

Congress of the New Urbanism - New England

Chapter 40R – A Good Law Made Better Finally Starts Showing Results

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Chapter 40R of the Massachusetts general laws (the “Smart Growth Zoning and Housing Production” act) (Available at: <http://www.mass.gov/dhcd/40R/statute.pdf>.) takes an innovative approach to encouraging the creation of more housing in Massachusetts. Passed during the summer of 2004, Chapter 40R implements a proposal from the Commonwealth Housing Task Force’s October 2003 study report “Building on Our Heritage: A Housing Strategy for Smart Growth and Economic Development.” (Available at: <http://www.tbf.org/tbfgn1.asp?id=1846>.) The task force singled out the lack of land zoned for residential use in sufficient density as the primary reason for high housing costs and lack of housing production in Massachusetts, particularly Greater Boston. Acknowledging that political and fiscal factors created disincentives to municipal support for increased housing production, it proposed a voluntary program of fiscal incentives to turn municipalities from opponents into proponents of increased housing production. The task force also saw creative urban design and location near existing infrastructure as a means to facilitate desirable development in the form of attractive, livable and dense communities.

In response to these goals, Chapter 40R provides for direct financial incentives to municipalities when they adopt zoning overlay districts intended to facilitate the production of housing and mixed-use development at specified “smart growth” locations.

Higher Density Residential and Mixed Use Development with an Affordable Component

A municipality may propose a “smart growth zoning district” as an overlay to its existing zoning in “eligible locations,” consisting of areas (1) near transit stations; (2) of concentrated development, including town and city centers and existing commercial and rural village districts; and (3) “that by virtue of their infrastructure, transportation access, existing underutilized facilities, and/or location make highly suitable locations for residential or mixed use...districts.” Allowed densities in a proposed district must be at least:

- 20 units per acre of developable land area (“DLA”) for multi-family housing, • 12 units per acre DLA for two- and three-family dwellings and • 8 units per acre DLA for single family housing.

Infill housing on existing vacant lots must also be permitted. The overlay provisions must require that at least 20% of the units in the district as a whole and 20% of the units in any single development of 12 or more units be affordable to households with incomes below 80% of the area-wide median income. The district may provide for “mixed use development” containing a mixture of single and multi-family residential, commercial, institutional, industrial and other uses “all conceived, planned and integrated to create vibrant, workable, livable and attractive neighborhoods.”

A municipality may adopt design standards for development in the overlay district to address physical character and planning issues such as character of building types, streetscapes and other features traditionally found in densely settled areas. Importantly, the statute provides that a municipality may not adopt a design standard that adds “unreasonable costs to” or “unreasonably impairs the economic feasibility of proposed projects.”

Financial Incentives for Municipalities

Chapter 40R provides three types of financial incentives for participating municipalities. To be eligible for these financial incentives, the proposed smart growth provisions, along with the municipality’s comprehensive housing plan and other specified information, must be presented to the Department of Housing and Community Development (“DHCD”) for a preliminary determination of eligibility. After local adoption and DHCD’s confirmation of final eligibility, the municipality receives a one-time “zoning incentive payment” under a schedule set forth in the statute. The size of payment is based on the amount by which the number of units of new construction allowed within the overlay district exceeds the number that would be allowed by the underlying zoning. The payment is to be made within 10 days of DHCD’s final eligibility determination. Payments range from as little as \$10,000 for districts with the potential to create up to 20 additional units, to \$600,000 for districts with the potential

to create 501 or more new units. In addition, municipalities are eligible for a “density bonus payment” in the amount of \$3,000 for each new housing unit that is created in the district, payable within 10 days of submission of proof that a building permit for the unit has issued. The third type of fiscal incentive requires that the Executive Office of Environmental Affairs, the Executive Office of Transportation, DHCD and the Department of Administration and Finance use a discretionary funding methodology which “favors” municipalities having smart growth zoning districts or other policies that encourage affordable housing production.

Development Review and Appeal Process

Chapter 40R establishes a review process that is similar to the process set forth in Chapter 40A (the “Massachusetts Zoning Act”), for special permits, but with some important differences. As with special permits, applications are filed with the municipal clerk and notice is given to parties in interest. The statute sets a time limit for development review of 120 days from the time the developer files an application with the municipal clerk to the time a decision issues. Although this time period may be extended by mutual agreement, it is less open-ended than the statutory process for special permit review, where the 90-day time limit for decision starts only after the public hearing is closed. The failure of the approving authority to act in a timely way will allow the applicant to claim a constructive approval.

An application may be denied only on limited grounds related to meeting conditions in the governing ordinance or by-law, failing to submit required information or the project’s inability to mitigate its impacts through appropriate conditions. In this respect, Chapter 40R’s form development review standard is most akin to municipal site plan approval of by-right development which does not encompass the outright denial of development applications except in those rare instances where it is impossible to condition a project to mitigate its impacts. An application may only be subject to such conditions as are necessary to “ensure substantial compliance of the proposed project with...” the overlay district or “to mitigate any extraordinary adverse impacts of the project on nearby properties.”

The appeal process also departs significantly from typical zoning appeals, principally by requiring a plaintiff seeking to reverse the approval of a project under Chapter 40R to post a bond, which is forfeited if the plaintiff does not substantially prevail, in an amount equal to twice the property owner’s net carrying costs and attorneys’ fees. A court must also affirm the approving authority’s decision to approve a development project unless it concludes that the authority abused its discretion under the statute. By contrast, in an appeal by the project applicant from a denial or conditional approval, the approving authority bears the burden of justifying its decision by substantial evidence in the record.

Chapter 40R’s Recent Progress and Future Prospects

The most significant criticism of Chapter 40R at the time of its adoption was its failure to address educational cost impacts of new residential development, particularly multifamily development. (See: “Massachusetts Boosts Incentives for Smart Growth Planning,” available at: <http://www.allbusiness.com/periodicals/article/877716-1.html>) A widely-supported provision that would have held municipalities essentially harmless for increased schooling costs had been recommended by the Commonwealth Housing Task Force as part of the original draft, but it was dropped on the House floor at the last minute. The lack of initial interest in Chapter 40R (no new districts were adopted in 2004 or 2005) was largely blamed on the lack of this provision. Last year, the General Court rectified its failure in 2004 by adopting Chapter 141 of the Acts of 2005, effective as of February 20, 2006, and codified as Massachusetts General Laws Chapter 40S.

In a nutshell, Chapter 40S authorizes, subject to appropriation and commencing in fiscal year 2008 (i.e., July 2007), “Smart Growth School Cost Reimbursement” for all municipalities with one or more Smart Growth Zoning Districts. According to Section 2 of the new law, the reimbursement amount is equal to “the positive difference, if any, between: (i) total education cost for eligible students, and (ii) the sum of local smart growth revenues for education plus additional chapter 70 aid.” In plain English, that means that the Commonwealth will reimburse municipalities for the increase in school costs for those public school students living in new residential units created in Smart Growth Zoning Districts while backing out of the reimbursement amount a calculated education-related percentage of the additional revenues flowing to the municipality from such residential growth such as increased auto excise taxes and increased property taxes as well as additional state educational assistance based on total school population. Regulations for implementing Chapter 40S are required to be issued by not later than July 20, 2006.

It certainly seems no coincidence that with the adoption of Chapter 40S, Chapter 40R seems finally to be catching on. This should be no surprise: with Chapter 40S, the most common municipal objection finally has been taken largely off the table. Following on this important statutory add-on, the first wave of Chapter 40R overlay districts finally cleared municipal approval in five communities this spring, permitting the construction of over 1500 new residential units as-of-right:

- a. Norwood – On May 8, 2006, Norwood Town Meeting adopted the St. George Avenue Smart Growth Overlay District, allowing the construction of 15 new residential units at a 0.78-acre former church site.

- b. North Reading – On May 18, 2006, North Reading Town Meeting adopted the Berry Center Smart Growth Overlay District, allowing the construction of 434 new residential units at a 21-acre former hospital site.

- c. Plymouth – On May 20, 2006, Plymouth Town Meeting adopted the Cordage Park Smart Growth Overlay District, allowing the construction of 635 new residential units on a 35-acre former industrial site.

- d. Dartmouth – On June 6, 2006, Dartmouth Town Meeting adopted the Lincoln Park Smart Growth Overlay District, allowing the construction of a total of 319 new residential units on a 40.65-acre site.

- e. Chelsea – In late May/early June 2006, the Chelsea City Council adopted the Gerrish Avenue Smart Growth Overlay District, allowing the construction of 125 new residential units on a 2.82-acre former light industrial site.

Several new Chapter 40R districts in a wide range of communities (from Bolton to Somerville to Kingston) are also currently under active consideration by DHCD. With the new, improved Chapter 40R/40S, it seems like Massachusetts may have finally found a key to unlock the significant potential of denser housing and mixed-use development that communities are finally able and willing to embrace rather than reject.