



Massachusetts Municipal Lawyers Association

"Dedicated to Effective Local Government Through the Advancement of Municipal Law"

December 21, 2023

PRESIDENT
Karis L. North

To: The Honorable Lydia Edwards, Chair, Joint Committee on Housing
The Honorable James Arciero, Chair, Joint Committee on Housing

VICE PRESIDENT
Ivria Glass Fried

Cc: The Honorable William C. Galvin, Chair, House Committee on Rules
and The Honorable William Smitty Pignatelli, Vice Chair

EXECUTIVE DIRECTOR
James B. Lampke

Re: HB3551 (HD4192) - An Act facilitating site plan review

**IMMEDIATE PAST
PRESIDENT**
Matthew Gray Feher

Dear Representatives Edwards and Arciero:

PAST PRESIDENT
Brandon H. Moss

I am writing to you in my capacity as the President of the Massachusetts Municipal Lawyers Association ("MMLA"), the Commonwealth's municipal bar association to communicate our comments and recommended revisions on HB 3551, An Act facilitating site plan review.

EXECUTIVE BOARD
Christopher L. Brown

Christine M. Griffin

HB 3551 seeks to codify the common practice of many municipalities to require "site plan review" under their zoning ordinances or bylaws in connection with certain as-of-right uses and uses allowed by special permit. As site plan review is not specifically mentioned in the Zoning Act (G.L. c. 40A)¹, legal oversight of site plan review has evolved under Massachusetts common law.

Jason D. Grossfield

Jillian Jagling

Donna MacNichol

Susan C. Murphy

David Shapiro

Shawn A. Williams

The codification of site plan review will provide certain public benefits, namely some procedural consistency in how it is implemented across municipalities, and a specific appeal process which, to date, has been somewhat disjointed under prevailing case law based on whether site plan approval is conducted in conjunction with a building permit or as a free-standing permit/special permit.

HB 3551 aims to address certain procedural and substantive aspects of site plan review. There are a number of provisions of the Bill that would benefit from revision prior to adoption, particularly to avoid unintended consequences.

Recommended revisions are discussed below and correspond to the marked copy of the Bill attached hereto as Exhibit A. Suggested revisions in tracked changes are also attached hereto as Exhibit B.

We would be happy to speak with the proponents of the Bill about our recommended changes.

¹ Except with respect to bonds upon appeal under GL Chapter 40A, Section 17.

Comment A (Lines 4-6)

(a) *Site plan review “shall mean review and approval...of a proposed use or structures” (See also Line 35).*

It is important to distinguish review and approval of a site plan from review and approval of a use.² The language in the definition does not provide a clear distinction. This concern also arises in subsection (d)(i) of the Bill (at Line 35). Some language changes are suggested in Exhibit B to clearly make the distinction established by the SJC and which we believe is intended by the proposed Bill.

(b) *“by an authority other than the zoning administrator” (See also subsection 7A(c))*

The definition creates some ambiguity with respect to “administrative site plan review” which is utilized in many communities. Often (particularly in cities) certain types of site plan review are done by with the planner, building commissioner, zoning administrator or like municipal official signing the decision after an internal multi-departmental review. It is unclear in the bill whether administrative site plan review is or is not permitted. Since it is integral to many existing zoning ordinances and by-laws, we recommend that it be expressly permitted and have suggested appropriate provisions at the end of subsection 7A(c) of the Bill.

Comment B (Lines 26-27 and others)

The Bill references site plan review in connection with the issuance of a “special permit or variance”.

All references to variances should be removed from the Bill. To our knowledge, based on discussion with land use counsel, planners, and a search of case law, zoning bylaws or ordinances do not currently require site plan review in connection with an application for a variance³. In addition, the issuance of a variance is strictly governed by the provisions of G.L. c. 40A, s. 10. While it is possible that after a dimensional or use variance is granted the resulting use and/or site may otherwise trigger site plan review, site plan review is not required for the application for a variance. Including reference to variances in the Bill (and any adopted legislation) may have the unintended consequence of leading to municipalities adopting zoning changes that would require site plan review for variance applications. This is not a recommended outcome.

Comment C (Lines 27-29)

The Bill requires review of site plan review and a special permit application “in a coordinated process”. It is important to note that special permits may be required pursuant to G.L. c. 40A, s. 9 to “provided for specific types of uses which shall only be permitted in specified districts”. By definition, therefore, special permits govern “use”. Site plan review does not govern use, but rather, simply put (per Comment A), the layout of the buildings, structures, infrastructure, and related improvements on the parcel of land where a use will take place. While some communities combine the review of use under a special permit and site plan review by the same permit granting authority, there are many that do not. Often, special permit applications may be reviewed by a zoning board of appeals, a select board, or city council, while site plan review is conducted by the

² Y.D. Dugout v. Bd. of Appeals of Canton, 357 Mass. 25, 31 (1970). Site plan review is the “regulation of a use rather than its prohibition...contemplating primarily the imposition for the public protection of reasonable terms and conditions.”

³ Only a sampling of ordinances and bylaws have been reviewed. Therefore, we cannot say definitively that no ordinance or bylaw adopted under Section 40A contains such a requirement but, if any exist, they would be atypical. We have also reviewed zoning decisions issued by the Attorney General’s Municipal Law Unit and found no reference to such a requirement in those decisions.

planning board. In many municipalities, this division of jurisdiction has significant merit. Particularly where site plan review may be triggered by certain as-of-right uses, land disturbance, or parking requirements, and such site plan review is undertaken by the planning board, it makes sense in many communities that all site plan reviews be undertaken by the planning board. By tying site plan review to a special permit use application in all cases, it means that any given municipality may have two or three boards who conduct site plan review. Even with site plan review codified as proposed by this Bill, each municipality's zoning ordinance or bylaw will have its own unique provisions and requiring every special permit granting authority to conduct site plan review could result in inconsistent interpretations and/or applications of ordinance/bylaw provisions. Simple changes are suggested in Exhibit B to address the process for either free-standing or combined site plan review.

Comment D (Lines 32-34)

“Any off-site conditions shall address solely any extraordinary direct adverse impacts of the project on adjacent properties or adjacent roadways”.

It is not advisable to use an undefined word such as “extraordinary” in zoning legislation. It will lead to different definitions and interpretations among municipalities and likely result in many appeals leaving interpretation and definition to the courts. As the purpose of the legislation is to codify the site plan review process for consistency, this would be an unintended consequence. There is significant existing case law, most notably US Supreme Court decisions, that speaks to appropriate, constitutional permit conditions.⁴ The Supreme Court has established two requirements: that there be (1) an “essential nexus” between the legitimate interest of the permitting authority and the condition imposed; and (2) “rough proportionality” requiring a determination that the condition is related both in nature and extent to the impact of the proposed development. In lieu of “extraordinary direct adverse impacts”, language incorporating these decisions is recommended. For example: *“any off-site conditions shall only address direct adverse impacts related to site plan review requirements expressly governed by the zoning ordinance or bylaw and which are proportionate in both nature and extent to the impacts of the project on adjacent properties or adjacent roadways”.*

Comment E (Lines 34-40)

The provisions in these lines of the Bill seek to set forth the limited bases upon which site plan review may be denied.

Similar to the discussion in Comment C above, there is established case law, in this instance by Massachusetts courts, that set forth when site plan review may be appropriately conditioned or denied. This case law is well established and recognized in the land use community and by practicing land use attorneys (and has been cited in decisions of the Attorney General's Municipal Law Unit). The Appeals Court found that a site plan review board may deny a site plan if either: (a) the site plan “fails to furnish adequate information on the various considerations imposed by the by-law as conditions of the approval of the plan” or (b) the site plan, “although proper in form, may be so intrusive on the needs of the public in one regulated aspect or another that rejection by the board would be tenable. This would typically be a case in which, despite best efforts, no form of reasonable conditions could be devised to satisfy the problem with the plan.”⁵ As discussed in

⁴ See Nollan v. California Coastal Commission, 483 U.S. 825 (1987) and Dolan v. City of Tigard, 512 US 374 (1994).

⁵ See Prudential Insurance Co. of America v. Board of Appeals of Westwood, 23 Mass. App. Ct. 278, 283-84, n.9 (1986) and cases cited therein.

Comment D above, we do not recommend the use of the word “extraordinary”. In addition, there is the possibility of conditions on-site that cannot be reasonably mitigated. It would be a substantive change to the existing common law to limit the language to off-site conditions. We recommend that these provisions of the Bill be slightly modified to more closely reflect existing case law which has well governed site plan review for many years. Suggestions are included in Exhibit B.

Comment F (Lines 46-47)

The three lapse period shall not include time necessary “to pursue or await the appeal of any other permit, license, determination or approval”.

Because “permit, license, determination or approval” is not defined, some clarification is recommended for this section. It is common in real estate practice in this context to refer to only land use permits through the building permit. As broadly worded, this phrase could arguably include operational licenses such as liquor licenses, entertainment licenses, or flammable liquid storage permits. A simple change that limits this to such permits as are necessary to obtain a building permit would avoid any competing interpretations of this provision.

Comment G (Subsection (f) - Lines 49-72)

Appeal process (including appeals by certiorari under GL c. 249, s. 4, and other provisions.)

We recommend that this entire section (f) be deleted. Since this bill is proposed as a new Section 7A to Chapter 40A, the provisions of subsection (f) are either redundant or in conflict with existing provisions of Chapter 40A. In particular, appeals of permits and zoning actions under Chapter 40A are already governed by Section 17, including timeframes for appeals, and requirements for a bond. Although there is no current Chapter 40A provision expressly governing site plan review, the third paragraph of Section 17 regarding bonds already mentions an appeal of a site plan. To have reference to bonds for site plan review appeals in two sections of the same Chapter would create a direct conflict within the statute.

It is unclear why GL c. 249, s. 4, was chosen when all other zoning decisions are appealed pursuant to Section 40A. Many municipal zoning ordinances and bylaws already provide for site plan review to be appealed in accordance with Section 40A and appeals of site plan review are regularly reviewed by Massachusetts courts pursuant to the appeal process set forth in Chapter 40A. In addition, under Chapter 249, a party has 60 days to appeal, while subsection (f) only allows for 20 days (which is the same as appeals under Chapter 40A). This is in effect a de facto modification of Chapter 249, section 4. Using the certiorari statute may also lead to an unintended and complicated consequence of multiple appeals having to be filed in connection with the same proposed development project, with a special permit being appealed under Chapter 40A and site plan review under Chapter 249. This complication would affect applicants appealing conditions or denials as much as it would third party appeals.

Finally, subsection (f) states that “*All issues in any proceeding under this section shall have precedence over all other civil actions and proceedings.*” Under Chapter 40A, this language is not necessary. The intent appears to be that appeals of site plan review decisions be prioritized over other types of court proceedings. This is already addressed in GL Chapter 185, Section 3A which establishes a “permit session” of the Land Court which allows for adjudication of land use matters on faster tracks than non-permitting matters. Chapter 185, Section 3A already provides that appeals

under Chapter 40A are to be heard in the “permit session”. This sentence creates an unclear directive to courts that could cause confusion.

For all of the above reasons, we believe that having an entirely separate appeal process within Section 7A will complicate and potentially confuse the appeal process for applicants, the courts and third parties. We therefore strongly recommend that appeals of site plan review be governed by the existing provisions of Chapter 40A govern, making subsection (f) unnecessary.

If there are aspects of Chapter 40A, section 17 that proponents wish to modify in any respect, we recommend that there be specific modifications proposed to the legislature to revise Section 17 rather than create different appeal standards for different types of permits granted under Chapter 40A.

Thank you for your time and attention to these comments. We are available to discuss the above, and the attachments hereto in greater detail.

Sincerely,

/s/ Karis L. North

Karis L. North
President, MMLA

cc: The Honorable Kristin Kassner
Jillian Jingling, Chair, MMLA Legislative Committee

Enclosures:
Exhibit A: HB 3551 – Annotated
Exhibit B: HB 3551 – Recommended Changes

EXHIBIT A
TO MMLA COMMENT LETTER

HOUSE DOCKET, NO. 4192 FILED ON: 3/2/2023

HOUSE No. 3551

By Representative Kassner of Hamilton, a petition (subject to Joint Rule 12) of Kristin E. Kassner relative to site plan zoning review. Housing.

[SIMILAR MATTER FILED IN PREVIOUS SESSION
SEE HOUSE, NO. 1411 OF 2021-2022.]

The Commonwealth of Massachusetts

**In the One Hundred and Ninety-Third General Court
(2023-2024)**

An Act facilitating site plan review.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. Chapter 40A of the General Laws, as appearing in the 2018 Official
2 Edition, is hereby amended by adding the following section:—

3 Section 7A

4 (a) As used in this section, "site plan review" shall mean **review and approval** under a Comment A
5 municipality's zoning ordinance or by-law, **by an authority other than the zoning administrator,** [See also Lines 20-21;
6 **of a proposed use of land or structures** to determine whether a proposed use of land or structures and Line 35]
7 is in compliance with sound site utilization principles relative to traffic circulation and safety,
8 pedestrian safety and access, off-street parking and loading, emergency vehicle access, storm
9 water drainage, screening, signage and exterior lighting, visual impact of parking, storage or
10 other outdoor service areas, and consistency with character and scale of surrounding buildings.

11 (b) In addition to the home rule authority of cities and towns to require site plan review, a
12 municipality may adopt a local ordinance or by-law under this section requiring site plan review
13 and approval by a designated authority before a building permit is granted for the use of land or
14 structures governed by a zoning ordinance or by-law. The approving authority may adopt, and
15 from time to time amend, rules and regulations to implement the local site plan review ordinance
16 or by-law, including provisions for the imposition of reasonable fees for the employment of
17 outside consultants in the same manner as set forth in section 53G of chapter 44.

18 (c) An ordinance or by-law requiring site plan review, whether adopted under this section
19 or under the municipality's home rule authority, shall comply with the provisions of this and all
20 following subsections of section 7A. The ordinance or by-law shall establish the submission, [See also Comment A]
21 review, and approval process for applications. Approval of a site plan for a use allowed by right
22 shall require a simple majority vote of the designated authority and shall be made within the time
23 limits prescribed by ordinance or by-law, not to exceed 90 days from the date of filing of the
24 application. If no decision is issued within the time limit prescribed, the site plan shall be deemed
25 constructively approved as provided in section 9, paragraph 11 of this chapter. The submission
26 and review process for a site plan required in connection with the issuance of a special permit or ~~or~~ Comment B
27 ~~variance~~ shall be conducted with the review of the application for the special permit ~~or variance~~
28 in a coordinated process and shall require the same quantum of vote required for approval of a ~~or~~ Comment C
29 special permit ~~or a variance~~.

30 (d) Site plan review for a use allowed by right may impose only those conditions that are
31 necessary to ensure substantial compliance of the proposed use of land or structures with the
32 other requirements of the zoning ordinance or by-law provided, however, that any off-site
33 conditions shall address solely any extraordinary direct adverse impacts of the project on ~~or~~ Comment D

34 adjacent properties or adjacent roadways. A site plan application for a use allowed by right may
35 be denied only on the grounds that: (i) the proposed ~~use of land or structures project~~ ^{site plan [See Comment A]} does not
36 meet the requirements set forth in the zoning ordinance or by-law; (ii) the applicant failed to
37 submit the information and fees required by the zoning ordinance or by-law necessary for an
38 adequate and timely review of the design of the proposed land or structures; or (iii) it is not
39 feasible to adequately mitigate any extraordinary direct adverse project impacts on adjacent
40 properties or adjacent roadways by means of suitable site design conditions.

Comment E

41 (e) Zoning ordinances or by-laws shall provide that a site plan approval granted under
42 this section shall lapse within a specified period of time, not less than three years from the date
43 of the filing of such approval with the city or town clerk, if substantial use or construction has
44 not yet begun, except as extended for good cause by the approving authority. Such specified
45 period shall not include time required to pursue or await the determination of an appeal under
46 subsection (f) or section 17 ~~or to pursue or await the appeal of any other permit, license,~~
47 ~~determination or approval.~~ The aforesaid minimum period of three years may, by ordinance or
48 by-law, be increased to a longer period.

Comment F

49 (f) Except where site plan review is required in connection with the issuance of a special
50 permit ~~or variance~~, decisions made under site plan review, whether made pursuant to statutory or
51 home rule authority, may be appealed by a civil action in the nature of certiorari pursuant to
52 section 4 of chapter 249, and not otherwise. Such civil action may be brought by a person
53 aggrieved by the decision in the superior court for the county where the land is located or in the
54 land court within twenty days after the filing of the decision of the site plan review approving
55 authority with the city or town clerk. The issuance or denial of a building permit shall not be a
56 prerequisite to the filing of such civil action under this section. All issues in any proceeding

Comment G
relates to the
entirety of
(f). Certain
particular
issues that are
highlighted
are also
discussed in
Comment G.

57 under this section shall have precedence over all other civil actions and proceedings. A
58 complaint by a plaintiff challenging a site plan approval under this section shall allege the
59 specific reasons why the project fails to satisfy the requirements of this section, the zoning
60 ordinance or by-law, or other applicable law and shall allege specific facts establishing how the
61 plaintiff is aggrieved by such decision. The approving authority's decision in such a case shall be
62 affirmed unless the court concludes that the approving authority abused its discretion under
63 subsection (d) in approving the project. Appeals commenced hereunder by any party other than
64 the applicant and/or property owner seeking site plan approval shall require the posting of a bond
65 in an amount to be set by the court that is sufficient to cover twice the estimated: (i) annual
66 carrying costs of the property owner, or a person or entity carrying such costs on behalf of the
67 owner for the property, as may be established by affidavit; plus (ii) an amount sufficient to cover
68 the defendant's attorney's fees, all of which shall be computed over the estimated period of time
69 during which the appeal is expected to delay the start of construction. The bond shall be forfeited
70 to the property owner in an amount sufficient to cover the property owner's carrying costs and
71 legal fees less any net income received by the plaintiff from the property during the pendency of
72 the court case in the event a plaintiff does not substantially prevail on its appeal.

73 (g) In municipalities that adopted a zoning ordinance or by-law requiring some form of
74 site plan review prior to the effective date of this act, the provisions of this section shall not be
75 effective with respect to such zoning ordinance or by-law until the date one year after the
76 effective date of this act.

**EXHIBIT B
TO MMLA COMMENT LETTER
PROPOSED TRACKED CHANGES TO HB 3551**

HOUSE BILL NO. 3551

An Act facilitating site plan review.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Chapter 40A of the General Laws, as appearing in the 2018 Official Edition, is hereby amended by adding the following section:–

Section 7A

(a) As used in this section, "site plan review" shall mean the review and approval process under a municipality's zoning ordinance or by-law, ~~by an authority other than the zoning administrator, of a proposed use of land or structures~~ that establishes criteria for the layout, scale, appearance, safety, and impacts of a proposed use or development, ~~to determine~~ such as whether a proposed use of land or structures is in compliance with sound site ~~utilization~~ principles relative to traffic circulation and safety, pedestrian safety and access, off-street parking and loading, emergency vehicle access, storm water drainage, screening, signage and exterior lighting, visual impact of parking, storage or other outdoor service areas, and consistency with character and scale of surrounding buildings.

(b) In addition to the home rule authority of cities and towns to require site plan review, a municipality may adopt a local ordinance or by-law under this section requiring site plan review and approval by a designated authority before a building permit is granted for the use of land or structures governed by a zoning ordinance or by-law. The ~~approving~~ designated authority may adopt, and from time to time amend, rules and regulations to implement the local site plan review ordinance or by-law, including provisions for the imposition of reasonable fees

for the employment of outside consultants in the same manner as set forth in section 53G of chapter 44.

(c) An ordinance or by-law requiring site plan review, whether adopted under this section or under the municipality's home rule authority, shall comply with the provisions of this and all following subsections of section 7A. The ordinance or by-law shall establish the submission, review, and approval process for applications. Approval of a site plan for a use allowed by right, or for a use requiring a special permit but reviewed by a separate designated authority, shall require a simple majority vote of the designated authority and shall be made within the time limits prescribed by ordinance or by-law, not to exceed 90 days from the date of filing of the application. If no decision is issued within the time limit prescribed, the site plan shall be deemed constructively approved as provided in section 9, paragraph 11 of this chapter. The submission and review process for a site plan required in connection with the issuance of a special permit and subject to review by the same permit granting authority as the special permit application, ~~or variance~~ shall be conducted with the review of the application for the special permit, ~~or variance~~ in a coordinated process and shall require the same quantum of vote required for approval of a special permit ~~or a variance~~. The ordinance or by-law may establish the designated authority to be the building commissioner, director of planning, or similar municipal official who coordinates administrative site plan review with other municipal employees, in which instance there shall be no vote requirement for site plan review. Any appeal from administrative site plan review shall be in accordance with section 17 of chapter 40A unless an ordinance or by-law first provides for an appeal to another public body of the municipality.

(d) Site plan review for a use allowed by right may impose only those conditions that are necessary to ensure substantial compliance of the proposed use of land or structures with the

other requirements of the zoning ordinance or by-law provided, however, that any off-site conditions shall only address ~~solely any extraordinary~~ direct adverse impacts related to site plan review requirements expressly governed by the zoning ordinance or bylaw and which conditions are proportionate in both nature and extent to the impacts of the project on adjacent properties or adjacent roadways. A site plan application for a use allowed by right may be denied only on the grounds that: (i) the proposed ~~use of land or structures project~~ site plan does not meet the requirements set forth in the zoning ordinance or by-law; (ii) the applicant failed to submit the information and fees required by the zoning ordinance or by-law necessary for an adequate and timely review of the design of the proposed land or structures; or (iii) it is not feasible to adequately mitigate any ~~extraordinary~~ direct adverse project impacts ~~on adjacent properties or adjacent roadways~~ by means of suitable site design conditions.

(e) Zoning ordinances or by-laws shall provide that a site plan approval granted under this section shall lapse within a specified period of time, not less than three years from the date of the filing of such approval with the city or town clerk, if substantial use or construction has not yet begun, except as extended for good cause by the ~~approving~~ designated authority. Such specified period shall not include time required to pursue or await the determination of an appeal under subsection (f) or section 17 or to pursue or await the appeal of any other permit, license, determination or approval which are prerequisites to issuance of a building permit. The aforesaid minimum period of three years may, by ordinance or by-law, be increased to a longer period.

(f) *[Please see Comment G for reasons that it is recommended that this entire section (f) be deleted as Ch. 40A, s. 17 should govern and this new provision will have unintended consequences.]* ~~Except where site plan review is required in connection with the issuance of a special permit or variance, decisions made under site plan review, whether made~~

~~pursuant to statutory or home rule authority, may be appealed by a civil action in the nature of certiorari pursuant to section 4 of chapter 249, and not otherwise. Such civil action may be brought by a person aggrieved by the decision in the superior court for the county where the land is located or in the land court within twenty days after the filing of the decision of the site plan review approving authority with the city or town clerk. The issuance or denial of a building permit shall not be a prerequisite to the filing of such civil action under this section. All issues in any proceeding under this section shall have precedence over all other civil actions and proceedings. A complaint by a plaintiff challenging a site plan approval under this section shall allege the specific reasons why the project fails to satisfy the requirements of this section, the zoning ordinance or by law, or other applicable law and shall allege specific facts establishing how the plaintiff is aggrieved by such decision. The approving authority's decision in such a case shall be affirmed unless the court concludes that the approving authority abused its discretion under subsection (d) in approving the project. Appeals commenced hereunder by any party other than the applicant and/or property owner seeking site plan approval shall require the posting of a bond in an amount to be set by the court that is sufficient to cover twice the estimated: (i) annual carrying costs of the property owner, or a person or entity carrying such costs on behalf of the owner for the property, as may be established by affidavit; plus (ii) an amount sufficient to cover the defendant's attorney's fees, all of which shall be computed over the estimated period of time during which the appeal is expected to delay the start of construction. The bond shall be forfeited to the property owner in an amount sufficient to cover the property owner's carrying costs and legal fees less any net income received by the plaintiff from the property during the pendency of the court case in the event a plaintiff does not substantially prevail on its appeal.~~

(g) In municipalities that adopted a zoning ordinance or by-law requiring some form of site plan review prior to the effective date of this act, the provisions of this section shall not be effective with respect to such zoning ordinance or by-law until the date one year after the effective date of this act.