POLICY
PIONEER OPPORTUNITY
BRIEF

How to Streamline Housing Permitting in Massachusetts

By Salim Furth & Andrew Mikula

Introduction

Delays and uncertainty in the approval of proposed housing developments decrease total production and increase costs. To understand the existing permitting process for housing in the Bay State, we spoke to 22 planners, lawyers, developers, government officials, and scholars. The first half of this brief describes the underlying political economy of zoning and housing and the typical permitting and appeals processes. The second half proposes 11 detailed reform recommendations that we developed with our interviewees' feedback.

A few of our interviewees have also engaged with the Governor's Commission on Unlocking Housing Production, which has investigated many barriers to housing, including permitting. We applaud the Commission's work and, as of this writing, eagerly anticipate its report. During our research process, several of the reforms we recommend in our paper were introduced as bills before the 194th General Court, which reflects the standing of our interviewees and the urgency with which lawmakers are seeking good ideas to address high housing costs.

The political economy of zoning and housing

Massachusetts has an exceptionally rich history of local government. The hometown of one of the authors maintained a militia and welfare system for generations before the American Revolution. In the 20th century, cities and towns received zoning power from the Commonwealth and began managing their growth by restricting the type and location of new housing. Other regulatory powers, including the authority to write local septic and wetlands ordinances, further entrench municipal control over land use.

Because its schools are largely funded at the local level, Massachusetts municipalities are more hostile than most American localities to family-oriented development.[1] Accurate or not, it is commonly believed that new residential development results in greater net expenditures and higher property taxes for incumbents. And unlike in many other states, localities cannot charge impact fees to cover some of the costs associated with growth.

Town meeting governance and Massachusetts' unique requirement for supermajority votes to change zoning also present technical difficulties for regulatory administration.[2] Unlike a City Council or Select Board, which can meet weekly to debate and amend regulatory policy, infrequent town meetings offer a one-time, up-or-down vote on many policy decisions. One interviewee who works in affordable housing development told us that "life is too short to go to town meeting."

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February 2025

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In this environment, discretionary special permits have taken on an outsize role.[3] Decisions that ought, in planning theory, to be debated in comprehensive planning exercises are instead implicitly delegated to project-by-project debate before citizen boards. As Boston University researchers found, public input in the permitting process is dominated by homeowners who live within a few blocks of the project in question.[4] Our interviewees confirmed this finding; one said special permits are "a popularity contest."

Our research did not cover the City of Boston, where land use is practiced under different statutes and norms than in the rest of the Commonwealth.[5]

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How the permitting process works now

Although there are differences across localities, most residential development in Massachusetts falls into one of three categories:

- ***Approval Not Required (ANR).*** As the name suggests, ANR developments are the simplest. These are typically the subdivision of a single large lot into a few lots fronting an existing public street. Although they must abide by relevant zoning and environmental rules, they do not need to come before a public hearing or vote.
- ***Single-family subdivisions.*** In this process, detached houses are created on newly subdivided lots fronting on new public or private streets. In most cases, the development abides by the existing zoning code, which privileges large-lot detached houses. But the subdivision and a site plan must be approved by the Planning Board.
- ***Multifamily buildings.*** Few Massachusetts zoning codes allow multifamily housing as of right in new locations. Instead, most new condominium or apartment buildings must obtain either a special permit or rezoning as well as site plan approval.

Other than ANR, these reviews typically require public hearings and give local officials broad discretion to approve or reject applications. At a hearing, developers, experts, and members of the public share information and opinions. One developer we interviewed told us that hearings are "where your problem starts. You don't attract people that are pro-housing, you attract people that are anti-housing, especially if they live within a quarter mile."

In Massachusetts, public hearings are often continued many times. As a result, a single hearing may stretch over multiple years. All individual hearing sessions, including continued sessions, must be scheduled with 14 days' public notice. The hearing process is a burden on all involved; one public-sector interviewee "attended 150 hearings in one 18-month period."

In parallel with the episodic hearing, the municipality, the developer, local boards, and well-connected neighbors conduct negotiations, commission studies, and lobby for their preferred outcome. One interviewee speculated that board members find it difficult to approve a technically compliant project in front of an angry crowd; continuing the hearing is easier.

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Our interviewees focused on four common types of review:

- ***Subdivision review.*** This is primarily a technical review undertaken by the Planning Board, intended to ensure that all newly created streets and lots abide by local ordinances regarding dimensions and environmental rules (local, state, and federal) governing water supply, wastewater, stormwater runoff, wetlands, and conservation.
- ***Site plan review.*** The site plan may cover many of the same issues as the subdivision review and is usually approved by the Planning Board, although municipal staff handle most of the work. For multifamily buildings, traffic circulation from the parking lot is an important topic. Municipal departments such as police and fire are asked to weigh in with any concerns. However, site plan review is not defined by Massachusetts statute, so its parameters are vague, leading to a long string of court cases. Multiple interviewees recalled site plan reviews delayed over aesthetic "nitpicking" that should not have been part of site plan review.

- ***Rezoning.*** Massachusetts governance makes it difficult for towns to change the zoning of a parcel. Doing so requires a vote of Town Meeting, which typically meets twice a year. For a town (but not a city), the rezoning does not take effect until the state Attorney General reviews it. In most other states, rezonings are the primary way that localities approve development applications.
- ***Special permit.*** Because the rezoning process is so onerous, Massachusetts has developed a unique reliance on special permits. Special permits are not available everywhere. Rather, each local zoning code lists some uses as "allowed" in a given zone, others as "prohibited", and others as "allowed by special permit." When a developer applies for a special permit to build multifamily housing, the local special permit granting authority—usually a Zoning Board of Appeals (ZBA), Planning Board, or City Council—can review many aspects of the project and demand changes.[6] In some municipalities, the conditions for special permits are clearly stated; in others, the special permit granting authority has broad, vague authority. Massachusetts statute requires a two-thirds vote to issue a special permit, except in specific cases.

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Development may be subject to further review in some circumstances, such as the following:

- ***Wastewater disposal.*** Massachusetts municipalities rarely extend their sewage systems, requiring instead that new development use septic systems that leach wastewater into the soil. Many cities and towns have developed their own restrictions on the size and placement of septic systems above and beyond the scientifically grounded state restrictions. In the uncommon case where a development without sewer access has more than 80 or 90 bedrooms, state law takes over and requires a wastewater treatment plant at a cost of a few million dollars. State regulations also require daily inspections for the life of the plant.
- ***Wetlands protection.*** Our interviewees characterized the state Wetlands Protection Act as tough but fair, with timely state administration. But many municipalities have stricter local wetlands or conservation ordinances and extended appeals processes.
- ***Design review.*** Some municipalities require that new buildings are subject to aesthetic review.[7] The Design Review Board may hold a public hearing. The board's aesthetic demands are often unpredictable and depend on who serves on the board. Design review is sometimes folded into site plan review, although that is legally questionable.

Appeals Processes

Local decisions are not always final. Sometimes, developers appeal denials or opponents of development appeal approvals. Usually, the plaintiff can choose to file either in land court or another superior court. Interviewees told us that developers favor land court, which is both technically adept and sympathetic to them. The land court features an expedited permit session to handle cases concerning larger developments.[8] Conversely, opponents of development prefer a general superior court, where judges are less likely to have subject matter expertise that could expedite cases.

Appeals of Chapter 40B affordable housing developments go to a special Housing Appeals Committee (HAC). One interviewee told us that the committee's decisions almost always favor the developer but can still take up to two years.

Developers have different options for appeal depending on where they have faced denial or allegedly illegal impositions:

- ***Technical reviews.*** When municipal staff or elected bodies either conduct site plan reviews for ANR developments or enforce non-germane standards as part of subdivision reviews, a developer can appeal and has a strong chance of judicial relief. As one town reportedly told one of our interviewees, "we know it's illegal, but you won't sue us." Indeed he did not; like most developers, he accepted illegally imposed conditions rather than spend a year or more obtaining judicial relief.

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- ***Site plan review.*** A developer whose site plan is denied by the Planning Board must appeal indirectly. Despite the Planning Board denial, the developer may file a building permit application, which is then rejected. The developer can then use the appeal rules for building permits to appear before the Zoning Board of Appeals.
- ***Special permits and rezonings.*** Developers and abutters alike rarely succeed in appealing a special permit decision. Likewise, developers seldom have recourse to appeal a rezoning decision, although in some municipalities rezoning decisions may be overturned by opponents either due to procedural errors or through a townwide referendum.

When opponents—almost always abutters of a project—appeal, they do so by filing a court case that is usually premised on procedural grounds. Developers often negotiate with an opponent to get a case dropped, even if the opponent has little chance of winning. One interviewee recalled a North Shore lawyer who tied a project up in court for four years. The costs of compromise are usually lower than the costs of delay, with the result that opponents know that even lawsuits of dubious merit are a ready tool for winning concessions. Because appeals are a negotiating tactic, opponents will usually appeal an unfavorable superior court decision—continuing to delay the project at minimal cost while holding out for a settlement.

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Even negotiated settlement of a lawsuit can require a taxing process, especially when there are diverse opponents with different priorities. One interviewee described a case in which it took almost a year to convince 45 anti-development plaintiffs to sign a negotiated memorandum of understanding that withdrew the lawsuit.

Massachusetts has some statutory protections against frivolous land-use lawsuits. But those protections are implemented on a case-by-case basis at the discretion of individual judges. That includes a bonding requirement for the plaintiff of up to $250,000. Further, plaintiffs can only be held liable for the defendant's costs if the defendant proves the plaintiff acted in bad faith or malice, a high bar given that, before the facts of the case are heard, a plaintiff's allegations are usually at least superficially plausible. Recent legislation requires abutters to "plausibly demonstrate [a] measurable injury [that is] special and different." [9] This provision has yet to be tested in court, but likely allows judges to dismiss baseless lawsuits at an earlier stage of the proceedings.

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Lastly, there is a separate appeals process for disputes related to wetlands protections and other environmental regulations. One of our sources described how the Massachusetts Department of Environmental Protection (DEP) has expedited appeals that go to the state in recent years, with what was once a one or two-year process typically now shortened to about six months. While appeals of state rules go to the DEP, many municipalities have stricter local rules, from wetlands ordinances to septic system standards. Appeals of decisions based on municipal ordinances go to superior court, and the developer rarely wins these cases. Appeals of local environmental ordinances blocking 40B developments go to HAC, where developers reportedly fare better.

Recommendations

To reduce delays and uncertainty, we offer a broad suite of targeted reforms, which we detail below:

- In permitting:
  - Define site plan review as a technical, administrative process
  - Reduce the red tape facing special permits
  - Reduce the delays built into the repeated-hearing process
  - Allow third-party administrative reviews of building permit applications
  - Vest development rights
  - Harmonize and refine state and local environmental standards

- Ensure that design review standards are specific and objective

- In the appeals process:
  - Discourage the use of lawsuits as a negotiating tactic
  - Ensure that appeals go to responsive venues with expert adjudicators
- In local government:
  - Train local board members
  - Allow school impact fees in growing municipalities

Reforms to the permitting process

Define site plan review as a technical, administrative process. The lack of a site plan review statute has led to many needless delays and lawsuits. A site plan review statute should grant municipalities the authority to conduct site plan review. But it should also limit that review to site planning—issues such as traffic circulation, stormwater runoff, and building placement. And the review must be performed administratively, usually by municipal staff, without a board vote. Relatively small projects should be eligible for review without a public hearing.

Reduce the red tape facing special permits. The legislature should lower the approval threshold for special permits to a simple-majority vote rather than a supermajority vote, at least for residential uses. We further suggest that the legislature define a category of contextual permits and require timely, administrative approval of such permits in municipalities large enough to have full-time staff. Legislation could define a special permit as "contextual" if it (a) is primarily residential and (b) conforms to the 75th percentile of floor area ratio, height, parking per square foot, setbacks, and lot coverage either on its block or within 300 feet.

Reduce the delays built into the repeated-hearing process. Hearings are frequently continued from one date to another to await minor informational updates. In most cases, current law requires two weeks' notice of each instance of a hearing. We suggest shrinking the notice for a continued hearing to five days, which would quietly accelerate many permit processes. Current law also has a rarely invoked requirement that a municipality approve or deny a permit within 90 days of the close of a hearing. We suggest shortening this to 30 days.[10]

We suggest shrinking the notice for a continued hearing to five days, which would quietly accelerate many permit processes.

Allow third-party administrative reviews of building permit applications. Municipal staffing is sometimes insufficient to ensure expeditious review of the technical aspects of a development proposal. Some small towns outsource reviews entirely to outside contractors, which have a financial incentive to drag out approval processes. To speed up approvals, the legislature should require that cities and towns accept administrative reviews from appropriately certified or licensed third-party planners and engineers hired by the developer. Municipalities would retain the right to audit and reject third-party approvals, a normal practice across the many cities and states that accept third-party review.

Vest development rights. Massachusetts does not protect builders from regulatory changes made during the application process except for subdivision applications. The Commonwealth should extend this protection, vesting development rights at the first request for building permits and zoning approvals in addition to subdivisions. Doing so would eliminate a common workaround, whereby builders file subdivision applications to vest their rights, even if they have no need to subdivide. It would also extend equal protections to developers of properties too small to subdivide.

Harmonize and refine state and local environmental standards. It is reasonable that some localities want to maintain stricter standards for wetlands and septic systems than the state. But those must, like state regulations, be grounded in science and clearly communicated. One possibility is that new and existing local environmental regulations and supporting scientific documentation should be reviewed by the DEP for both rigor and clarity, much as the Attorney General's Office reviews

town zoning bylaws before they take effect. Another is to restrict local departures from some basic state definitions and measurements, such as the relationships between number of bedrooms, gallons of sewage produced, and land conditions and area necessary for on-site wastewater disposal. A few interviewees noted a 2015 Massachusetts Housing Partnership paper suggesting reforms to sewage rules.[11]

Ensure that design review standards are specific and objective. One interviewee told us that some design review boards "just make it up as they go along." Massachusetts should follow the State of Washington and require design review to be limited to specific and objective criteria so that any builder can quickly comply. Another interviewee suggested local pattern books as an affirmative approach to design.

Reforms to the appeal process

Discourage the use of lawsuits as a negotiating tactic. "A lot of abutters and attorneys use zoning appeals to get a bunch of money out of a project," one interviewee told us. Their goal is to hold out for a financial settlement from which the plaintiff's attorney takes a large cut. This misuse of the system delays justice for others. Recent reforms allow judges to set high bonds for plaintiffs, but it's too early to discern how often such bonding requirements are imposed. We suggest furthering bond reform by setting a modest bond by default in abutter appeals, which the judge can reduce or increase depending on circumstances. More importantly, abutters appealing a land use decision should be required to submit a written opinion by a certified professional to substantiate an allegation that the approval will harm them in a specific, particular way. Change of property value alone should not constitute actionable harm.

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Ensure that appeals go to responsive venues with expert adjudicators. Although Massachusetts has a land court, HAC, and appeal review at the DEP, many technical cases are nonetheless heard in a general superior court. We suggest giving more resources to the specialized venues along with a clear mandate for rapid decisions. With these resources in place, the legislature should open the land court, HAC, and DEP to more cases. Defendants in land use cases should have the option of transferring the case to land court. And plaintiffs appealing the denial of a permit should be allowed to appeal to HAC.

Local government reforms

Train local board members. The Citizen Planner Training Collaborative offers state-supported training for local Planning Board and ZBA members, but many do not take advantage. Poorly informed board members are more likely to go along with confused or unethical actions, which can lead to delays and lawsuits. We suggest that training be required of any board member in order to serve beyond an introductory period, perhaps one or two years. Alternatively, the state could require that each board have a chair and vice-chair who have received appropriate training.

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Allow school impact fees in growing municipalities. Massachusetts does not permit localities to charge school impact fees. That may seem like a benefit to developers, but it contributes to hostility toward growth. We suggest that the legislature allow a city or town to charge school impact fees when its under-18 population exceeds its historic peak. The fees must apply only to by-right development and be calculated according to a published formula[12] that abides by constitutional principles of nexus and proportionality.[13] Such fees must then be used for capital expenditures that expand school capacity.

Conclusion

Across disciplines, levels of government, and particular regions of the Commonwealth, land use and development experts interviewed for this brief described Massachusetts' residential permitting process as too lengthy, complex, opaque, and discretionary. And the appeal process only exacerbates the entire system's tendency towards delay and obfuscation. In reforming these processes, the policy changes listed above aim to make residential permitting more easily navigable for the citizens and professionals who will ultimately bring housing affordability and abundance to Massachusetts.

Appendix: Interviewees[14]

Jeffrey Brem, Meisner Brem Corp.

Tim Czerwienski, Town of Milton[15]

Amy Dain, Dain Research

Katherine Levine Einstein, Boston University

Brian Falk, Mirick O'Connell

Wayne Feiden, UMass Center for Resilient Metro-Regions

Benjamin Fierro III, Lynch & Fierro LLP

John Infranca, Suffolk University Law School

Mike Kennealy, former Secretary, Executive Office of Housing and Economic Development

Sarah Khatib, former Vice Chair, Town of Walpole Planning Board

James Kupfer, Town of Barnstable

Ed Marchant, EHM/Real Estate Advisor

Sammy Nabulsi, Rose Law Partners LLP

Suhail Oweis, developer

Alex Peterson, Cape Cod Commission

Jennifer Raitt, Northern Middlesex Council of Governments

Jeff Rhuda, Symes Associates, Inc.

Todd Rodman, Seder & Chandler, LLP

Eric Smith, Town of Athol

John Smolak, Smolak & Vaughn LLP

Clark Ziegler, Massachusetts Housing Partnership

Endnotes

1 In most states, school districts are politically separate from zoning jurisdictions.

2 Governor Baker's Housing Choice reforms removed the supermajority requirement for many rezonings that allow more housing.

3 In a random sample of 15 cities and 15 towns with between 20,000 and 70,000 residents, we found that the ratio between special permit land uses and by-right land uses is 0.67. There was no difference between cities and towns. Most states have a similar divergence between planning theory and practice, but rely on legislative tools, such as rezonings and Planned Unit Developments. We thank Eli Kahn for research assistance on this question.

4 Einstein, Katherine Levine et al. "Neighborhood Defenders: Participatory Politics and America's Housing Crisis." Cambridge University Press. December 5, 2019. https://www.cambridge.org/core/books/neighborhood-defenders/0677F4F75667B490CBC7A98396DD527A

5 John Infranca and Ronnie Farr have documented Boston's unique reliance on variances. Boston Mayor Michelle Wu has inaugurated a procedural reform process. See Infranca, John J. and Ronnie M. Farr. "Variances: A Canary in the Coal Mine for Zoning Reform?" Hein Online. 2023. https://heinonline.org/HOL/LandingPage?handle=hein.journals/pepplr50&div=16&id=&page=; and City of Boston Planning Department. "Improving Our Development Review Process." n.d. https://www.bostonplans.org/projects/improving-development-review-process-article-80

6 A growing number of municipalities, especially cities, require legislative approval of special permits. See Dain, Amy. "A Reformer's Guidebook to Zoning's Knots: Approval Processes for Multi-Family Housing in Greater Boston." Lincoln Institute of Land Policy. October 2021. https://www.lincolninst.edu/publications/working-papers/reformers-guidebook-zonings-knots/

7 In some cases, design review applies only to a specific district within the municipality.

8 General Court of the Commonwealth of Massachusetts. "General Laws Chapter 185, Section 3A." Commonwealth of Massachusetts. n.d. https://malegislature.gov/Laws/GeneralLaws/PartII/TitleI/Chapter185/Section3A

9 General Court of the Commonwealth of Massachusetts. "Bill H.4977: An Act Relative To The Affordable Homes Act." Commonwealth of Massachusetts. n.d. https://malegislature.gov/Bills/193/H4977

10 Developments under Chapter 40B already enjoy tight timelines for hearing turnaround and overall approval, as interviewees noted. However, simply extending the 40B rules to all developments could potentially backfire, because a municipality facing a deadline can simply reject a normal discretionary development. The deadlines for 40B work because the burden of proof is on the municipality, not the developer.

11 Peznola, Joseph D. "Sewage Rules Create Gap in Housing Supply in Massachusetts." Massachusetts Housing Partnership. July 2015. https://www.mhp.net/assets/resources/documents/sewer_rules_housing_supply.pdf

12 Multifamily housing attracts few families with children, so allowable fees would have to be lower for multifamily housing than single-family housing. The School Impact Tax system in Montgomery County, Maryland, offers a reasonable model: https://montgomeryplanning.org/planning/countywide/growth-and-infrastructure-policy/schools/school-impact-taxes/.

13 Gardner, Charles and Emily Hamilton. "Sheetz vs. County of El Dorado." Mercatus Center at George Mason University. November 22, 2023. https://www.mercatus.org/research/amicus-briefs/sheetz-v-county-el-dorado

14 One interviewee in state government spoke to us off-the-record only.

15 Since the time of our interview, Czerwienski has moved to Beals Associates, Inc.

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