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LEGISLATIVE DEVELOPMENTS IN MASSACHUSETTS REAL ESTATE LAW: A PANOPLY OF CHANGES

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Jesse D. Schomer, Esq.

OUTLINE OF TOPICS

- Enhanced standing requirements for abutters in M.G.L. c. 40A,§ 17 zoning appeals
- Strengthened bond provision for M.G.L. c. 40A, § 17 zoning appeals
- Permit Extension Law of 2024
- Protection of special permits and site plan review approvals
- (Partial) overhaul of the merger doctrine
- Other miscellaneous topics

Enhanced standing requirements in abutter appeals (M.G.L c. 40A, § 17)

- Enacted as Section 11 of the Affordable Homes Act
- Applies in all abutter-commenced appeals governed by Ch. 40A (variances, special permits, ZBA/ISD appeals, site plan review, Ch. 40B comprehensive permits, Ch. 40R plan review)
- The Previous Standard:

  Only persons "aggrieved" had standing to appeal, where aggrievement constitutes an infringement of the party's legal rights. *Circle Lounge & Grille, Inc. v. Bd. of Appeal of Boston*, 324 Mass. 427, 430 (1949). The interest asserted must be something that the statute is intended to protect. *Kenner v. Zoning Bd. of Appeals of Chatham*, 459 Mass. 115, 120 (2011).

  HOWEVER, "parties in interest" (Ch. 40A, § 11) had a presumption of standing *Marashlian v. Newburyport ZBA*, 421 Mass. 719 (1996).

  Parties in interest: Per Ch. 40A, § 11: direct abutters, owners of land across the street, and abutters of direct abutters within 300 feet. N.B.: Not all owners within 300'. *Arena v. Williams*, 18 MISC 000028 (MDV) (Mass. Land Ct. Mar. 21, 2019), *aff'd*, 96 Mass. App. Ct. 1116, *rev. denied*, 484 Mass. 1103 (2020).

- A party in interest's presumption of standard could be rebutted by evidence presented by the defendants (i.e., the board or t he developer), shifting the burden of proof to the abutter. *81 Spooner Rd., LLC v. Brookline ZBA*, 461 Mass. 692 (2012).
- If any one plaintiff had standing, all plaintiffs are treated as having standing. No requirement of others to individually prove standing. *Murray v. Bd. of Appeals of Barnstable*, 22 Mass. App. Ct. 473, n 7 (1986)

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Enhanced standing requirements in abutter appeals (M.G.L c. 40A, § 17)

- New standard: By the insertion of the following language in § 17, ¶ 1, the presumption of standing for Parties in Interest is now kaput:

  "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."

  Affordable Homes Act, § 11, amending Ch. 40A§ 17.

- OK, let's unpack that . . .

  "Each plaintiff": Previously, if <u>any</u> plaintiff had standing, <u>all</u> had standing. This created a situation that enabled abutter groups funded by parties without a strong case for standing to enlist direct abutters to join litigation in order to bolster their standing case. Now, each plaintiff must prove her own standing.

  "Sufficiently allege" and "plausibly demonstrate": In conjunction with the lack of presumed standing, all project opponents now must be able to <u>prove</u>, with "credible evidence", that they have some "measurable injury" that is "special and different" to them. Alleged harms that affect the community generally (e.g., traffic congestion) are likely to be insufficient to confer standing.

  "Likely flow from the decision": The plaintiffs must prove a **<u>causal link</u>** between the specific zoning relief granted by a permit and their alleged aggrievement. E.g., if the ZBA grants *dimensional* relief, alleged harms associated with the proposed *use* (traffic, etc.) probably cannot be claimed to "likely flow" from the specific relief granted.

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Enhanced standing requirements in abutter appeals (M.G.L c. 40A, § 17)

- The Land Court weighs in on the new standing requirement: *J.D. Raymond Transport, Inc. v. Peabody ZBA*, 22 MISC 000681 & 23 MISC 000115 (RBF) (Mass. Land Ct. Sept. 30, 2024)

  The amendment of Ch. 40A, § 17, effective as of August 6, 2024, "effectively eliminated the presumption of standing."

  "As before the amendment, an abutter must be a 'person aggrieved' by the decision. The amendment only changes the procedure for enforcing that right and determining standing".

  The amendment is "procedural" and "does not affect or change the substantive rights of abutters to bring an appeal of local zoning boards of appeals' decisions to the courts."

  N.B.: The determination that the amendment is procedural rather than substantive means that it can have retroactive effect. However, the Land Court has suggested that it will not allow retroactivity to impact cases that have been closed nor stages of proceedings that have already been completed. For example, where the issue of standing had been briefed and argued before the amendment, the new standard has not been applied.

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Strengthened bond provision for abutter appeals (M.G.L c. 40A, § 17)

- The previous bond requirement: Ch. 40A, § 17 was amended by the Housing Choice Act of 2020 to allow courts to require plaintiffs to post a bond of up to $50,000 "to secure payment of costs":

  > 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 to secure the payment of 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. The court shall consider the relative merits of the appeal and the relative financial means of the plaintiff and the defendant.
  >
  > Ch. 40A, § 17 (prior language).

- The enactment of this bond requirement was one of the reforms of the Housing Choice Act of 2020 enacted specifically for the purpose of improving "[a]ccess to housing, especially affordable housing, . . . [and to] help in the larger effort of creating more housing . . . and economic development . . . ." . . . "Without [these reforms], we will continue to see good projects delayed and production stalled." Baker-Polito Administration Highlights Housing Choice Bill (Feb. 28, 2020).

- Applies in all abutter-commenced appeals governed by Ch. 40A (variances, special permits, ZBA/ISD appeals, site plan review, Ch. 40B comprehensive permits, Ch. 40R plan review).

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Strengthened bond provision for abutter appeals (M.G.L c. 40A, § 17)

- *Marengi v. 6 Forest Road, LLC*, 491 Mass. 19 (2022): The SJC effectively gutted the bond requirement of Section 17

  Mostly limited the "costs" to be secured by the bond to taxable litigation costs plus "the actual, reasonable costs directly incurred by litigating the appeal". (No attorneys' fees, no carrying or delay costs, and no lost profits.)

  Conditioned the imposition of a bond on a finding of "bad faith or malice", importing unrelated language from a different paragraph of Section 17 that long pre-dated the 2020 enactment of the bond requirement.

  Discussion by the justices at oral argument suggested that concerns over the onerousness of the bond in garden variety disputes between neighbors was a motivation for the Court's creation of the "Marengi Rule" – not the justices' consideration of the General Court's stated policy goals in its enactment of the bond requirement, which were largely brushed aside.

- On remand, the trial court judge in *Marengi* did re-impose a bond.

- However, that anomaly aside, following the *Marengi* decision, in the midst of a debilitating housing crisis, most bond requests were effectively DOA and were summarily denied based on inability to meet the very high "bad faith or malice" standard.

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Strengthened bond provision for abutter appeals (M.G.L c. 40A, § 17)

- The General Court responded to *Marengi* by enacting Section 12 of the Affordable Homes Act, which amended Ch. 40A, § 17, ¶ 3 :

  > 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.**

- This legislatively overrules most of the holding in *Marengi* by specifying that imposing a bond does <u>not</u> require a finding of bad faith or malice.

- The holding in *Marengi* that a ruling on a bond motion should be based on an abbreviated presentation at the outset of the case with only a "preliminary" evaluation of the "relative merits of the appeal", but not of the plaintiffs' "state of mind", appears intact.

- Likewise, *Marengi*'s holding that "the bond provision applies to appeals of comprehensive permits" is still good law.

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Strengthened bond provision for abutter appeals (M.G.L c. 40A, § 17)

- As *Marengi* observed, Courts must "choose an interpretation that 'lends meaning and purpose' to all the statutory language." This requires us to parse the language of the new bond provision to determine what it now requires.

- *Marengi* specifically ruled out attorneys' fees, delay/carrying costs, and lost profits, reasoning that these items "could far outstrip the $50,000 bond limit. Indeed, in the instant case, the developer estimates costs totaling $250,000."

- The revised provision increased the bond cap to $250,000, suggesting that the sorts of line items ruled out by *Marengi* are now fair game. *Cf. Kavanaugh v. Newton ZBA*, 33 LCR 121 (2025) (Smith, J.) (recognizing that the new language has expanded the types of costs that may be considered beyond the confines of what was allowed by *Marengi*).

  "Costs": Per *Marengi*, costs include taxable costs and direct litigation costs (witness fees, etc.).

  "Damages": Potentially includes lost profits, increased construction/labor costs, and/or delay/carrying costs (property taxes, property insurance, debt service, etc.). *Cf. Shoucair v. Bd. of Appeal of Boston*, 494 Mass. 319. 325, n. 8 (2024) ("damages" includes lost profits).

  "Expenses incurred in such an action": What else could this mean if not attorneys' fees?

- "Secure the payment of" and "indemnify and reimburse": this language suggests that bond funds should be awarded upon a successful permit defense by the defendants.

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Strengthened bond provision for abutter appeals (M.G.L c. 40A, § 17)

- The new language is now closer to the bond provision under St. 1956, c. 665, § 11, applicable in Boston, which may provide guidance on interpreting the new language.

- Confusingly, Section 13 of the Affordable Homes Act stated as follows:

> Costs, including reasonable attorneys' fees, in an amount to be fixed by the court may be allowed against the party appealing from the decision of the board or special permit granting authority if the court finds that the appellant or appellants acted in bad faith or with malice in making the appeal to court.

I.e., a bond to "reimburse" for legal fees may be imposed without a finding of bad faith or malice, but the Court can award those fees only upon a showing of bad faith or malice? Make it make sense!

- No change to the provision of Ch. 40A, § 17 that there may be no award of costs against the board absent a finding of negligence, bad faith, or malice.

- At least one court has held that the new bond standard could not be applied in a case commenced prior to the amendment. *Findeisen v. Newton ZBA*, Middlesex Superior Ct. (Case No 2481 CV 01596) (Tabit, J.).

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The Permit Extension Law of 2024

- Mass. Leads Act, § 280: Grants an automatic 2-year extension to most development permits that were valid at any time between January 1, 2023 and January 1, 2025.

- Applies to most permits, approvals, orders, certificates, variances, waivers, and determinations of rights issued by any municipal, regional, or state entity including, among others, most approvals under the following statutes:

  Ch. 21 (Dep't of Environmental Mgmt), Ch. 21A (EOEEA), Ch. 21E, Ch. 30A, Ch. 40, Ch. 40A (zoning), Ch. 40B (comprehensive permits), Ch. 40C (historic districts), Ch. 40R (smart growth districts), Ch. 40Y (starter home districts), Ch. 41 (subdivision control), Ch. 43D (expedited permitting), Ch. 81 s. 21 (state highway opening & access), Ch. 91 (waterways), Ch. 131 (wetlands protection), Ch. 131A (MESA), Ch. 143 (inspections/licenses for buildings & elevators), the Boston Zoning Enabling Act, and all local bylaws/ordinances.

- Example: A comprehensive permit (3-year duration) was granted on February 1, 2022 and was scheduled to expire on February 1, 2025. This permit is automatically extended to February 1, 2027.

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The Permit Extension Law of 2024

- Does not apply to any federal permits/approvals; enforcement orders, consent decrees, or settlement agreements; Dep't of Fisheries & Wildlife approvals (Ch. 131), actions by the Dep't of Energy Resources (see statute for specifics), or MBTA agreements or approvals relating to land transactions.

- Does not affect the ability of government entities to revoke or modify approvals, if warranted under the law.

- Tolling of sanitary sewer connection permits is contingent on sufficient capacity in the treatment facility

- Issues for future consideration:

  Does the tolling period stack upon other tolling provisions (e.g. Covid tolling, tolling related to litigation, etc.)? Most likely yes. *Cf. Palmer Renewable Energy, LLC v. Zoning Board of Appeals of Springfield* (AC 24-P-136) (May 7, 2025) (permit extension act tolling runs consecutively to litigation tolling).

  Can the extension of a qualifying permit result in the revival of permits that have already expired? Nothing in the statute indicates otherwise.

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The Permit Extension Law of 2024

- In addition to extending covered permits and approvals, the Permit Extension Law of 2024 also protects those permits with a broad regulatory freeze:

  > Any project covered by [an] 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.

- This regulatory freeze is considerably broader than Ch. 40A, § 6. Applies both to zoning and non-zoning bylaws.

- The broadness of this freeze is compounded by the broadness of the definition of “approval”: any permit, certificate, order, 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

- Issues for future consideration:

  - What constitutes a “project”?

  - What about “approvals” that do not expire? Still protected by the freeze?

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Protection of Special Permits and Site Plan Approvals

- Mass Leads Act, § 171 (amends Ch. 40A, § 6, ¶ 2)

- Building Permits: Construction or operations shall conform to any subsequent amendment of the zoning bylaw unless commenced not more than 12 months after issuance. In cases of construction, work must continue through to completion "as continuously and expeditiously as is reasonable." (Unchanged from prior version of Section 6.)

  N.B.: This 12-month window is equitably tolled where "real practical impediments" prevent the use of the permit. *Belfer v. Bldg. Comm'r of Boston*, 363 Mass. 439 (1973) (appeal of variance); *see also Hadley v. Casper*, 2002 WL 1991609 (Mass. Super. 2002) (appeals of other permits); *Braccia v. Mountain*, 2005 WL 107092 (Mass. Land Ct. 2005) (time spent pursuing other permits).

- Special Permits (Ch. 40A, § 9) and Site Plan Approvals (local bylaw): Construction or operations shall conform to any subsequent amendment of the zoning bylaw and any other local land use regulations unless the use or construction is commenced within 3 years after issuance. In cases of construction, work must be continued through to completion as continuously and expeditiously as is reasonable.

- "Commencement of Construction": Construction involving the redevelopment of previously disturbed land is deemed to have commenced upon "substantial investment in site preparation or infrastructure construction".

- Phased Construction: Phased construction must proceed "expeditiously, but not continuously" among phases?

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(Partial) Overhaul of the Merger Doctrine

- The Merger Doctrine: "[A]djacent lots in common ownership will normally be treated as a single lot for zoning purposes so as to minimize nonconformities." *Preston v. Bd. of Appeals of Hull*, 51 Mass. App. Ct. 236, 238, (2001).

- The doctrine was created by common law, it is partially incorporated into Ch. 40A, § 6, which protects undersized lots from subsequent zoning changes, but only if they are not held in common ownership.

- Most merger cases involve situations where a single landowner owns (or a predecessor in title owned) two or more adjacent parcels, one or more of which are undeveloped.

- Example: The Town of Smallville owns two adjacent parcels, both with an area of 1 acre, one containing a municipal building, the other undeveloped. The town's zoning bylaw requires two -acre minimum land area. Because the undeveloped parcel's land area, if combined with the land area of the developed parcel, would eliminate the dimensional nonconformity, the lots are deemed to have merged for zoning purposes.

- Merger does not affect tax parcel classification or legally change the lines of ownership.

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(Partial) Overhaul of the Merger Doctrine

- Affordable Homes Act, § 10: No merger if, at the time the instrument creating the lots was recorded, all lots:
    1. Conformed to then existing requirements of area, frontage, width, yard or depth,
    2. Had at least 10,000 square feet of area,
    3. Had at least 75 feet of frontage, and
    4. Were located in a zoning district that allows for single-family residential use.
- Exception for "Starter Homes": The amended merger doctrine now allows a single-family residential structure to be constructed on the undeveloped (non-merged) lot, as long as the structure:
    1. Does not exceed 1,850 square feet of heated living area,
    2. Contains at least 3 bedrooms, and
    3. Is not used as a seasonal home or short-term rental.

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Miscellaneous Other Recent Changes

- MBTA Communities Regulations (760 CMR 72)
- New funding programs added to MBTA Communities (AHA & MLA):

HousingWorks	Brownfields
Office of Travel & Tourism grants	MassDevelopment grants
Seaport Economic Council grants	Mass. Historical Commission grants
Mass Impact funding	Cultural Facilities Fund grants
library grants	economic development grants
technical assistance grants	IT/infrastructure grants.

- Priority in awards of state funding given to MBTA Communities-compliant municipalities (AHA & MLA)
- Proposed Amendment of EOHLC Ch. 40B regulations (760 CMR 56) regarding Safe Harbor appeals
- Proposed Regulation: Petitions for Adoption, Amendment or Repeal of EOHLC Regulations (760 CMR 73)
- Proposed Regulation: Residential Home Inspection Waivers (760 CMR 74.00)

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THANK YOU!

Do you have any questions?

jschomer@daintorpy.com
(617) 892-9047
linkedin.com/in/jesse-d-schomer

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