**January 30, 2018**

**House 4075*, An Act to promote housing choices***

Senator Joseph Boncore, Co-Chair

Representative Kevin Honan, Co-Chair

Joint Committee on Housing

State House, Boston MA 02133

Dear Chairmen:

We are pleased to be here today testifying in favor of Governor Baker’s *An Act to Promote Housing Choices* (House 4075). The Massachusetts Smart Growth Alliance (MSGA) is composed of nine diverse policy organizations working to promote healthy and diverse communities, to protect critical environmental resources, to advocate for housing and transportation choices, and to support equitable community development and urban reinvestment.

**Why change is needed**

Before going into the specific proposal made by Governor Baker, I want to put that proposal in a larger context. We are all here for two reasons. First, we are not getting the land use outcomes in Massachusetts that we want. The Governor would not be here testifying about local zoning but for dissatisfaction from residents, municipalities, real estate developers, non-profit advocates, businesses and many more about the outcomes produced by our land use system. Among other things, we have a housing crisis in Greater Boston that is one of the few threats to our long-term economic future. Second, many of these bad outcomes flow from a zoning, planning and permitting system that is broken in many ways.

1. Not the land use outcomes we want

There is widespread consensus about our Commonwealth is not getting the land use outcomes that we want.

Not enough housing is being built, and not enough of the housing types that are most in demand (e.g., multifamily homes, accessory apartments, single family homes on small lots). Because supply has not matched demand, home prices and rents have risen in most places in Greater Boston, putting great stress on households and particularly making it hard for our young workers and seniors to find affordable homes. Because even affluent downsizing seniors have trouble finding their next (smaller) home, the inventory for single family homes is at a historically low level. Since so many baby boomers are retiring in the next 10-15 years, they must be replaced by millennials who are, frankly, deciding now whether they can afford to stay here.

Traffic congestion has increased on many major highways and local roads. One cause is “drive until you qualify” as people move farther away from their jobs to find housing they can afford. Low density suburban sprawl has increased auto use and consumed more land than needed. Critical natural resources have been lost and wildlife habitats are shrinking because of low density development patterns. We have a climate change future to prepare for, but are continuing to aggravate the problem in today’s decisions.

As demonstrated by the recent *Boston Globe* series on race, there is persistent inequality between the races in key economic and social indicators. That inequality is intertwined with the segregated land use patterns of Greater Boston. We are the seventh most segregated metropolitan region in the nation.

Our municipalities struggle to provide the infrastructure that is needed to support growth, encouraging local officials and residents to look for ways to slow development, especially housing. Artificial barriers are erected, the development process made overly time-consuming and unpredictable. There is friction over development proposals, pitting residents against developers and residents against residents.

Of course, there are also many bright spots in this picture. To name some, there are regional planning agencies that plan for the future and provide expertise to their communities, municipal planners and leaders who propose and implement innovative strategies, developers who thoughtfully choose sites and design developments that fit community needs, residents who constructively engage with municipal officials and developers, and state officials who operate affordable housing programs that are among the best in the country. But they succeed despite a system that was designed for the 1960s and 1970s, with many of that era’s assumptions. While the vast majority of states in the nation have moved into the 21st century, we have not.

1. Our local zoning, planning and permitting system is broken

Our broken system is responsible in large part for these bad outcomes. In our view, here are the aspects that can be addressed by comprehensive zoning reform and housing production legislation:

* Lack of state-wide, regional or county-wide planning and land use controls. We are unusual nationwide in placing virtually all of the planning, zoning and permitting authority on 351 cities and towns.[[1]](#footnote-1) That makes it difficult to address the housing crisis. While the region as a whole benefits from new housing, many communities view that same housing as a municipal burden. We must recognize that our structure has this flaw and set minimum expectations so that the burden is spread more fairly. We should also make it easier for communities to collaborate.
* The Governor is right that requiring a 2/3 majority to change zoning makes it harder for communities to adopt best practices. Only a small number of states use a super-majority for zoning changes.
* In addition, the super-majority requirement for special permit approval is a major barrier, because it requires not only a two-thirds vote in many communities, but also *four of five votes on five-member boards and unanimous votes by three-member boards*. This requirement, combined with the considerable discretion given to permit issuing authorities, makes obtaining a special permit highly unpredictable in Massachusetts. Special permits, often called discretionary permits elsewhere, are approved by simple majority in most other states.
* Much of the opposition to development, and the popularity of special permits in Massachusetts, flows from the inability of municipalities to assess development impact fees. Thirty-seven states allow municipalities to assess such fees, specifying the types of infrastructure they may assess for and the process that must be used.
* Too many projects that are approved locally are held up by appeals that take too long to be decided and often lack merit. Common sense reforms are needed, such as a better alternative dispute mechanism, a bonding requirement for all land use appeals, and better rules about when new evidence may be considered on appeal.
* Many communities are hesitant to do a master plan because the process is so time-consuming and costly—and many question their value when inconsistent zoning can be freely adopted. We need to streamline master planning and encourage zoning that is consistent with that agreed vision.
* With the structural flaws in the system, no wonder that developers look for ways to bypass the system. A prime example is the Commonwealth’s unique “approval not required” subdivisions—new roadside lots created without regulatory oversight. Such roadside development, which is a bane of small towns in rural Massachusetts, should have some form of regulation. And if we can make the system as a whole work better, developers will have less need to go around it.

**The Governor’s proposal principally addresses one part of our broken system**

The Governor’s Housing Choice bill principally addresses one of these structural problems: the 2/3 voting majority for zoning changes.[[2]](#footnote-2) The particular solution he proposes is thoughtful and we support it. By identifying best practices and lowering the voting majority for those practices, the Governor’s bill increases the chances that municipalities will promote development in smart growth locations and conservation in areas that should be protected.

We agree that promoting multi-family housing and accessory apartments is a critical goal, as failure to produce enough of these housing types is at the heart of our current housing crisis. We also agree that promoting mixed use development is important because combining housing and commercial uses tends to create vibrant and walkable places. We need more places where residents can shop, work, and play within walking/biking distances.

It is also important to have more open space residential developments (typically single-family homes on small lots) so that we can provide homeowners with the compact lots they want, while also permanently protecting land and minimizing the cost of municipal services. Two other practices enumerated in the Governor’s bill, transfer of development rights and natural resource protection zoning, deserve to be on the list because they are creative ways to balance development and environmental goals.

**The Governor’s bill fits well within a comprehensive and balanced solution**

Fixing our broken zoning, planning and permitting system requires a comprehensive and balanced solution. We cannot just fix one part and expect that the system as a whole is going to work smoothly again.

The Governor’s proposal fits well within legislation already being considered—including what is informally called the Great Neighborhoods bill (House 2420, Senate 81). House 4075 is highly compatible with these bills, as they all promote development (particularly housing production) in smart growth locations and make it easier for communities to protect natural resources in other locations. The Great Neighborhoods legislation goes much farther, by addressing structural flaws like the 2/3 majority for special permits, appeals, master planning, and development impact fees. We need to do more.

**Proposed language changes in House 4075**

While the Governor’s proposal is thoughtful, there are several changes we ask you to make before reporting the bill out of committee.

First, the wording that relates to the natural resource protection zoning (“NRPZ”) and transfer of development rights (“TDR”) zoning tools in Sections 2-4 should be amended to reflect their nuanced role in housing production. The NRPZ definition should be changed to reflect that it is designed to be lower density/small lot (and thus is different from open space residential development (“OSRD”), which is typically same density/small lot).[[3]](#footnote-3) The definitions now in the Governor’s bill for NRPZ and OSRD make them functionally indistinguishable. Similarly, the TDR definition should not require that a density bonus goes along with the transfer.[[4]](#footnote-4) The provision that allows each of these zoning tools to be adopted by simple majority should not require that the overall number of housing units in the municipality remain the same (or be increased). It should be sufficient that adoption of these tools will result in concentration of development and will not substantially affect the overall number of housing units.

Second, clause (c) in Section 4, listing approval of a “mixed-use development” as requiring a simple majority, should not be limited to projects in “areas of concentrated development” as defined in Chapter 40R. We think that it should also apply, as in clause (a), to projects in eligible locations as defined in Chapter 40R. This would allow for mixed-use developments “near transit stations, including rapid transit, commuter rail and bus and ferry terminals,” the other major locational category in Chapter 40R. There are commuter rail station areas that are presently underdeveloped and would be suitable locations for mixed-use development.

Third, clause (e) in Section 4 should contain a locational requirement like clauses (a) and (c). This clause covers regulations concerning “bulk and height of structures, yard sizes, lot area, setbacks, open space, parking and building coverage.” While increasing density/intensity of use is generally desirable in smart growth locations, there are many places in which such increases are not necessarily desirable. For example, a modest increase in density in a zoning district characterized by agricultural uses is exactly the kind of low density sprawl which is disfavored. We therefore urge that clause (e) be limited to “eligible locations” as defined in Chapter 40R.[[5]](#footnote-5)

Fourth, clause (e) in Section 4, by combining a number of different zoning parameters (dimensions, parking, open space) raises the possibility that a single zoning proposal may be difficult to characterize. It may be difficult for a town moderator, even assisted by the planner and town counsel, to determine whether the net effect is to “allow provision of additional housing units beyond what would otherwise be permitted under the existing zoning ordinance” as required in clause (e).[[6]](#footnote-6) We think that this provision must provide municipalities with a clearer way of determining which voting majority applies.

Fifth, inclusionary zoning should be added as one of the enumerated zoning changes that can be approved with a simple majority. Inclusionary zoning has become accepted as a best practice for municipalities that have strong markets and want to ensure that some affordable units are created. Each municipality should be able to make its own judgment based on local market conditions and housing needs as to whether such a requirement makes sense and how it should be structured. The state’s 2/3 voting majority requirement should not be an artificial barrier to producing affordable housing.

Sixth, House 4075 retains the concept in our voting majority provision that a written protest by land owners can raise the majority required for passage of a zoning change. Under both existing law and the Governor’s proposal, a “written protest” signed by a certain percentage of owners “of the area of the land proposed to be included in the change or of the area of the land immediately adjacent extending three hundred feet” automatically raises the voting majority.[[7]](#footnote-7) This proviso will undercut the legislation’s intent to make it easier for municipalities to adopt best practices and promote housing production.

**Conclusion**

We thank the Governor for making this very thoughtful and constructive proposal, and this Committee for providing us the opportunity to testify today.

Sincerely,



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1. Although this statement applies to all municipalities, Boston has its own zoning statute and only Sections 10-12 of House 4075 would affect Boston (other than these sections, which deal with Chapter 40R and 40S, the Governor’s bill applies to the 350 municipalities subject to Chapter 40A). [↑](#footnote-ref-1)
2. It also partly addresses the issue of inter-municipal collaboration, by authorizing cities and towns to share revenue and costs of a particular development. Another bill, filed by Rep. Honan and Sen. Forry, deals with another piece of this issue, by allowing cities and towns to create inter-municipal planning, zoning, conservation and/or health boards (House 3845, Senate 2131). [↑](#footnote-ref-2)
3. NRPZ is a tool for areas where one seeks to preserve 65-90% of the developable land, lowering the overall density and placing the homes on small lots. It is designed to be by-right, with the number of homes set by formula. OSRD is a tool for areas where one seeks to preserve a much smaller percentage of the developable land while keeping the same number of homes (unless there is a density bonus) by putting them on smaller lots. OSRD is often by special permit and municipalities can use a formula or require proof that the proposal will not result in more homes. [↑](#footnote-ref-3)
4. The existing definition of transfer of development rights in Chapter 40A, section 9 requires such an ordinance to include “incentives such as increases in density of population, intensity of use, amount of floor space or percentage of lot coverage.” This limitation discourages transfers where the sending location is of limited development value and no additional incentive is needed. [↑](#footnote-ref-4)
5. There is enough flexibility in Chapter 40R’s definition of eligible locations so that such increases in density would be not limited to areas of concentrated development and transit station areas. [↑](#footnote-ref-5)
6. For example, if a town warrant contains several changes pertaining to a zoning district, the proposal could decrease height, decrease setbacks, expand building coverage, require a lower percentage of open space, and set a maximum (not minimum) parking ratio. [↑](#footnote-ref-6)
7. In existing law, if 20% sign the protest, the standard is raised from 2/3 to ¾. Chapter 40A, Section 5. In House 4075, if 50% sign the protest, the standard is raised from simple majority to 2/3. [↑](#footnote-ref-7)