September 15, 2015

**S. 122, *An Act Promoting the Planning and Development of Sustainable Communities***

The Honorable Kathleen O’Connor Ives, Senate Chair

The Honorable Ann-Margaret Ferrante, House Chair

Joint Committee on Community Development and Small Businesses

State House

Boston, MA 02133

Dear Senator O’Connor Ives, Representative Ferrante and Committee members:

I am pleased to submit this testimony on behalf of Senate 122, “An Act Promoting the Planning and Development of Sustainable Communities.” This important bill, filed by Senator Wolf and Representative Kulik, would comprehensively reform our planning, zoning and subdivision laws for the first time since the 1970’s. The Massachusetts Smart Growth Alliance and a broadly based coalition of development, planning, environmental, municipal and public health stakeholders believe that this legislation can simultaneously promote economic prosperity and maintain our high quality of life.

**Why We Need to Reform our Planning, Zoning and Subdivision Laws**

Before outlining the specific ways that this legislation will improve land use outcomes in Massachusetts, I want to describe how our current legal framework has affected the lives of our residents and imperiled our future. We are managing, at the same time, to produce fewer homes than our residents want, at a higher cost than many can afford, making it harder to attract employers, forcing municipalities to spend on unsustainable infrastructure, not producing enough of the walkable neighborhoods that make our communities healthy, consuming too much forest and farmland, and putting too much greenhouse gas into the air. That is quite a feat.

Multiple studies have documented that Greater Boston is not building enough housing—and particularly not enough of the right types of housing—to meet demand. In January 2014, the Metropolitan Area Planning Council (MAPC) released projections for Greater Boston showing that 435,000 new housing units will be needed by the year 2040. Most of these units must be multi-family and most located in urban areas to meet projected demographic demands. While significant factors include shifts in household size and housing preference, we already have a housing deficit caused by inadequate production over the last 25 years. Over the last 12 years, Northeastern University’s Dukakis Center has issued a “Greater Boston Housing Report Card” documenting the region’s chronic failure to produce enough housing. It is no accident that both the Commonwealth and the City of Boston set housing production goals in the last three years.

Inadequate supply in turn, drives up the price of buying or renting a home. As observed by the “Housing Report Card,” Greater Boston has been below the vacancy rate needed for stable rents for virtually every quarter of the last 15 years. The 2014-15 “Housing Report Card” indicates that Greater Boston is now the third most-expensive market in the country for renters (behind only New York City and San Francisco). These market forces mean that residents live farther out to lower housing costs, or devote more of their household income to housing. The former intensifies sprawl, highway congestion, raises transportation and public infrastructure costs, and increases greenhouse gas emissions. The latter puts increasing economic pressure on households. Combined housing and transportation costs are eating up a larger share of family budgets—averaging 50%. (Center for Neighborhood Technology’s 2010 report proposing Housing + Transportation Index to more accurately measure housing burden.)

Beyond the immediate effect on families, when housing and transportation costs are so high, it becomes harder for workers to stay here. It is particularly critical that our Commonwealth, which has an aging work force, retain and attract the young workers who fuel our innovative economy. Both MAPC’s 2014 regional projections and the “Housing Report Card” document the demographic imperatives. More than one million “Baby Boomers” will retire by 2030 and must be replaced by younger workers. These are exactly the population cohort that has a strong preference for smaller homes in walkable, transit-connected places but is having difficulty in affording such homes because of rising costs and their college debt.

At the same time, employers are increasing dependent on this workforce, willing to site their offices in the places that attract this talent. A 2015 study by Smart Growth America identified hundreds of employers, many in Massachusetts, that moved from less to more walkable places to attract young workers. Our economic prosperity depends in significant part on stabilizing housing and transportation costs for our workers, while keeping the quality of life that is so important.

Our quality of life depends on healthy, highly livable communities. For example, over the last 25 years, obesity has been rising in Massachusetts (from 10% to 23.6% according to the Trust for America’s Health). While there are many factors involved, physical activity is a key to reducing obesity and its health risks. Numerous studies have shown the linkage between walking and the built environment. Residents are more likely to walk in a neighborhood with sidewalks and a mix of uses, i.e., frequent destinations.

Increasingly, Massachusetts residents want to live in such walkable places, but our zoning laws are often a barrier to such development by making it difficult to build multifamily projects and by limiting allowed uses.

But quality of life is not always about urban, or even town, centers. For those who live and work in rural areas, preserving our natural resources is key to their quality of life. When sprawl development needlessly pushes new construction farther from areas of existing density and infrastructure, then those who want walkable neighborhoods and those who want to preserve scenic byways and a rural lifestyle both suffer.

Every day, thirteen acres of forest and farmland are being lost to low-density, residential sprawl. 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. In the communities that “Losing Ground” characterizes as the “Sprawl Frontier,” development tends toward single-family homes and commercial development along roadways, as well as large lot-size subdivisions.

Sprawl development not only consumes land, but increases car ownership, car trips, vehicle miles, and smog. Studies by Reid Ewing, Rolf Pendall and Don Chen have created a “sprawl index” and associated sprawl patterns with these negative impacts. When the Massachusetts legislature passed the Global Warming Solutions Act in 2008, it set critical goals to cut greenhouse gas emissions. The executive branch, in its implementation plan, identified changes in land use patterns as one way to achieve reductions and noted the need to reform state planning and zoning statutes.

Sprawl isn’t 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.

For the most part, Massachusetts residents have not chosen to build too few of the homes we need, or chosen to create sprawl. A major reason for these undesirable outcomes is that we are still using a zoning regime based on what worked in the 1970’s.

**What Zoning Reform Would Do**

Senate 122 would amend Chapter 40A (zoning), Chapter 81D (master planning), and Chapter 41 (subdivision controls). These are the statutes that provide the legal framework for municipalities (other than Boston) in their land use controls. Senate 122 also proposes a new “Planning Ahead for Growth” section as Chapter 40Y. While the amendments would apply to all municipalities, Chapter 40Y only applies to communities that choose to “opt-in.” In return for adopting planning and development requirements, the opt-in communities would receive specified incentives.

There is nothing proposed in Senate 122 that is outside of mainstream land use practice in the rest of the United States. Indeed, this bill would bring Massachusetts more in line with the zoning and permitting rules of our competitor states—the very places that have been more effective at building additional housing than the Commonwealth over the last two decades. We have incorporated language wherever possible that has proven successful in other jurisdictions. It is our existing status quo in Massachusetts that is peculiar, outdated, and ineffective.

Senate 122 is not a magic bullet that will quickly fix the broken land use system we now have. Our goal with Senate 122 is to encourage cities and towns to think about future growth and to plan, re-zone, and streamline their permitting processes. If we do this, we believe that cities and towns will identify areas for growth and, with the support of the Commonwealth, will create places such as town centers, urban squares, and rural villages where more dense development can occur. We believe that Senate 122 will complement a housing production bill that thoughtfully provides additional tools for developers and municipalities.

The key provisions of Senate 122 support four important outcomes.

1. **Improve the Permitting Process to Create More Homes and Businesses**

Zoning reform can increase production of housing and commercial development if permitting is prompt and predictable. Senate 122 contains a number of specific measures to make the process work as it should:

**Consolidated Permitting:** By the time a development project has been through the serial string of separate local permits from different boards the design may have changed to such a degree that the applicant must resubmit a new application to the original board. Senate 122 would allow the proponent of an eligible project (projects consisting of 25,000 or more gross floor area or of 25 or more dwelling units) to file a concurrent application, which starts a process that includes a consolidated hearing for all boards involved within 45 days of filing, after which the boards may continue their regular process of peer and board reviews per applicable statutes and local regulations.

**Land Use Dispute Avoidance**: Senate 122 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.

**Reducing the difficulty of obtaining a Special Permit:** Currently a special permit requires a super-majority vote to be approved. Senate 122 reduces the default vote majority to approve (from 3/3, 4/5, or 5/7, depending on size of board) down to a simple majority regardless of size of board. Since many municipalities require special permits for multi-family housing and commercial development projects, this change could have a significant impact on production.

**Development Impact Fees**: Massachusetts is one of the few states where assessing a fee on a developer for off-site impacts is not common practice.  Rationally-based impact fees are predictable for developers and can reduce local opposition to some development projects, because there is confidence that projects will bear their fair share of impacts on public infrastructure. This allows more types of development to be permitted as-of-right instead of undergoing the lengthy and costly special permit process. This new section in the Zoning Act authorizes development impact fees and establishes a fact-based process for determining a project’s off-site impacts. The bill clearly lists the public infrastructure for which impact fees may be assessed. Affordable housing projects and agriculture are exempted from impact fees. Fees must be paid into a dedicated trust fund and used within 10 years.

**Extending Time Periods for using Permits**: Senate 122 extends a building permit from 6 months to two years before construction must begin. It also extends the duration of a special permit to a minimum of three years instead of the current maximum of two years, and establishes a clear lapse and extension process. These time periods better reflect today’s development schedules, affording builders more time to secure financing or engage with the community prior to actual construction.

**Appeals:** Senate 122 streamlines the appeals language for site plan review, special permits, and 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; and clarifies the jurisdiction of the Land Court permit session to include residential, commercial, industrial, and mixed-use projects.

1. **Enhance Quality of Life through Modern Planning and Zoning Tools**

Municipalities intend that land use controls will enhance the quality of life for residents; one of the underlying goals of a state statutory framework for planning and zoning is to give them clear and effective tools. Through several major reforms and a number of modest ones, Senate 122 will give municipalities what they need for the 21st century.

**Modern Zoning Tools**: The bill adds or expands definitions and authorizations for many useful zoning techniques, including cluster development, transfer of development rights, inclusionary zoning, natural resource protection zoning, and form-based codes. While Massachusetts municipalities have adopted local ordinances with one or more of these tools, in some cases (e.g., inclusionary zoning) they do so at the risk of legal challenge.

**Master Planning:** Current Massachusetts law does not require zoning to be consistent with a local master plan. As a result, many municipalities have not created or updated their plans. To incentivize thoughtful local planning, the bill provides that if local zoning is challenged in a lawsuit, and the court finds that the challenged provision is not inconsistent with a local master plan that has been certified by the applicable regional planning agency, then the provision shall be deemed to serve a public purpose. The bill also rewrites the master plan section to add language on sustainable development principles, including public health, and otherwise modernize the content of such plans.

**Development Impact Fees**: In addition to increasing the predictability of projects, the use of fact-based impact fees will allow municipalities to absorb new development and protect the quality of life of its residents at the same time.

**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. The bill adds a new section that 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.

**Zoning Variances**: The state's current eligibility criteria is so strict that many cities and towns grant almost no zoning variances; others ignore the statute and grant them subject to no standards.  There is no middle ground, and at both extremes it's a broken statute. Senate 122 rewrites the current variance statute in its entirety, expanding landowner eligibility to apply for a lawful variance; setting reasonable procedures and criteria; extending the effective duration of a variance from one to two years before lapse if not used; and increasing the permissible extension interval from 6 months to one year. A workable zoning variance statute provides the intended flexibility to municipalities and property owners.

**Vested Rights.** It is appropriate and fair that when zoning changes, the law should protect development projects already in the pipeline, where a substantial investment of time and money has been made. In the Zoning Act, however, some of these protections are excessively protective. The vesting loopholes for subdivisions and Approval Not Required (ANR) plans undermine thoughtful local planning and zoning modifications. The bill proposes to modify the first loophole, mainly by protecting submission of definitive subdivision plans and not preliminary ones, and would eliminate the ANR vesting loophole. Meanwhile, the vesting periods for projects seeking a building permit or special permit are difficult to obtain and unrealistically short. The vesting periods for building permits and special permits are appropriately extended.

1. **Preserve Open Space, Discourage Sprawl and Promote Public Health**

Senate 122 results in environmental and public health gains by its effects on land use patterns. Zoning reform provides municipalities with tools and incentives to concentrate growth and reduce sprawl. It also removes some of the zoning rules that make roadside residential and commercial development the path of least resistance.

**Modern tools for preserving open space and reducing sprawl:** Modern zoning tools like cluster development, natural resource protection zoning and transfer of development rights can be used by municipalities to reduce loss of forest and farmland.

**Option to replace “ANR” lots with lots regulated via minor subdivision controls:** Current Massachusetts law prevents communities from effectively planning or regulating the development of roadside land, through the uniquely permissive “approval not required” (ANR) process. No other state law allows unregulated roadside development in this fashion. At the same time, small residential subdivisions with a new road must undergo the same process as those with 50 or 100 lots. The bill permits a community to eliminate the ANR loophole if it creates a less onerous minor subdivision review process for projects with six or fewer lots. Reform of the so-called “ANR” provision in the Subdivision Control Law is needed because easy approval of roadside lots makes even the worst, unpaved roads in the most remote places a prescription for sprawl. It is particularly responsible for spoiling scenic roadways.

**Walkable neighborhoods**: As discussed in the next section, the proposed Chapter 40Y would provide incentives to encourage communities to create walkable neighborhoods. Moreover, many of the permitting reforms discussed above are likely to support more smart growth development even in communities that do not opt-in. With increasing demand for multi-family development in walkable neighborhoods, reducing the artificial barriers to production makes such development more likely.

1. **Local Opt-In: Planning Ahead for Growth**

Current zoning codes are not resulting in enough smart-growth development—precisely the kind of walkable, mixed use neighborhoods that attract young workers, promote public health, and conserves environmental resources. To channel growth in that direction, rather than sprawl development patterns, the proposed Chapter 40Y provides strong smart growth incentives. To obtain “opt-in” status under Chapter 40Y, a community (or group of communities) must take the following actions:

* Establish a housing development district(s) in a smart-growth location(s) that can accommodate, through by-right development, a 5% increase the community’s total number of existing housing units. Minimum densities are set for single-family, duplex-triplex, or multi-family housing.
* Establish an economic development district in a smart-growth location(s) that permits prompt and predictable permitting of commercial / industrial development.
* Institute mandatory use of open space residential design for projects of 5 units or more on land zoned for a minimum lot-size of 40,000 square feet or greater per unit.
* Institute mandatory use of low impact development (LID) techniques for developments that disturb over one acre of land.

The following regulatory and financial tools would be authorized and available for a community’s use after it has opted in:

* Ability to consider impact fees to support public schools, libraries, municipal offices, affordable housing, and public safety facilities.
* Authorization to enter into development agreements.
* Reduction of the vested rights period for subdivisions from 8 to 5 years.
* Adoption of rate of development measures (annual caps on building permit issuance) in areas inside and outside of housing development districts.
* Adoption of natural resource protection zoning at area densities of five acres or more per dwelling unit to protect identified lands of high natural or cultural resource value.
* Preference for state discretionary funds and grants; priority for state infrastructure investments, such as water and sewer infrastructure, school building funds, and biking and walking facilities; and requirements that the state take into consideration regional plans and local master plans in its capital spending.

**Conclusion**

Senate 122 has been endorsed by a broad coalition including the Massachusetts Municipal Lawyers Association, the Zoning Reform Working Group, the Massachusetts Public Health Association, the Massachusetts Association of Planning Directors, American Farmland Trust, and many other organizations and local officials.

We believe that S 122 as drafted represents a significant step forward for planning, zoning, and permitting in the Commonwealth. Thank you once more for your consideration of this important matter.

Sincerely,



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