

May 14, 2019

**Omnibus testimony on housing production bills (other than H 3507)**

American Institute of  
Architects - Massachusetts  
Citizens' Housing and Planning  
Association  
Conservation Law Foundation  
Environmental League of  
Massachusetts  
Fair Housing Center of Greater  
Boston  
Local Initiatives Support  
Corporation - Boston  
Massachusetts Association of  
Community Development  
Corporations  
Massachusetts Public Health  
Association  
Metropolitan Area Planning  
Council

Senator Brendan Crighton, 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 to provide testimony on a number of the housing production bills on your docket today. We have submitted separate testimony on the Governor's Housing Choices legislation (House 3507).

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.

Since our testimony is organized around the various topics addressed in the pending bills, we attached an appendix that lists the bill numbers and where to find our comments on each.

**Accessory dwelling units**

Accessory dwelling units (ADUs) are small units carved out of the main structure of an existing home or small units created in a detached structure on the lot, such as a garage. They are used for relatives, caregivers or for rentals. Or they can be a place that downsizing owners move into while others occupy the primary home. While there are multiple ADU bills on today's docket, we think that **House 1277 and Senate 788** best promote this important housing type.<sup>1</sup>

These bills, filed respectively by Representative Hay and Senate Cyr, are designed to make it easier for homeowners to create ADUs within the main structure of the home. Such units should be easy because they don't expand the building structure on the lot and often don't increase population density for the building type. Because of today's aging baby-boomers, many single family homes originally built for households of 4 to 6 persons are being occupied by 1 or

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<sup>1</sup> Section 6 of Senator Cyr's "Attainable housing in seasonal communities" bill (**Senate 789**) contains an identical ADU provision.

2. In that circumstance, adding an ADU with 2 residents is well within the original expectations for the structure's density.

ADUs are an important way to address two increasing problems:

- They can help aging homeowners by giving them more flexibility to convert unused parts of their single-family home to an apartment that can be occupied by family or caregivers. This flexibility is essential to healthy aging, to allowing homeowners to change the way their home is used as their own needs change over the years.
- ADUs can also ease the housing crisis by allowing homeowners to rent out the apartment for extra income. The rents are usually modest, so that they provide “naturally-occurring” affordable housing.

A 2018 study found that only thirty-seven of the 100 communities around Boston allow ADUs and permit them to be rented out, typically with significant restrictions. Another 31 allow them temporarily for occupancy by relatives of the homeowner or a caretaker, and 32 have no zoning for ADUs.<sup>2</sup> The typical history of a local ADU ordinance or bylaw is that the community begins with extreme caution and, over a decade or more, gradually passes more liberal ordinances. Four notable examples are Newton, Ipswich, Northampton and Lexington. These communities prove that ADUs can provide flexibility for homeowners while not creating negative impacts for others in the neighborhood.

House 1277 and Senate 788 would create statewide rules for permitting the easiest category of ADUs (units internal to the existing structure), without limiting communities that want to be more liberal:

- A city/town would not be able to prohibit or require a special permit for an accessory dwelling unit (ADU) within the main structure of a single-family dwelling, with many provisos. It does not address detached accessory units on the property (e.g., a garage).
- Those provisos include:
  - ✓ minimum lot size of 5,000 square feet,
  - ✓ subject to reasonable dimensional requirements,

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<sup>2</sup> The study, by researcher Amy Dain, was published by the Pioneer Institute: [https://pioneerinstitute.org/economic\\_opportunity/study-boston-area-communities-should-loosen-restrictions-for-accessory-dwelling-units/](https://pioneerinstitute.org/economic_opportunity/study-boston-area-communities-should-loosen-restrictions-for-accessory-dwelling-units/). The underlying study was commissioned by a consortium that included MSGA.

- ✓ unit must be clearly accessory (less than 900 square feet or ½ floor area of principal dwelling – whichever is smaller),
- ✓ municipality may require principal dwelling or ADU to be owner-occupied,
- ✓ municipality may prohibit or restrict short term rental of ADUs, and
- ✓ municipality may limit total ADUs to 5% total non-seasonal single-family units.

As our population ages and our housing crisis deepens, we have noticed rising interest among cities and towns in adopting local ADU ordinances. That being said, many of them struggle to enact local by-laws because of the complexity of the issue and because of the ever present fear of change. It is always difficult to reform local zoning. A statewide policy on this commonsense class of ADUs makes sense rather than wasting time and money asking the 350 cities and towns subject to Chapter 40A to make the change separately.

In 2016, New Hampshire enacted a state statute that limited the ability of municipalities to prohibit or restrict accessory dwelling units.<sup>3</sup> This has not provoked any backlash and demonstrates that Massachusetts could follow the same path.

Although the impact on each community is modest—Newton, for example, increased its ADU permits from 5/year to about 15/year after a similar change--the cumulative impact for the state’s housing production could be significant. If even 100 municipalities permitted just 5 units/year, that would represent an additional 500 units of housing statewide of unsubsidized but affordable apartments in communities that desperately need them, without building a single new structure. And the impact could be greater than that.

The other ADU bills on today’s docket are positive signs that legislators see the value in promoting such units and are looking for ways to accomplish this. However, these bills are not as effective as House 1277/S 788 in addressing the issue. **House 1250 and Senate 820** also allow ADUs by right within the main structure but limits them to units occupied by elderly or disabled persons. This limit also creates the same kind of enforcement issues—and ironies-- that occur now as an owner is subject to proof of occupancy requirements and sometimes forced to rip out a kitchen when a relative moves out. **House 1281** would allow

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<sup>3</sup> New Hampshire municipalities must allow ADUs by right or by special permit; absent a local bylaw or ordinance, one ADU is allowed by right in every single family home. For more information about New Hampshire’s law, see: <https://nhcitizenplanner.org/articles/accessory-dwelling-units-new-hampshire-guide-municipalities-new-hampshire-housing>

ADUs by right in any district where single family homes are by right; we are concerned this would provide an incentive for communities to require single family homes to obtain a special permit. **House 1282** would allow ADUs by right within the main structure, but only if the community creates an ADU zoning overlay district under Chapter 40R. The bill does not provide any incentives for a community to create such a district—other than allowing them to be approved by simple majority vote. The Governor’s Housing Choices bill would also do that—and much more.

We urge you to report favorably on **House 1277/Senate 788**.

### **Cluster or open space residential development**

Cluster or open space residential development (OSRD) is an alternative to conventional subdivisions—it allows the developer to build the same number of homes on smaller lots and permanently preserve the remaining land.

This approach is environmentally-friendly and typically saves money for the developer and municipality because of shorter roads and utility lines. The bill before you, **Senate 787**, filed by Senator Cyr, would provide a general framework for municipalities that already use OSRD and provide a “default” method for owners to use an OSRD layout if the community doesn’t have such zoning.

The consumption of farm and woodland acres is a serious problem in the Commonwealth. The Fifth Edition of “Losing Ground” from MassAudubon shows that from 2005 through 2013, approximately 38,000 acres of forest or other undeveloped land were converted to development. Regions particularly affected during this period include the Cape and Southeastern Massachusetts, parts of Central Massachusetts and the Merrimack Valley.

Sprawl is not even a sensible land use pattern from a narrow fiscal viewpoint, as distributed development is more expensive for municipalities to sustain. A 2015 Smart Growth America study on the fiscal impacts of development patterns indicated that road, water, stormwater, fire protection, school transportation and waste collection costs were all higher with low-density patterns.

While this bill will address only one aspect of this overall issue, it is the easiest to implement. Municipal regulations that require conventional single-family subdivisions consume land unnecessarily by cutting all the developable land into building lots. OSRD is a best practice that is not used as commonly in Massachusetts as in many other states. Sometimes the municipality does not have OSRD as an option. Even if they do, often the local regulations make it harder to use OSRD than conventional subdivisions.

**Senate 787** is a balanced approach that makes it easier for developers to do OSRDs while ensuring that there is real preservation of natural resources on the property. It would work this way:

- If a municipality already has an OSRD ordinance, it must meet certain general requirements. These include: an easier way for developers to “prove” they are building the same number of homes, laying out homes to protect natural resources, and permanent preservation of 30-60% of developable land.
- If a municipality does not have OSRD, an owner proposing 5+ homes in district with minimum lot size 30,000 sq. ft. or more can use the cluster option set forth in this second part of this bill.

**House 1281** proposes a different way to promote OSRD—allowing cluster developments by right, in the districts where single family conventional subdivisions are by right (and at the same density). Although this OSRD approach has a certain appeal, it would allow developments that achieve little land conservation and it provide an incentive for municipalities to require conventional subdivisions to obtain a special permit.

We urge you to report favorably on **Senate 787**.

### **Transit incentives for multifamily housing**

We support the Administration’s Housing Choice incentive program, which is now in its second year, and includes 69 communities that have in the prior years shown they are producing housing and adopting best zoning practices. **Senate 779**, filed by Senator Chandler, proposes a complementary idea, using transit infrastructure investments to attract specific and substantial multifamily housing commitments by municipalities.

Producing more multi-family housing in smart growth locations is a key state goal but finding attractive incentives for communities can be hard. This bill reverses the usual approach, which is for state government to offer narrowly-tailored incentives. Creative municipalities would have the opportunity to propose their own incentive. Since this is an untested idea, the bill makes it a pilot program with administration control over whether the municipal responses warrant changes in its capital planning.

This is how it would work:

- The Housing & Economic Development secretary, in consultation with the MassDOT secretary, would design a competition available to municipalities in different regions, and of different sizes.
- Interested municipalities would then respond. For example, a community could offer to rezone its town center in return for commuter rail improvements or rezone a corridor in return for bus rapid transit service.
- If a proposal or proposals was selected, the transit investments would be made from existing resources or the secretaries would ask for additional resources from the legislature. If no satisfactory proposals were made, the RFP could be re-issued or the pilot could be terminated.

We urge you to report favorably on **Senate 779**. We believe that this could be a significant innovation in the way Massachusetts addresses housing and infrastructure.

### **Multifamily zoning around transit**

We support the concept of requiring multifamily zoning by right at suitable density around public transit. This requirement appears in two bills on this docket, the Housing Reform bill filed Representative Honan and Senator Boncore (**House 1288/Senate 775**) and **House 1251**, filed by Representative Barber. There is a clear consensus that promoting more multifamily zoning around public transit is highly desirable—the question is the best way to achieve this goal. There is value in providing incentives. There is also an argument that communities that have benefited from large and continuing state investment in public transit have an obligation to zone for the multifamily housing we need.

We prefer this more targeted approach to the one proposed in **House 1281**, which requires every city and town to create multifamily zoning by right at suitable density on 1.5% of its land area.

We urge you to report favorably on the multifamily zoning provision in **House 1288/Senate 775** and **House 1251**

### **Improving the zoning/permitting/appeals process**

A number of bills (or parts of more comprehensive bills) propose ways to improve the process we use for zoning, permitting, and resolving land use disputes. These technical fixes are important and we urge you to report favorably on these bills.

**Site plan review.** Many communities already employ a form of site plan review (SPR), but because there are no explicit standards in the Zoning Act, uncertainties have plagued the SPR process. **House 1289**, filed by Representative Honan, standardizes SPR as follows: (1) decisions must be made within 95 days, with a public hearing optional; (2) when SPR overlaps with a special permit, the reviews must coincide; (3) approval is by simple majority; (4) approvals may be subject to conditions, including off-site mitigation, in limited circumstances only; (5) duration shall be a minimum of two years; and (6) appeals shall be based on the existing record, not new evidence. **Senate 794**, filed by Senator DiZoglio, is similar in many respects but contains a punitive bond requirement for appeals.

**Citizen board training:** Planning, zoning, and subdivision decisions in Massachusetts are made by citizen boards. Members of Planning Boards and Zoning Boards of Appeals need more and better training opportunities. While a number of other states have mandatory training, Massachusetts relies on voluntary training provided by the Citizen Planner Training Collaborative (CPTC). It provides workshops and trainings and most of its trainers provide their services without any compensation. **Senate 780**, filed by Senator Chandler, does not require training, but does require the Department of Housing and Community Development to establish and maintain a program, in consultation with CPTC's members. Last year, the Legislature appropriated \$200,000 in supplemental funds for CPTC to update and digitize its curriculum for the first time. This is in process, and sets the stage for Planning Boards and Zoning Boards across the state to access this educational material with guidelines that will be established if this bill is enacted.

**Land use dispute avoidance:** **Senate 780** introduces a voluntary, “off-line” avenue for applicants and municipalities to work out issues in a prospective development project so that the later formal approval process may be successful. Senator Chandler’s bill uses language drafted by Senate Ways & Means in 2016 to address legal barriers to mediation at the local level, e.g., making them confidential and privileged from discovery.

**Simplifying subdivision appeals.** **Senate 780** also streamlines the appeals language for subdivisions, providing for a record-based decision (*certiorari*) rather than a decision based on new evidence by the court evaluating a local approving authority’s action. Appeals are now decided “de novo”—everything starts from scratch. There can be new evidence and new arguments never presented to the local board. For subdivision decisions, it makes more sense to have the court decide on the record made before the local board. Subdivisions are typically technical in nature, often focusing on subdivision roadway requirements.

Having “de novo” trials unnecessarily delays resolution of appeals and costs much more to litigate.

**Frivolous Appeals:** The Housing Reform bill (**House 1288/Senate 775**) allows judges to require non-municipal parties who appeal special permits, site plan reviews, and variances to post a bond to secure statutory costs. The judge would have discretion and would consider the merits of the appeal and the relative financial ability of the parties. This bill, although modest, would allow a judge to give a strong signal to a frivolous litigant and may lessen appeals that delay projects without good reason.

### **Housing production goal**

The Housing Reform bill (**House 1288/Senate 775**) and **House 1318**, filed by Representative Rogers, propose a statutory housing production goal. The bills adopt the Governor’s goal, set in December 2017, of producing 427,000 new units of housing in Massachusetts by 2040. It creates a new, sub-goal of having 85,400 units of housing be created by 2040 that are affordable to households earning less than 80% of the Area Median Income, with at least 8,500 of these units affordable to households earning less than 30 percent of the Area Median Income.

We supported Governor Baker in setting his housing production goal in 2017, as we supported Governor Patrick in setting a multifamily housing production goal in 2012. Codifying such goals makes them more than the goal of a particular Governor; they should be Commonwealth goals. The bills propose that 20% of the units be deed-restricted, affordable units. This is, in fact, well below what we actually need, but it is a worthy and realistic goal.

We urge you to report favorably on the housing production goal provision in **House 1288/Senate 775** and **House 1318**.

### **Attainable housing in seasonal communities**

**Senate 789**, filed by Senator Cyr, rightly recognizes that housing markets in seasonal communities like the Cape & Islands (and the Berkshires) have distinct characteristics and may require distinct solutions. If the legislature creates a joint task force on housing (as proposed by **Senate 780** and **House 1325**), this bill contains many interesting ideas that should be explored. We think the idea of creating a financing program for municipalities and school districts that partner with qualified developers to create workforce housing for municipal employees is particularly interesting (section 7). **Senate 789** is one of a number of proposals to use real estate transfer/registry fee revenue for affordable housing, climate



adaptation/mitigation, community preservation act funding (or some combination of those). We support this approach and look forward to further consideration of how best to structure it.

We would support sections 3/4 of **Senate 789** if it linked allowance of tiny houses with municipal ordinances that already allow detached ADUs by right. If a community has not made that decision, then tying tiny houses to an ordinance that allows ADUs within the main structure may make passing ADUs harder.

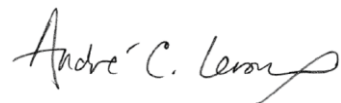
### **Ban on design standards for starter homes**

The 2016 economic development bill added a new category under Chapter 40R’s smart growth overlay district formula—starter homes at a density of 4 units per acre. We supported this idea and hope that it facilitates production of starter homes. We do not support the proposal, in **House 1285** to bar municipalities from using design standards in starter homes districts. Because Chapter 40R districts must be “by right,” many communities are nervous about passing them. Design standards are one way to allay local concerns about using a by right process. Chapter 40R provides a safeguard to prevent these standards from becoming a barrier to production—the local regulations must be approved by the Department of Housing and Community Development.

### **Conclusion**

We thank the committee for providing us the opportunity to testify today. Since the committee is hearing so much oral testimony today, we submitted our testimony on most bills entirely in writing. We would be happy to answer any questions that members or staff have, and via any means the committee deems appropriate. .

Sincerely,



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**Appendix—Cross-reference to bills**

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