KP | LAW eUpdate

An Act Relative to the Affordable Homes Act

August 13, 2024

On August 6, 2024, the Governor signed into law Chapter 150 of the Acts of 2024, "An Act relative to the Affordable Homes Act" (the "Act"), which amends the Zoning Act, G.L. c. 40A, in significant ways. This eUpdate highlights certain significant provisions. Due to the Act's emergency preamble, all of the below changes are now law, except for the new ADU requirements in Section 8 of the Act, described below, which will take effect on February 2, 2025, 180 days following the date on which the Act was enacted.

1. Accessory Dwelling Units

One of the most significant provisions of the Act is the creation of a statewide definition of Accessory Dwelling Units ("ADU") and the establishment of uniform rules governing the creation of ADUs. The Act will soon make Accessory Dwelling Units "as of right" every city and town. The new provisions in the Act supersede any inconsistent local bylaws already in existence, although the ADU "as of right" provision will not be in effect until February 2, 2025, 180 days following the date on which the Act was enacted into law.

(a) New Definition of ADU. Section 7 of the Act replaces the definition of Accessory Dwelling Unit found in G.L. c. 40A, § 1A. Specifically, the Act:

- Removes the ability of cities and towns to impose owner occupancy requirements on ADUs or their principal dwellings;
- Affirms the ability of municipalities to regulate, or prohibit short-term rental of, ADUs; and
- Clarifies that the square footage reference in the definition applies to gross floor area.

Municipalities may consider reviewing their zoning bylaws or ordinances to determine whether the existing definition of an ADU is inconsistent with the new definition.

(b) ADUs As of Right. Section 8 of the Act amends G.L. c. 40A, § 3 to allow ADUs as of right in single-family residential zoning districts subject only to reasonable regulations including, but not limited to, site plan review, dimensional setbacks, restrictions on the bulk and height of structures, and restrictions on and prohibition of short-term rental ADUs. Specifically, Section 8 prohibits zoning bylaws and ordinances from:

- Imposing owner occupancy requirements for either the ADU or the principal dwelling; and
- Imposing parking requirements in excess of one parking space per ADU, except that, when an ADU is located not more than 0.5 miles from a commuter rail station, subway station, ferry terminal or bus station, no parking spaces may be required.

Section 8 does provide, however, that a special permit may be required for more than one ADU, or rental thereof, in a single-family residential zoning district. The Act authorizes the Executive Office of Housing and Livable Communities ("EOHLC") to issue guidelines or promulgate regulations relative to "as of right" ADUs, although it is uncertain whether, or when, EOHLC may take such action.

As noted above, Section 8 of the Act, providing for ADUs as of right in single-family residential zoning districts, will not take effect until February 2, 2025. Prior to that date, inconsistent municipal zoning bylaws or ordinances will remain in effect and be applicable to the permitting of ADUs. After February 2, 2025, however, zoning bylaws or ordinances inconsistent with Section 8, or enforcement thereof, may be subject to challenge. Cities and towns may wish to take advantage of this delayed effective date to consider revising existing bylaws or ordinances conflicting with Section 8.

2. Merger of Lots Under Common Ownership

Section 10 of the Act preserves the buildable status of certain lots owned in common by exempting them from the doctrine of merger. When two nonconforming lots come into common ownership, case law provides that the two lots will "merge" to eliminate or reduce the zoning nonconformities. Section 10 of the Act amends G.L. c. 40A, § 6 by prohibiting the merger, for zoning purposes, of adjacent lots under common ownership 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.

As a condition of receiving this new protection from the merger doctrine, and, in turn, the increase in value afforded to buildable lots, Section 10 requires that any single-family residential structure constructed on a lot protected by Section 10's new exemption 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. In creating these rules, the General Court is converting qualifying lots to buildable status while simultaneously imposing permanent restrictions that could, it appears, create a permitting environment favorable to development of so-called "starter homes".

3. Zoning Appeals

(a) Particularized Injury for Standing. Section 11 of the Act revised G.L. c. 40A, § 17 limiting the types of appellants who will be eligible to establish standing to challenge local zoning determinations. Specifically, Section 17 requires that a complainant who is not an original applicant, appellant or petitioner in a zoning matter at the local level must "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." The requirement that appellants demonstrate a particularized injury establishes a higher standard for persons seeking to file lawsuits challenging zoning decisions.

(b) Higher Bonds Authorized for Appeals. Section 12 of the Act further revised G.L. c. 40A, § 17 by empowering judges to require plaintiffs to post sureties or cash bonds of not more than $250,000, rather than $50,000 when appealing a decision approving a special permit, variance or site plan. The bond, intended to secure the payment of, and to indemnify and reimburse, damages, costs and expenses incurred in such an action, can be imposed 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 must consider the relative merits of the appeal and the relative financial means of the plaintiff and the defendant. Notably, if a court finds bad faith or malice in the filing of a complaint, the bond may then be increased further to include costs and reasonable attorneys' fees.

4. Veteran Preference for Affordable Housing

The Act inserts a new G.L. c. 40A, § 18, which allows a municipality, in specific circumstances, to negotiate with a housing developer or residential development owner to include a preference for affordable housing for low- or moderate-income veterans. This option is available only to municipalities that permit or adopt:

- inclusionary zoning;
- incentive zoning;
- a density bonus ordinance or bylaw; or
- a housing production plan submitted to EOHLC.

The so-called veteran preference can include up to 10 percent of the affordable units in a particular development. Importantly, the preference will not affect a municipality's ability to receive credit for affordable housing purposes, such as inclusion on the Subsidized Housing Inventory ("SHI").

It is critical to recognize that municipal zoning bylaws or ordinances will need review on a case-by-case basis to determine the impacts of the Act, if any. Where the scope of this law is far reaching, and where it is anticipated that further guidance may be issued by the EOHLC, we expect that additional analysis will be needed. We will, of course, monitor any developments and inform you of the same.

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