

Bill would eliminate 'zoning process freeze'

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There are numerous proposals pending in the Massachusetts Legislature regarding amendments to the Zoning Act (G.L. c. 40A) and the Subdivision Control Law (G.L. c. 41 §81K- 81GG).

One current proposal is being sponsored by the Zoning Reform Working Group (ZRWG), which is made up of state legislators, municipal officials, planners, environmental and housing advocates, and interested citizens who have joined together to sponsor legis-

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lation to update state statutes regarding zoning and subdivisions.

The ZRWG is currently sponsoring a comprehensive revision of both the Zoning Enabling Act and the Subdivision Control Law known as the Land Use Reform Act (LURA), the current version of which can be found on the city solicitors and town counsel's website, <http://www.massmunilaw.org>.

If the statutes are to be amended, it should be the goal of the bar to help the Legislature appreciate the need to: (a) balance the rights of property owners and municipalities; (b) enact legislation that provides better planning tools for property owners and planning boards; and (c) enact legislation that is easier to interpret and apply than the current statutes. This article seeks to illustrate how just one aspect of LURA would radically change land use law in this Commonwealth.

A 'mere guide'

Under section 3 of LURA, the Zoning Enabling Act would be changed from a limitation on a municipality's zoning authority into a mere guide for town planning. Such a provision would render LURA virtually meaningless. Assuming, however, that the final version of LURA ultimately operates as a limitation on municipal zoning authority, the current law with respect to zoning freezes applicable to subdivision applications and approvals will be materially changed.

LURA proposes to eliminate the current provisions of G.L. c. 40A, §6 that

freeze zoning for property at the time that a preliminary definitive subdivision application is filed and applies until final disposition of the subdivision application, and then for eight more years if approved.

Under the current version of LURA, definitive subdivision plans would only receive zoning freeze protection for the zoning in effect on the date of first publication notice of a zoning change that occurs *after the plan is approved* and then for only three years.

Potential for unfairness

The potential for unfairness and difficulty that this single provision of LURA would visit on land owners seeking approvals to develop their property is demonstrated by the recent case of *Kindercare Learning Centers, Inc. v. Town of Westford*, 62 Mass. App. Ct. 924 (2004).

In that case, KinderCare Learning Centers, Inc. proposed to construct a 10,000 square foot childcare facility in Westford. The proposed use was allowed as of right in the underlying zoning district and was dimensionally conforming.

KinderCare submitted a site plan review application (a non-discretionary review process that cannot generally result in denial of a project) to the planning board, and after seven months of review, the planning board denied site plan approval. The building inspector denied a building permit on the grounds that the planning board had denied site plan approval.

KinderCare appealed the building commissioner's denial to the zoning board of appeals, which upheld the building commissioner. KinderCare appealed the decision to Land Court.

While the matter was pending in the Land Court, and about a year after the original submission of the site plan application, a group of residents proposed a zoning amendment to limit the as-of-right size of child care facilities to 2,500 square feet, an amendment that would have effectively killed the project.

With the zoning freeze protections of G.L. c. 40A, §6 in mind, KinderCare submitted a subdivision plan for the subject land prior to the adoption of the proposed amendment. The Town Meeting thereafter adopted the zoning change, and the planning board denied approval of the definitive subdivision plan. KinderCare appealed the denial of the subdivision plan.

In *KinderCare Learning Centers, Inc., et al. v. Westford, et al.*, L.C. Misc. Case # 284997 and L.C. Misc. Case # 286435, Land Court Chief Justice Peter W. Kilborn ruled that denial of site plan approval was in excess of the local board's authority, that the subject property had the benefit of the section 6 zoning freeze and that KinderCare was entitled to its requested building permit.

The town disputed that the property had zoning freeze protection because approval of the subdivision had been denied, and the town appealed the

Land Court's judgment ordering the issuance of the building permit.

Ultimately, the Appeals Court held that the land shown on a subdivision plan was protected from zoning changes while the plan was pending before the planning board and while the appeal of the denial of subdivision approval was pending before the courts. The source of what has now become known as a "process freeze" is

or by-law which became effective after the date of submission of the plan first submitted, together with time required to comply with any such agreement or with the terms of any order or decree of the court."

Landowners often spend many months and many thousands of dollars seeking approvals for projects. If LURA were adopted in its current form, municipalities or abutters that do not favor

a proposed project could easily thwart development efforts by a simple amendment of the zoning by-law or code to prohibit or inhibit the proposed project.

All the time and money expended would be wasted if the landowner could not avail itself of the current zoning freeze protections of the Zoning Enabling

If the Land Use Reform Act were adopted in its current form, municipalities or abutters that do not favor a proposed project could easily thwart development efforts by a simple amendment of the zoning by-law or code to prohibit or inhibit the proposed project.

found in the seventh paragraph of G.L. c. 40A, §6, which states:

"Disapproval of a plan shall not serve to terminate any rights which shall have accrued under the provisions of this section, provided an appeal from the decision disapproving said plan is made under applicable provisions of law. Such appeal shall stay, pending either (1) the conclusion of voluntary mediation proceedings and the filing of a written agreement for judgment or stipulation of dismissal, or (2) the entry of an order or decree of a court of final jurisdiction, the applicability to land shown on said plan of the provisions of any zoning ordinance

Act.

In addition to the loss of the "process freeze," LURA proposes reducing the zoning freeze for approved subdivision plans from the current eight-year freeze to only a three-year freeze after approval.

Such a period does not provide adequate time to build out a larger subdivision. A three-year zoning freeze for subdivisions would force developers to build out at much faster rates of development, thereby thwarting the expressed purpose of LURA to advance "orderly and sustainable growth." REBA