the Boston Bar Foundation and a co-chair of the Housing Committee of the Massachusetts Access to Justice Commission, and the Reporter for the Uniform Law Commission's Study Committee on the Use of Tenant Information in Rental Decisions.

Esme received her J.D. from Harvard Law School, and a B.A. in Social Anthropology from Harvard University.

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Jesse Schomer, a partner at Dain, Torpy, Le Ray, Wiest & Garner, PC, focuses his practice on real estate development, land use, zoning, and environmental permitting. He primarily represents developers, entrepreneurs, and landowners in the context of residential and commercial land use permitting and development.

Jesse specializes in the development of affordable housing under M.G.L. Chapter 40B. In this field, he is one of a small number of Chapter 40B subject matter experts with the knowledge, experience, and know-how to guide a project from concept to occupancy, and his recent development portfolio includes occupied projects throughout eastern Massachusetts.

In addition to his active permitting practice, Jesse is an experienced real estate litigator specializing in zoning appeals, permit defense litigation, land use rights and title disputes, environmental law litigation, and registered land matters.

Jesse is Co-chair of the REBA Affordable Housing Section, and a member of its Land Use & Zoning and Litigation Sections. He was also a co-author of the Association's amicus brief in *Attorney General v. Town of Milton*. In addition to his work with REBA, Jesse is a member of the MBA, BBA, NAIOP, MMLA, and CHAPA, as well as a contributing commentator for the Massachusetts Housing Appeals Committee Reporter (MHACR).

Jesse received his J.D., *cum laude*, from the University of Notre Dame, his M.Phil., *magna cum laude*, from City University of New York, and his B.A., with distinction, from Hendrix College. He is licensed to practice in Massachusetts, New York and New Jersey.

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The Affordable Homes Act, Chapter 150 of the Acts of 2024

Excerpts are provided below. Full text is available at:
https://malegislature.gov/Laws/SessionLaws/Acts/2024/Chapter150

The Mass. Leads Act, Chapter 238 of the Acts of 2024

Excerpts are provided below. Full text is available at:
https://malegislature.gov/Laws/SessionLaws/Acts/2024/Chapter238

760 CMR 56.00: Comprehensive Permit; Low or Moderate Income Housing

Full text of proposed amendments relating to the General Land Area Minimum (GLAM) Safe Harbor and procedures relating to Safe Harbor appeals is available at:
https://www.mass.gov/doc/11222024-proposed-amendments-to-760-cmr-5600-comprehensive-permit-low-or-moderate-income-housing/download

760 CMR 71.00: Protected Use Accessory Dwelling Units

Full text is provided below and is available at:
https://www.mass.gov/doc/760-cmr-7100-protected-use-adus-final-version/download

Model Zoning for Accessory Dwelling Units

Full text, as prepared by the Metropolitan Area Planning Council (MAPC) on behalf of the Executive Office of Housing and Livable Communities (EOHLC) and the Massachusetts Housing Partnership (MHP), is available at:
https://www.mass.gov/doc/accessory-dwelling-units-model-zoning-v11/download

760 CMR 72.00: Multi-Family Zoning Requirements for MBTA Communities

Coming soon!

M.G.L. c. 40A, § 3 (as amended by the Affordable Homes Act, Section 8)

Adding the following paragraph:

No zoning ordinance or by-law shall prohibit, unreasonably restrict or require a special permit or other discretionary zoning approval for the use of land or structures for a single accessory dwelling unit, or the rental thereof, in a single-family residential zoning district; provided, that the use of land or structures for such accessory dwelling unit under this paragraph may be subject to reasonable regulations, including, but not limited to, 310 CMR 15.000 et seq., if applicable, site plan review, regulations concerning dimensional setbacks and the bulk and height of structures and may be subject to restrictions and prohibitions on short-term rental, as defined in section 1 of chapter 64G. The use of land or structures for an accessory dwelling unit under this paragraph shall not require owner occupancy of either the accessory dwelling unit or the principal dwelling; provided, that not more than 1 additional parking space shall be required for an accessory dwelling unit; and provided further, that no additional parking space shall be required for an accessory dwelling located not more than 0.5 miles from a commuter rail station, subway station, ferry terminal or bus station. For more than 1 accessory dwelling unit, or rental thereof, in a single-family residential zoning district there shall be a special permit for the use of land or structures for an accessory dwelling unit. The executive office of housing and livable communities may issue guidelines or promulgate regulations to administer this paragraph.

M.G.L. c. 40A, § 6 (as amended by the Affordable Homes Act, Section 10 and the Mass. Leads Act, Section 171)

Except as hereinafter provided, a zoning ordinance or by-law shall not apply to structures or uses lawfully in existence or lawfully begun, or to a building or special permit issued before the first publication of notice of the public hearing on such ordinance or by-law required by section five, but shall apply to any change or substantial extension of such use, to a building or special permit issued after the first notice of said public hearing, to any reconstruction, extension or structural change of such structure and to any alteration of a structure begun after the first notice of said public hearing to provide for its use for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent except where alteration, reconstruction, extension or structural change to a single or two-family residential structure does not increase the nonconforming nature of said structure. Pre-existing nonconforming structures or uses may be extended or altered, provided, that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority or by the special permit granting authority designated by ordinance or by-law that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood. This section shall not apply to establishments which display live nudity for their patrons, as defined in section nine A, adult bookstores, adult motion picture theaters, adult paraphernalia shops, or adult video stores subject to the provisions of section nine A.

A zoning ordinance or by-law shall provide that construction or operations under a building permit ~~or special permit~~ shall conform to any subsequent amendment of the ordinance or by-law unless the use or construction is commenced within a period of not more than 12 months after the issuance of the permit and, in cases involving construction, unless such construction is continued through to completion as continuously and expeditiously as is reasonable. Construction or operations under a special permit issued pursuant to section 9 or site plan approval pursuant to the local ordinance or by-law shall conform to any subsequent amendment of the zoning ordinance or by-law or of any other local land use regulations unless the use or construction is commenced within a period of 3 years after the issuance of the special permit or site plan approval and, in cases involving construction, unless such construction is continued through to completion as continuously and expeditiously as is reasonable. For the purpose of the prior sentence, construction involving the redevelopment of previously disturbed land shall be deemed to have commenced upon substantial investment in site preparation or infrastructure construction, and construction of developments intended to proceed in phases shall proceed expeditiously, but not continuously, among phases.

A zoning ordinance or by-law may define and regulate nonconforming uses and structures abandoned or not used for a period of two years or more.

Any increase in area, frontage, width, yard, or depth requirements of a zoning ordinance or by-law shall not apply to a lot for single and two-family residential use which at the time of recording or endorsement, whichever occurs sooner was not held in common ownership with any adjoining

land, conformed to then existing requirements and had less than the proposed requirement but at least five thousand square feet of area and fifty feet of frontage. Any increase in area, frontage, width, yard or depth requirement of a zoning ordinance or by-law shall not apply for a period of five years from its effective date or for five years after January first, nineteen hundred and seventy-six, whichever is later, to a lot for single and two family residential use, provided the plan for such lot was recorded or endorsed and such lot was held in common ownership with any adjoining land and conformed to the existing zoning requirements as of January first, nineteen hundred and seventy-six, and had less area, frontage, width, yard or depth requirements than the newly effective zoning requirements but contained at least seven thousand five hundred square feet of area and seventy-five feet of frontage, and provided that said five year period does not commence prior to January first, nineteen hundred and seventy-six, and provided further that the provisions of this sentence shall not apply to more than three of such adjoining lots held in common ownership. The provisions of this paragraph shall not be construed to prohibit a lot being built upon, if at the time of the building, building upon such lot is not prohibited by the zoning ordinances or by-laws in effect in a city or town.

Adjacent lots under common ownership shall not be treated as a single lot for local zoning purposes if, at the time of recording or endorsement, the lots: (i) conformed to then existing requirements of area, frontage, width, yard or depth, where each such lot has not less than 10,000 square feet of area and 75 feet of frontage; and (ii) are located in a zoning district that allows for single-family residential use. Any single-family residential structure constructed on said lot shall not exceed 1,850 square feet of heated living area, shall contain not less than 3 bedrooms and shall not be used as a seasonal home or short-term rental.

M.G.L. c. 40A, § 17 (as amended by the Affordable Homes Act, Sections 11-13)

Any person aggrieved by a decision of the board of appeals or any special permit granting authority or by the failure of the board of appeals to take final action concerning any appeal, application or petition within the required time or by the failure of any special permit granting authority to take final action concerning any application for a special permit within the required time, whether or not previously a party to the proceeding, or any municipal officer or board may appeal to the land court department, the superior court department in which the land concerned is situated or, if the land is situated in Hampden county, either to said land court or, superior court department or to the division of the housing court department for said county, or if the land is situated in a county, region or area served by a division of the housing court department either to said land court or superior court department or to the division of said housing court department for said county, region or area, or to the division of the district court department within whose jurisdiction the land is situated except in Hampden county, by bringing an action within twenty days after the decision has been filed in the office of the city or town clerk. If said appeal is made to said division of the district court department, any party shall have the right to file a claim for trial of said appeal in the superior court department within twenty-five days after service on the appeal is completed, subject to such rules as the supreme judicial court may prescribe. Notice of the action with a copy of the complaint shall be given to such city or town clerk so as to be received within such twenty days. The complaint shall allege that the decision exceeds the authority of the board or authority, and any facts pertinent to the issue, and shall contain a prayer that the decision be annulled. If the complaint is filed by someone other than the original applicant, appellant or petitioner, then each plaintiff, whether or not previously constituting parties in interest for notice purposes, shall also sufficiently allege and must plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision through credible evidence. There shall be attached to the complaint a copy of the decision appealed from, bearing the date of filing thereof, certified by the city or town clerk with whom the decision was filed.

If the complaint is filed by someone other than the original applicant, appellant or petitioner, such original applicant, appellant, or petitioner and all members of the board of appeals or special permit granting authority shall be named as parties defendant with their addresses. To avoid delay in the proceedings, instead of the usual service of process, the plaintiff shall within fourteen days after the filing of the complaint, send written notice thereof, with a copy of the complaint, by delivery or certified mail to all defendants, including the members of the board of appeals or special permit granting authority and shall within twenty-one days after the entry of the complaint file with the clerk of the court an affidavit that such notice has been given. If no such affidavit is filed within such time the complaint shall be dismissed. No answer shall be required but an answer may be filed and notice of such filing with a copy of the answer and an affidavit of such notice given to all parties as provided above within seven days after the filing of the answer. Other persons may be permitted to intervene, upon motion. The clerk of the court shall give notice of the hearing as in other cases without jury, to all parties whether or not they have appeared. The court shall hear all evidence pertinent to the authority of the board or special permit granting authority and determine the facts, and, upon the facts as so determined, annul such decision if found to exceed the authority of such board or special permit granting authority or make such other decree as justice and equity may require. The foregoing remedy shall be exclusive, notwithstanding any defect of

procedure or of notice other than notice by publication, mailing or posting as required by this chapter, and the validity of any action shall not be questioned for matters relating to defects in procedure or of notice in any other proceedings except with respect to such publication, mailing or posting and then only by a proceeding commenced within ninety days after the decision has been filed in the office of the city or town clerk, but the parties shall have all rights of appeal and exception as in other equity cases.

The court, in its discretion, may require a plaintiff in an action under this section appealing a decision to approve a special permit, variance or site plan to post a surety or cash bond in an amount of not more than ~~$50,000~~ $250,000 to secure the payment of and to indemnify and reimburse damages and costs and expenses incurred in such an action 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. The court shall consider the relative merits of the appeal and the relative financial means of the plaintiff and the defendant. Nothing in this section shall require bad faith or malice of a plaintiff for the court to issue a bond under this section.

A city or town may provide any officer or board of such city or town with independent legal counsel for appealing, as provided in this section, a decision of a board of appeals or special permit granting authority and for taking such other subsequent action as parties are authorized to take.

Costs shall not be allowed against the board or special permit granting authority unless it shall appear to the court that the board or special permit granting authority in making the decision appealed from acted with gross negligence, in bad faith or with malice.

Costs, including reasonable attorneys' fees, in an amount to be fixed by the court may ~~shall not~~ be allowed against the party appealing from the decision of the board or special permit granting authority ~~unless it shall appear to~~ if the court finds that ~~said~~ the appellant or appellants acted in bad faith or with malice in making the appeal to the court.

The court shall require nonmunicipal plaintiffs to post a surety or cash bond in a sum of not less than two thousand nor more than fifteen thousand dollars to secure the payment of such costs in appeals of decisions approving subdivision plans.

All issues in any proceeding under this section shall have precedence over all other civil actions and proceedings.

M.G.L. c. 40A, § 18 (new section created by the Affordable Homes Act, Section 14)

(a) Notwithstanding any general or special law to the contrary, a city or town that permits or adopts inclusionary zoning, incentive zoning, a density bonus ordinance or by-law pursuant to this chapter or a housing production plan submitted to the executive office of housing and livable communities may enter into an agreement with a housing developer or residential development owner to provide a preference for affordable housing to low- or moderate-income veterans, as defined in clause Forty-third of section 7 of chapter 4. The preference shall be for up to 10 per cent of the affordable units in a particular development.

(b) The preference under this section shall be established in the applicant selection process for available affordable units. Applicants who are veterans and who apply within 90 days of the initial marketing period of the development shall receive preference for the rental of up to10 per cent of the affordable units. After the first 90 days of the initial marketing period, if any of the units subject to the preference remain available, applicants from the general public shall be considered for occupancy. Following the initial marketing period, qualified applicants who are veterans shall be placed on a waiting list for the preference-occupied units for veterans and on any general waiting list. The veterans on the preference-occupied waiting list shall be given preference for affordable units, as the units become available, whenever the percentage of preference-occupied units falls below 10 per cent.

(c) Any agreement to provide affordable housing preferences for veterans pursuant to this section shall not affect a municipality's ability to receive credit for the unit for affordable housing pursuant to chapter 40B or any other law. The agreement may be monitored by a third party assigned by the municipality.

(d) This section shall not require an increase in the existing amount of affordable units set by the city or town.

(e) The city or town may require proof of veteran status and income eligibility as the city or town deems necessary.

M.G.L. c. 40B, § 22 (as amended by the Affordable Homes Act, § 15)

Whenever an application filed under the provisions of section twenty-one is denied, or is granted with such conditions and requirements as to make the building or operation of such housing uneconomic, the applicant shall have the right to appeal to the housing appeals committee in the executive office of housing and livable communities for a review of the same. Such appeal shall be taken within twenty days after the date of the notice of the decision by the board of appeals by filing with said committee a statement of the prior proceedings and the reasons upon which the appeal is based. The committee shall forthwith notify the board of appeals of the filing of such petition for review and the latter shall, within ten days of the receipt of such notice, transmit a copy of its decision and the reasons therefor to the committee. Such appeal shall be heard by the committee within twenty days after receipt of the applicant's statement. A stenographic record of the proceedings shall be kept and the committee shall render a written decision, based upon a majority vote, stating its findings of fact, its conclusions and the reasons therefor within thirty days after the termination of the hearing, unless such time shall have been extended by mutual agreement between the committee and the applicant; provided, however, that the committee shall provide notice to the secretary of any such extension or other failure to perform action by the deadlines set forth in this section and the reason for such delay; provided further, that the secretary shall annually, not later than November 1, submit to the governor and the joint committee on housing a summary of such delays including, but not limited to: (i) any deadlines missed pursuant to this section for each applicable appeal; (ii) the reason for any such delay; (iii) the total number of days, from the date of the committee's receipt of the applicant's statement of the prior proceedings, in which the committee ultimately issued a written decision or, if such appeal is in progress at the time the report is submitted, the projected number of days beyond the deadlines listed herein as may be necessary for the committee to issue a decision; and (iv) the board that issued the denial or conditions and requirements being appealed by the applicant. Such decision may be reviewed in the superior court in accordance with the provisions of chapter thirty A.

Mass. Leads Act, § 280

(a) For purposes of this section, the following words shall, unless the context clearly requires otherwise, have the following meanings:

"Approval", except as otherwise provided in subsection (b), any permit, certificate, order, excluding enforcement orders, license, certification, determination, exemption, variance, waiver, building permit or other approval or determination of rights from any municipal, regional or state governmental entity, including any agency, department, commission or other instrumentality thereof, concerning the use or development of real property, and any environmental permit, including certificates, licenses, certifications, determinations, exemptions, variances, waivers, building permits or other approvals or determinations of rights issued or made under chapter 21 of the General Laws, chapter 21A of the General Laws except section 16 of said chapter 21A, chapter 21D of the General Laws, section 3B of chapter 21E of the General Laws, sections 61 to 62L, inclusive, of chapter 30 of the General Laws, chapter 30A of the General Laws, chapter 40 of the General Laws, chapters 40A to 40C, inclusive, of the General Laws, chapter 40R of the General Laws, chapter 40Y of the General Laws, chapter 41 of the General Laws, chapter 43D of the General Laws, section 21 of chapter 81 of the General Laws, chapter 91 of the General Laws, chapter 131 of the General Laws, chapter 131A of the General Laws, chapter 143 of the General Laws, sections 4 and 5 of chapter 249 of the General Laws, chapter 258 of the General Laws or chapter 665 of the acts of 1956 or any local by-law or ordinance.

"Development", division of a parcel of land into 2 or more parcels, the construction, reconstruction, conversion, structural alteration, relocation or enlargement of a building or other structure or facility or any grading, soil removal or relocation, excavation or landfill or any use or change in the use of any building or other structure or land or extension of the use of land.

"Tolling period", the period from January 1, 2023 to January 1, 2025, inclusive.

(b) (1) Notwithstanding any general or special law to the contrary, an approval in effect or existence during the tolling period shall be extended for a period of 2 years in addition to the lawful term of the approval; provided, however, that nothing in this section shall extend or purport to extend: (i) a permit or approval issued by the United States government or an agency or instrumentality thereof or a permit or approval of which the duration of effect or the date or terms of its expiration are specified or determined under a law or regulation of the United States government or an agency or instrumentality thereof; (ii) a permit, license, privilege or approval issued by the division of fisheries and wildlife under chapter 131 of the General Laws; (iii) an approval, determination, exemption, certification, statement of qualification or any other administrative action by the department of energy resources under 225 CMR 20.00, subsection (c) of section 17 of chapter 25A of the General Laws or corresponding regulations under 225 CMR 21.00; (iv) any agreement entered into by the Massachusetts Department of Transportation or the Massachusetts Bay Transportation Authority or any permit, license or approval issued by the department or authority relating to the sale, acquisition or lease or development of real property owned in whole or in part

by the department or authority or the sale, acquisition, lease or development of any interest therein related to such real property pursuant to chapter 6C or chapter 161A of the General Laws; or (v) any enforcement order, consent decree or settlement agreement.

(2) Nothing in this section shall affect the ability of a municipal, regional or state governmental entity, including an agency, department, commission or other instrumentality thereof, to revoke or modify a specific permit or approval, or extension of a specific permit or approval, under this section, when that specific permit or approval or the law or regulation under which the permit or approval was issued contains language authorizing the modification or revocation of the permit or approval.

(3) If an approval tolled under this section is based upon the connection to a sanitary sewer system, the extension of the approval shall be contingent upon the availability of sufficient capacity, on the part of the treatment facility, to accommodate the development for whose approval has been extended. If sufficient capacity is not available, then the permit holders whose approvals have been extended shall have priority with regard to the further allocation of gallonage over the permit holders who have not received approval of a hookup prior to the effective date of this section. Priority regarding the distribution of further gallonage to a permit holder who has received the extension of an approval under this section shall be allocated in order of the granting of the original approval of the connection.

(4) If an owner or petitioner sells or otherwise transfers a property or project in order for an approval to receive an extension, all commitments made by the original owner or petitioner under the terms of the permit shall be assigned to and assumed by the new owner or petitioner. If the new owner or petitioner does not meet or abide by such commitments, then the approval shall not be extended under this section.

(5) Nothing in this section shall be construed or implemented in such a way as to modify a requirement of law that is necessary to retain federal delegation to or assumption by the commonwealth of the authority to implement a federal law or program.

(6) Any project covered by approval in effect during the tolling period shall be governed by the applicable provisions of any local ordinance or by-law, if any, in effect at the time of the granting of the approval, unless the owner or petitioner of such project elects to waive the provisions of this section.