

3 MINUTES ON MASSACHUSETTS REAL ESTATE

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Boston Adopts New Coastal Flood Resilience Zoning Overlay District as City

Prepares to Protect Against Threats of Future Sea Level Rise.

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Like all other New England coastal communities, the City of Boston has experienced recent events of extreme heat, rain, snow, and flooding. These events, which stem from the phenomenon of climate change, are predicted to continue well into the future. In response to this threat, the previous city administration implemented Climate Ready Boston, spearheaded by the Boston Planning and Development Agency (BPDA), as an ongoing initiative to devise policies and plans to protect against the adverse impacts of climate change, including sea level rise. In furtherance of this initiative, Boston recently adopted a new *Coastal Flood Resilience Overlay District*, promulgated as Article 25A to the Boston Zoning Code, and additionally updated already existing sections of the Zoning Code that pertain to climate change.

Climate Ready Boston’s resilience strategy is centered on introducing multiple layers of protection at varying scales to

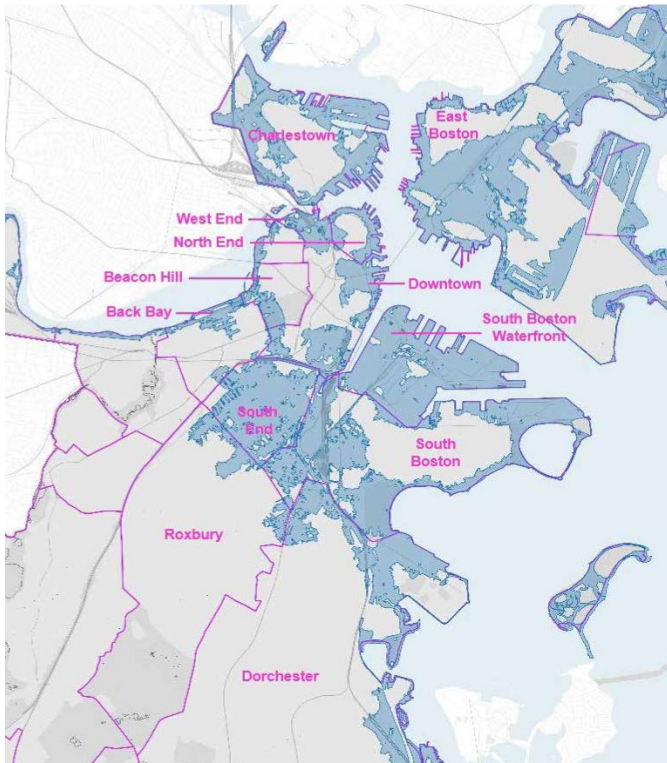
combat the ill effects of rising sea levels at all levels. Article 25A codifies the draft Coastal Flood Resilience Design Guidelines originally published by the BPDA in September 2019. The implementation of Article 25A serves as a further layer of protection because it requires private developers to include significant protective measures against rising sea levels as part of their proposed developments. The *Coastal Flood Resilience Overlay District* (CFROD) regulations and related zoning map are concentrated in areas inside Boston that are anticipated to be flooded with a 1% chance storm event in 2070 with 40 inches of sea level rise.

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Inside the CFROD, Article 25A would apply to Article 80 type projects that usually propose to: erect or extend one or more buildings within the Harborpark District that would result in the addition of more than 10,000 square feet (20,000 square feet outside the Harborpark District); construct 15 or more dwelling units; change the use of a gross floor area of 50,000 or more square feet outside of the Downtown District (100,000 or more square feet within the Downtown District); and rehabilitate a structure having, or to have after rehabilitation, a gross floor area of 100,000 or more square feet. The neighborhoods most impacted by the overlay are highlighted in the accompanying map and illustration.

Projects will be monitored for compliance with the new requirements at two phases in the development permitting process: first, at an initial filing under Article 80; and second, when a building permit application is filed with the Inspectional Services Department. A Resilience Reviewer is to be appointed by the city to advise both city agencies regarding resilience compliance. Although Article 25 was adopted prior to the time that former Boston City Councilor

Michell Wu was sworn in as Boston’s new Mayor in early November 2021, the policies Article 25 espouses and the goals it seeks to achieve are certainly in line with the goals of the Boston New Green Deal, which served as a centerpiece of Mayor Wu’s recent electoral campaign.

Source: BPDA September 2019 draft *Coastal Flood Resilience Design Guidelines*, p.19

- Coastal Flood Resilience Zoning Overlay District
- Neighborhoods impacted

Affirmatively Furthering Fair Housing: City Enacts Nation’s First Zoning Amendment to Directly Address Discrimination and Gentrification in Boston.

The recent Affirmatively Furthering Fair Housing Amendment to Boston Zoning Code Article 80 is the nation’s first zoning measure to address vestiges of discriminatory housing practices and the lack of access to housing created in many gentrified neighborhoods. By this amendment, Article 80 will now require an Affirmatively Furthering Fair Housing (AFFH) component, which provides one of the most significant policy efforts in Boston’s history to mitigate the effects of discrimination and gentrification from all Article 80 large project

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development proposals. In effect, the amendment will improve accessibility to housing for people of all backgrounds and will ensure that residents are not priced out of neighborhoods that were home to them growing up.

The AFFH addition to Article 80 was enacted with the approval of Text Amendment 446 by the City of Boston Zoning Commission, which was submitted originally by City Councilor Lydia Edwards and her colleagues on the Boston City Council. The Amendment incorporates into Article 80's procedures the requirement that all Article 80 projects having a residential component enter into a "cooperation agreement" to achieve AFFH goals and comply with the new "AFFH Assessment Component" requirements for identifying and implementing strategies to address housing accessibility within the applicable project under Article 80 review. Text Amendment 446 also adds a number of new definitions to Zoning Code Article 2 and Article 2A, which are the definitional sections of the Boston Zoning Code and are to be applied in the new AFFH requirements and process. The new requirements contained in Text Amendment 446 became effective on March 14, 2021.

What the New Zoning Amendment Will Require of Developers

The AFFH component will now be part of the approval process for all Article 80 large projects with a residential component, including Planned Development Areas. The AFFH component's compliance will have three key requirements: (1) disclosure of the project's strategies to overcome segregation and foster inclusive communities; (2) completion of an "AFFH Assessment Component" tool intended to calculate housing displacement risk, based, in part, on an analysis of historical exclusion; and (3) description of measures, based on the proposed use, size, and scope of the project, that the proponent plans to employ to achieve compliance with the AFFH Intervention Options for the project that are established through completion of the AFFH Assessment Component and approved by the BPDA.

Specifically, the AFFH Assessment Component must include a narrative section describing past discriminatory practices in the area of the project and how the project will foster inclusive housing to counter those past practices. A project proponent must also complete a project "Assessment Tool," which is a standard form set forth in the Amendment text, and further describe how the project will achieve the goals established in the project's AFFH component.

The new Article 2 and 2A definitions created by the Amendment include, among others, a specific definition for "Affirmatively Furthering Fair Housing," which, in summary, is defined as certain "meaningful actions" for accomplishing the goals intended for this new Amendment. These "meaningful actions," also defined in the Amendment, include, among others, providing a mix of affordable and market rate units, establishing affordability levels, and devising transportation plans. Once completed, the Boston Interagency Fair Housing Development Committee, which was created by the Amendment, shall review and approve each project's AFFH component and enforce subsequent compliance with the same.

Our Guidance for Compliance

Developers should affirmatively plan for their AFFH component at the time they are preparing their Article 80 project notification form. Involving community and local leaders to address the requirements of the AFFH component will augment planning and subsequent approval. While the goals of the new Amendment are important, the standards for what will create a 'compliant' AFFH component are still evolving. The AFFH



component obligations are also in addition to any development impact or Housing Trust contributions required pursuant to Article 80. Because the AFFH came directly from the City Council to the Zoning Commission, instead of through the City's established planning process, some of the standards it contains could be construed as vague and potentially challenged on constitutional grounds. Therefore, Developers should also anticipate that, as the AFFH is implemented, the standards by which the Committee will review, approve, and enforce an AFFH component could become subject to further refinement in order to better define these standards and requirements and to protect against subjective determinations during the project review process, which could result in due process scrutiny. These issues must be addressed to protect the constitutionality of this historic Amendment and the legislative goals it advances. Importantly, the Amendment will serve to further remove the vestiges of discriminatory housing in Boston. The Amendment will also help improve the affordability of housing in Boston's neighborhoods so that residents growing up in those neighborhoods can continue to call them home.

The Bipartisan Infrastructure Investment and Jobs Act Will Deliver Much to Massachusetts During the Years to Come.

On November 15, 2021, President Joseph Biden signed the Bipartisan Infrastructure Investment and Jobs Act (the "IIJA") into law. The IIJA, also known as public law 117-58, represents a \$1.2 trillion, once-in-a-generation major investment, in the nation's infrastructure. The investment is intended to help further spur the nation's economic recovery from the disastrous effects of the Covid-19 pandemic. Massachusetts is expected to receive \$10 billion in federal funds under IIJA.

The funds being awarded to the state under the IIJA are in addition to the approximately \$5.3 billion in discretionary funds that Massachusetts has already received for distribution under the American Rescue Plan Act, H. R. 1319 of 2021 ("ARPA"). In early December 2021, the Massachusetts Legislature approved a consensus bill (H.B. 4269) for spending of a \$3.998 billion portion of the \$5.3 billion in discretionary funds awarded to the state under ARPA.

The Biden Administration initially introduced the IIJA to Congress in early 2021 as the American Jobs Act and was the first part of the Administration's Build Back Better Plan. The Build Back Better Plan was intended to ultimately propel the nation's economy to full recovery. While pending before Congress, the IIJA garnered much bipartisan support, which eventually led to its passage.

The second part of the Build Back Better Plan, known as the Build Back Better Act, is currently pending before Congress and is expected to provide an additional \$1.75 trillion investment nationwide in family care, health care, and sustaining the environment against the threats of climate change.

The funds to be distributed under the IIJA will be used to rebuild and replace many of the highways, secondary roads, bridges, water pipes, airports, ports, and rail roads in the United States that are currently in poor condition. In addition, the funds will be used to help expand reliable access to high-speed internet and to adequately address climate resiliency matters in many communities that have too often been left behind. The



intended consequence of the investment is to ease inflationary pressures on the economy by strengthening supply chains and creating good-paying jobs, which will assist the economy in growing sustainably and equitably for decades to come.

According to a Congressional Budget Office report released in August 2021, the funds awarded under the IIJA will have a direct impact on the country's economy for at least the next ten years.

What this all means for Massachusetts's industries is that they all will be able to share in the approximately \$10 billion in federal funds that have been allocated for Massachusetts under the IIJA. The majority of the funds will be distributed to several key sectors of the state's economy as follows:

•Roads and Bridges: \$5.3 billion over five years. \$5.3 billion has been allocated under IIJA specifically to repair and rebuild roads (\$4.2 billion) and bridges (\$1.1 billion) in Massachusetts. The rebuilt facilities are required to be climate resilient and safe for all users, including cyclists and pedestrians. The rebuilding program is planned to take place over the next five years. In addition, Massachusetts is eligible to apply for additional funds under the separate, discretionary \$12.5 billion Bridge Investment Program that has been established as a part of the IIJA to specifically fund the repair of economically significant bridges. The state may also apply for a portion of the nearly \$16 billion of discretionary funds earmarked for distribution to fund major projects that will deliver further substantial economic benefits to local communities.

Water Infrastructure Improvements: \$1.1 billion over five years. Massachusetts is slated to receive \$1.1 billion in discretionary funds under the IIJA to eliminate lead water service lines and pipes and improve other water service infrastructure facilities in local communities in Massachusetts.

Public Transportation: \$2.5 billion over five years. The state will receive \$2.5 billion to improve its public transportation options, as at least twenty three percent of the state's public transit vehicles have either reached or are past their useful lives, and those who take public transportation spend an extra fifty percent of their time commuting as opposed to those who do not.

Other sectors of the Massachusetts economy that will benefit from the IIJA funds over the next five years include: \$100 million for expanding connections to reliable high-speed internet service, \$63 million for building electrical vehicle charger networks to facilitate long-distance travel and to provide convenient charging options, \$15.7 million to protect against cyber-attacks, \$5.8 million to protect against wildfires, and \$244 million for airport infrastructure improvements.

Takeaway. This information should provide a more expansive view of how this funding could help create new public and private business partnerships to take advantage of emerging opportunities. For example, this funding can foster the creation of opportunities such as utilizing new and developing technologies to deliver innovative services to improve things such as regional mobility and transit-oriented housing through the Metro-Boston Area.



Practice Tip: Right of Entry G. L. c. 266, § 120B

While fences may make good neighbors, property owners who live in close proximity to others sometimes require access to an abutter's property in order to perform repairs to their own property. But what happens when an abutter refuses to allow access to his property? A remedy is provided by G.L. c. 266, § 120B, which allows a property owner such entry onto an abutter's property and protects against criminal trespass and civil liability for such action. For a property owner to avail himself of this right of entry, the owner must first notify the police chief of the municipality where the abutting property is located that the owner has requested permission to enter the abutting property for the purpose of repairing or maintaining his own property, that such permission was refused by the owner or occupants of the abutting property, and that he intends to enter the abutting property under G.L. c. 266, § 120B. Additionally, the owner is required to post a bond in the amount of \$1,000.00 with the police department to protect the abutting property against damage caused by entry on the abutting property. Entry is allowed for up to 30 days in any calendar year, and materials and tools may be stored on the abutting property for up to eight hours in any one day. After the property owner completes repairs to his property, the owner must ensure that the abutting property is restored.

Boston Sets New Parking Guidelines for Proposed Developments Over 50,000 Square Feet & Eliminates Minimums for Affordable Housing Developments

The City of Boston recently announced new maximum parking ratio guidelines for large development proposals in Boston. The guidelines apply to projects that propose to contain over 50,000 square feet and are required to submit a transportation access plan agreement, also known as a TAPA, as a part of their building permit approval process.

It took over two years of study to create the guidelines which are intended to help reduce overall carbon emissions by lessening the demand for parking at new developments through the creation of more walkable neighborhoods and by encouraging more investment in public transit, bike lanes, walking paths and additional green space.

The new guidelines reduce the number of required parking spaces, which are estimated to cost \$50,000.00 per space for new developments, thereby, reducing the total cost of a building project. The cost savings can be used to create additional affordable housing opportunities, green spaces, and other building amenities. According to a statement from Boston Planning and Development Agency Director Brian Golden, "By reducing the number of required parking spaces in areas well-served by transit, we can lower the cost of new housing and decrease the amount of traffic in our neighborhoods." The parking ratios are site specific and take into consideration things like a proposed development's proximity to bike and care share stations, bus routes and public transit stations in factoring lower parking ratios.

Because the new ratios are uniform and published on the city's web-site they also help to take the some of the guess work out of what had formerly been an ad-hoc process by ensuring that project proponents now know what the parking requirements are at the beginning of the permitting process.

In late December 2021 the City of Boston took a further step to remove outdated minimum parking standards (that had long been seen by many as barriers to creating more affordable housing from the Boston Zoning Code by adopting a zoning code amendment that removes all minimum parking requirements where at least

sixty percent (60%) of the proposed units area income restricted at one hundred percent (100%) of Area Mean



Income or AMI. The measure which had been unanimously approved by both the Boston Planning and Development Agency and the Boston Zoning Commission was signed into law by City of Boston Mayor Mitchell Wu on December 22, 2021.

The new measure however does not eliminate all required parking minimums from qualifying affordable housing developments. Instead, it replaces them with new parking ratio guidelines that stem from the new maximum parking ratio guidelines that were established by the Boston Transportation for new developments proposing over 50,000 square feet. The new rules will now allow eligible proposals to base minimum parking requirements based on an evaluation of the needs of the residents of the new development rather than on non-flexible outdated standards.

The city's administration hopes that the new rules will go a long way to bolster creation of new affordable transit- oriented housing units that are much needed in Boston today.

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A Note from The Editor

I hope that this newsletter finds you staying healthy and well. Each of the articles contained in this issue of 3 Minutes on Massachusetts Real Estate were in production before the most recent spikes in the COVID-19 virus and its variants. Although the articles are primarily focused on developments in permitting law and practices in the City of Boston, I believe that you may find them useful even if you do not conduct business in Boston. As concerns regarding the threats

posed by rising sea levels continue to grow, other cities and towns in Massachusetts, especially those situated along the coast, will begin to consider adopting similar policies on climate resiliency, if they have not done so already. As we continue to adapt to the changes to the workplace in the era of COVID-19, we will continue to endeavor to report promptly on new developments in the permitting area that may have implications for your project or business. Over the past year, we have published several advisories

regarding the implications of COVID-19 for our clients. The advisories are posted on my web page, which can be found at: www.permitlawyer.com. Our practice includes representing development companies as their outside general counsel in matters relating to land use and permitting, and we have chosen to address the topics outlined in this newsletter because they are of particular import at this time. Should you like to discuss further how any of the topics addressed in this newsletter might affect your particular interests, please feel free to contact me by email at kjj@dohertylawoffices.net or by phone at (617) 542-8905.

Attorney **Kevin J. Joyce** represents a broad range of real estate clients, including property owners, developers, lenders, landlords and investors. He has handled real estate transactions involving hotels, residential subdivisions, office, residential and commercial condominiums and restaurants. Mr. Joyce publishes **3 Minutes on Massachusetts Real Estate** to keep his readers informed of recent developments in real estate and land development law. The Information contained in **3 Minutes on Massachusetts Real Estate** does not constitute legal advice and it should not be relied on without a discussion of your specific situation with an attorney of your choice. "ADVERTISING" -SJC Rule 3:07.

