Summary of Zoning Reform Bill

"AN ACT PROMOTING THE PLANNING AND
DEVELOPMENT OF SUSTAINABLE COMMUNITIES"
House Docket #3216

Sponsored by:
Representative Stephen Kulik
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1) Statutory Authority

Current Status: Massachusetts is a home-rule state, wherein, subject only to constitutional limitations, all powers in the realm of planning, zoning, and the regulation of subdivision reside at the municipal level unless limited in some way by the legislature. The primary purpose of a zoning act (note: not a zoning "enabling" act) in a home rule state is to guide or place limits on local authority, not to authorize powers communities already possess. Nonetheless, some prior state laws purporting to "authorize" certain planning tools and techniques by calling them out in statute have unintentionally been limiting, not liberating. However, due to some contradictory court decisions, it may be beneficial to define and authorize the use of some planning tools, in particular those that may be constitutionally challenged.

Proposed Reforms: Many definitions and some authorizations are added to the Zoning Act in a manner sufficient to clearly identify the zoning term or technique, but general enough so such language doesn't inadvertently constrain its application. The current Zoning Act definitions of "cluster development" and transfer of development rights" are modified in this manner. In addition to inclusionary zoning, addressed in a more detailed section, natural resource protection zoning is an obvious choice given the checkered Massachusetts case law relating to development density. A definition/authorization of "form-based codes" is provided.

Refer to bill sections: 1, 2, 3, 14, 15, 18, and 19.

2) Zoning Vote [voting majority required to adopt or amend zoning]

Current Status: The current super-majority requirement (two-thirds) to adopt or amend a zoning ordinance or bylaw is unduly burdensome for Massachusetts cities and towns, one that is unique in the U.S. The national norm is a simple majority to adopt/amend local zoning. There is no local ability to choose a different majority. This is another aspect of current law that undermines the incentive for communities to undertake a thoughtful, forward-looking planning and rezoning process.

Proposed Reforms: A provision is added such that communities may lower the vote quantum from the super-majority default anywhere down to a simple majority. Such a vote to reduce the majority must be by whatever vote majority is currently in place. Once reduced, the majority may also be subsequently raised, again, by whatever majority is then in place.

Refer to bill sections: 4 and 5.

3) Vested Rights

Current Status: Even if the zoning laws change, most states offer protection to development projects in the pipeline where a substantial investment of time and money has been made. In Massachusetts these protections are excessive, and more liberal (to landowners) than any common or statutory law in the U.S. The Zoning Act today provides three egregious vesting loopholes which facilitate easy circumvention of local zoning law changes. Such proposed modifications may have come out of a lengthy public process, and the loopholes act to perpetuate zoning no longer deemed in the public interest. At the same time, the current Zoning Act provides unreasonably difficult to obtain and short vesting periods for projects that are seeking a building permit or special permit.

Proposed Reforms: The bill eliminates two vesting loopholes and modifies the third. The vesting periods for building permits and special permits are appropriately extended. Below these changes are named and described:

Three Lots in Common Ownership Dimensional Freeze: Up to three pre-existing adjoining lots in conformance with existing zoning requirements and held in common ownership are automatically protected against any zoning dimensional changes for five years after a zoning amendment. Reportedly, this was added by a legislator in the 1970s at the request of a constituent to address land belonging to the constituent! It has remained to vex cities and towns for over 35 years. It is eliminated.

ANR Plan Use Freeze: Before the date of zoning adoption, the endorsement of a simple ANR plan, even a sham perimeter plan or a plan showing only a slight line change to an existing parcel, freezes any zoning change in allowed "use" for three years thereafter. This device was recently used in the City of Northampton to preserve rights to build a porn store in the face of zoning use changes that would have prohibited such a use at that location. Although ANR is thought of as a rural/suburban issue, this contrivance can be used in any city to protect use. It is eliminated.

Subdivision Plan Complete Zoning Freeze: Before the date of zoning adoption, submission of definitive subdivision plan, or more commonly a simple preliminary plan followed by definitive plan within seven months and eventual approval of the definitive plan, provides a blanket freeze on all zoning changes for eight years after final approval. A Massachusetts court case interpreting this statute further clarified that the freeze attaches to the land itself, not just the subdivision design on the plan submitted. This provides complete insulation against zoning changes no matter what might later be proposed (e.g., once the simple two-lot "fake" subdivision plan is approved, it may be discarded and replaced by any proposed development project, even if not a subdivision). There is no other such gaping loophole in the United States, and no way a community can beat it.

After extensive national research looking at vested rights state statutes on the books around the country and referencing the American Planning Association's Growing Smart model zoning

statute, this section was written to provide reasonable and standardized zoning protections for development projects proposed in building permits, special permits, and subdivision plans. Only the proposed project itself is protected, for periods of 2, 3, and 8 years, respectively. The all important vesting trigger point was set at the date an applicant "duly applies for" a permit, which must be before the first published notice of the public hearing on a proposed zoning change, and the permit must ultimately be approved. There was no evident reason for different trigger points, so they were standardized across the three types of permits. In essence, whoever steps forward first, the municipality or the applicant, is accorded the deference. If a subdivision, the application must be for a definitive plan; preliminary plans are no longer adequate as place-holders for securing vested rights. A minor subdivision similarly applied for enjoys 4 years of protection if approved. There are no vested rights for ANR plans, even for communities which do not take advantage of the new minor subdivision process.

These reforms are in line with the recommendations of the American Planning Association and are the national norm for states that have vested rights statutes.

Refer to bill sections: 6, 7, 8, 9, 10, 11, and 12.

4) Special Permits

Current Status: The current statute requires a super-majority vote to approve a special permit, a high hurdle that communities cannot lower. Not only does this make special permits harder to obtain, many zoning and planning boards find it burdensome to maintain the required number of members present to ensure the required super-majority for hearings and action. In addition, the duration of a special permit may not exceed two years, which does not reflect today's development project schedules. This places unreasonable burdens on applicants, and can force a busy volunteer board to reprocess the same special permit needlessly.

Proposed Reforms: Three significant changes are proposed. The required vote majority necessary to approve a special permit becomes a simple majority, which may be increased by zoning ordinance or by-law up to the current requirements. The effective duration of a special permit is set at no shorter than three years (which matches the period of vested rights for a special permit proposed elsewhere in the bill). Finally, a process for the extension of a special permit is established.

Refer to bill sections: 16 and 17.

5) Site Plan Review

Current Status: Although not included in the Zoning Act, many communities now employ a form of site plan review (SPR) under their home-rule powers. Without statutory guidance, a number of ambiguities have plagued SPR including uncertainty about: 1) the degree of discretional that may be exercised by a review board; 2) the ability to require mitigation; 3) timelines for approval; 4) public hearings; 5) voting majorities; 6) duration of SPR after approval; and 7) an appeal process.

Proposed Reforms: A new section is added to the Zoning Act dealing specifically with SPR. Standardized procedures are established and the above-referenced ambiguities resolved as follows: 1) discretion is limited, but approvals may be subject to conditions; 2) off-site mitigation is permitted, but limited; 3) decisions must be made within 95 days; 4) the ordinance or bylaw may/may not require a public hearing (within the 95 days); 5) a simple majority only is required for approval; 6) the duration shall be no less than 2 years; and 7) SPR decisions may be appealed in accordance with a stated procedure which specifies a review based on the existing record, not new evidence. Two other significant aspects include: 1) a prohibition on requiring separate and distinct reviews when site plan review is coupled with a discretionary special permit (e.g., SPR must be folded into special permit timelines); and 2) establishing that no zoning freezes are triggered by a SPR application or approval.

Refer to bill section 20.

6) Development Impact Fees

Current Status: Impact fees help communities recoup some of the capital costs of private development. Rationally-based impact fees are predictable for developers and can reduce local opposition to some development projects, allowing more types of development to be permitted as-of-right instead of undergoing the lengthy and costly special permit process; this because there is confidence they will bear their fair share of project impacts. Despite being a commonly used regulatory tool in the U.S. (approximately 60% of all development nationally in subject to an impact fee), impact fees are generally unavailable in Massachusetts due to troublesome case law and no mention in statute.

Proposed Reforms: This new section in the Zoning Act establishes that development impact fees are distinct from illegal taxation and are permissible if in accordance with the statute, and it sets out the required steps for adopting a local development impact fee ordinance or by-law. This section is based upon a number of in-state models (Medford and Cape Cod Commission), and out-of-state models, and is mainstream in its scope, reflecting federal case law in this area. Two of the nation's leading impact fee consultants, TischlerBise and Duncan Associates, assisted in the development of this section. Communities following the requirements of this section will have defensible impact fee ordnances or by-laws that should withstand judicial scrutiny. Public capital facilities for which impact fees may be assessed are listed (opt-in communities may assess impact fees to offset costs of a greater array of municipal capital facilities). Municipal expenses ineligible for the application of impact fees, such as routine maintenance or staff salaries, are also listed. Affordable housing subject to a restriction on sale price or rent under the provisions of sections 31-33 of chapter 184 (Affordable Housing Restriction) is exempt from being assessed an impact fee. The planning and study prerequisites to the adoption of an impact fee ordinance or bylaw are detailed, as is fiscal administration of an impact fee program.

Refer to bill section 21.

7) Inclusionary Zoning

Current Status: While a number of examples exist on the books, this essential smart growth tool for towns enjoys no supportive case law in Massachusetts. Inclusionary housing requirements placed upon market-rate housing developments can increase diversity in local housing opportunities and add units to a community's Subsidized Housing Inventory (helping to meet local requirements under the state's affordable housing law, known as "40B"). Although widely used in other states such requirements are akin to impact fees and possibly subject to the same Massachusetts-centric legal problems; therefore statutory underpinnings are needed here so that more communities will consider these measures.

Proposed Reforms: This new section in the Zoning Act, called inclusionary zoning, is designed to authorize and provide some parameters for zoning measures that require the creation of affordable housing in development projects. It is written broadly to encompass the wide array of such techniques in existence today in Massachusetts. Subject to approval, off-site units, land dedication, or funds may also be provided in lieu of on-site dwelling units, and dedicated accounts may be set up for this purpose. Any dwelling units created under this statute must be price-restricted for no less than 30 years. The upper limit of affordability is to households earning no more than 120% of the Area Median Income (AMI). Inclusionary zoning ordinances or by-laws may require all or a portion of the units created be eligible for inclusion on the community's Subsidized Housing Inventory (affordable to household with income not exceeding 80% of AMI).

Refer to bill section 22.

8) Land Use Dispute Avoidance

Current Status: Although informal dispute resolution processes may occur now, there is no set process laid out in the Zoning Act, and no relief from either "discovery" under section 23C of chapter 233, or from the open meeting law under section 21(a)(9) of chapter 30A.

Proposed Reforms: This new section in the Zoning Act offers an "off-line" avenue for applicants, municipal officials, and the public to work through the difficulties in a prospective development project using a neutral facilitator so that the formal approval process may later be successful for all.

Refer to bill section 23.

9) Variances

Current Status: The variance is a common feature of most, if not every state statute, designed to offer the local government a "relief valve" to its own regulations since no zoning ordinance can be written with foreknowledge of every piece of land or personal circumstance. The variance, because it offers a degree of flexibility to otherwise rigid zoning requirements, is also seen as a hedge against takings claims of aggrieved landowners. Many small-scale residential projects, which involve renovations, additions, or infill development, require variances from current

zoning. But the Massachusetts statute as written is overly restrictive for landowners and towns, tying the hands of appointed zoning boards and preventing the resolution of many difficulties for citizens. This has led to widespread abuse in our state, with some zoning boards approving almost no variances while others grant them liberally, but illegally.

Proposed Reforms: This section rewrites the current variance statute in its entirety. It seeks to find a middle ground by setting reasonable procedures and criteria for variances while still maintaining a community's discretion to condition or deny a variance. An explicit ability to deny variances sought because of "self-created" hardship is added. The effective life of a variance is extended from one to 2 years before it lapses if not used, and the permissible extension interval increases from 6 months to one year.

Refer to bill section 24.

10) Notice to Board of Health

Current Status: Section 11 of the Zoning Act does not now require notice of public hearings on zoning permits be provided to local boards of health.

Proposed Reforms: Section 11 is amended to additionally require such notice be provided to boards of health.

Refer to bill section 25.

11) Consolidated Permitting

Current Status: Development proposals often need to receive multiple local permits in order to proceed. The boards have differing jurisdictional and procedural requirements and often development reviews are uncoordinated between the local boards. The various reviews are often serialized, taking years to complete. Consolidated permitting is not currently included in the Zoning Act, though it is possible under home-rule powers provided it does not conflict with the procedures in statute for the individual permits.

Proposed Reforms: This provision, a new Chapter 40X, would help to ensure that for larger, more complex projects, local boards receive common information about the project and that they have the opportunity to bring all decision-making bodies together at the beginning of a project review. Consolidated and more efficient reviews could result, benefitting all parties to the development review process. At the same time, each board would retain the authority to make an independent decision in accordance with its own standards.

The proponent of an Eligible Project (projects consisting of 25,000 or more gross floor area or of 25 or more dwelling units) is allowed 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. It calls for a concurrent application that contains general project information relevant to all boards.

Refer to bill section 26.

(12) Planning Ahead for Growth Act [opt-in]

Current Status: Current development patterns are not resulting in smart-growth-consistent development that would create adequate new housing and jobs across the Commonwealth, while protecting environmental resources and community character. The "town and country" landscape of Massachusetts s being lost to sprawling suburban development.

Proposed Reforms: A new chapter, 40Y, provides strong incentives for the "plan, zone, invest" framework and provides more opportunities for housing and job growth in appropriate locations, coupled with environmental and open space protections. In exchange for local adoption of zoning districts for new residential and commercial development, preserving open space in subdivisions, and protecting water quality in development projects, municipalities will be granted access to additional regulatory and fiscal resources and tools to realize their plans for sustainable development.

The "opt-in" features of previous bills are worthwhile additions to help fill the void of state involvement in local planning, but are here simplified to omit the duplicative pre-planning steps earlier proposed. The regional planning agencies will be charged with determining if a community has satisfactorily met the listed requirements. Such requirements and resulting beneficial measures are described in detail so that an RPA may readily determine if a community has met the program's requirements and thereafter may "opt-in" to the program's benefits. Oversight, implementing regulations, and resolution of disputes would be through the Secretary of the Executive Office of Housing and Economic Development. $2,000,000 is budgeted for reimbursements to communities that prepare implementing regulations and regional planning agencies that review them.

The following are required to opt-in:

- Establishment of a housing development district(s) that can accommodate, over a ten-year period, 5% of a community's existing year-round housing units by-right. Types of housing are single-family, duplex-triplex, or multi-family at set densities.

- Establishment of an economic development district that permits commercial and/or industrial development using prompt and predictable permitting.

- Mandatory use of open space residential design (OSRD) for developments of 5 units or more on land zoned for a minimum lot-size of 40,000 square feet or more per unit.

- Requirements for the use of low impact development (LID) techniques for developments that disturb over one acre of land.

The following would be authorized and available after opting-in:

• Adoption of natural resource protection zoning (NRPZ) at area densities of 10 acres or more per dwelling unit to protect identified lands of high natural resource value.

• Adoption of rate of development measures (annual caps on building permit issuance) in areas inside and outside of housing development districts.

• Enhanced assessment of development impact fees to additionally consider capital facilities relating to public elementary and secondary schools, libraries, municipal offices, affordable housing, and public safety facilities.

• Reduction of the period of vested rights for a definitive subdivision plan from 8 to 5 years.

• Authorization to enter into development agreements

• Certified opt-in communities enjoy: 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.

• Eligibility to receive state planning funds to reimburse for costs of developing and reviewing implementing regulations.

Refer to bill section 27.

13) Master Plans

Current Status: The descriptions of the required elements of a master plan in the statute lack focus, resulting in overly-comprehensive and costly plans that often emphasize data collection of dubious value over action planning and implementation. The required nine elements of a master plan are the same regardless of community size or characteristics, and the descriptive language is dated. Adoption of the master plan is solely by the planning board, and without a required public hearing.

Proposed Reforms: The entire section on master plans is rewritten to accomplish a number of objectives: 1) the elements of a plan are described in updated language reflective of the state's Sustainable Development Principles, including public health considerations; 2) all communities must complete five required elements (goals and objectives, housing, natural resources and energy, land use and zoning, and implementation), but are free to choose among the other seven optional elements, and may customize their treatment according to local needs; 3) superfluous data collection unrelated to land use and the physical development of the community is discouraged; 4) all elements required or selected must be assessed against similar material in a regional plan, if any; 5) a public hearing is required before a plan may be adopted by the planning board; and 6) the plan must subsequently be adopted by the local legislative body. Refer to bill section 28.

14) Approval Not Required (ANR)

Current Status: Because of limiting state statutes, it is not possible to effectively plan for or regulate roadside subdivision of land. The resulting unregulated, potentially unlimited development along existing, often substandard roadways is a principal driver of "dumb growth" in the Commonwealth. The inability to regulate such roadside growth actually incentivizes it. Servicing this far-flung development is costly for towns and undermines forward-looking planning. There is nothing comparable in the statutes of other states.

Proposed Reforms: The bill redefines subdivision to include all land divisions and replaces the old c. 41, § 81P with a new section describing the procedures for minor subdivisions (which would include previous ANR roadside divisions). However, until a planning board adopts rules and regulations under the minor subdivision section, the old ANR process remains in effect. The minor subdivision provisions reduce the regulatory burden for smaller projects that currently require the full subdivision review process, while ensuring that all large projects are appropriately reviewed.

The following are features of the minor subdivision section. A planning board may adopt rules and regulations pertaining to minor subdivisions which may be no stricter than for regular subdivisions, including an option to waive or eliminate any requirements under c. 41, § 81U (including requirements for performance guarantees, such as the posting of a bond). Preliminary plans are not applicable to minor subdivisions. Minor subdivisions must be defined in the regulations to include up to six new lots on existing or new ways. Other features include the ability to require improvements to existing ways (previously off-limits under ANR), the discretion to require or not require a public hearing if a new way is proposed, the ability to limit serial applications for minor subdivisions during a set period of time, and a statutory bar on requiring combined roadway travelled lane widths in excess of 22 feet (with exceptions for existing roadways with travelled lanes in excess of 22 feet or new roadways designed to be later extended). The time limit to review a minor subdivision is either 65 or 95 days for an existing way or a new way, respectively. There are also optional provisions which expand upon what may be considered a minor subdivision and the maximum number of lots allowed in an application for a minor subdivision; adoption of these require ratification by the local legislative body.

Communities wishing to retain ANR may do nothing and continue, but those desiring more control of these common land divisions may now regulate them as minor subdivisions. Adoption of rules and regulations for minor subdivisions does mean that smaller projects of six or less lots on a new street, previously subject to full subdivision review, will now be governed by the statutory limits set for review of a minor subdivision. As stated above, repetitive applications for these can be time-limited. In addition, with the exception of a roadway traveled lane width limit of 22 feet and a shorter timeframe for review (95 days instead of 135), these smaller projects may be regulated as before if the planning board so desires. These two concessions are more than compensated for by the ability to genuinely regulate problematic ANRs.

Because the ANR device is routinely used to make small changes to property lines, a suitable replacement mechanism was needed. Section 81X of the Subdivision Control Law was selected

for this purpose because it already covers so-called perimeter plans, allowing them to go directly to the registry. A new section is added entitled "Lot Line Changes," where such plans bearing an opinion from a professional land surveyor and a certificate from the local zoning enforcement official or board may go directly to the registry under certain circumstances. These plans may not create a new lot, change the lines of a street or way, create an illegal lot or structure, or worsen an existing nonconformity. A planning board not wishing to use this mechanism may instead elect to directly oversee these lot-line-change plans as minor subdivisions.

Another frequent use, and some would say abuse, of ANR plans is to modify the lots shown on an approved subdivision plan. These changes can be sweeping revisions to the layout of recently-approved new subdivisions lots with only a cursory review under the 21-day ANR clock. In this bill, and notwithstanding the paragraph above relative to Section 81X, any changes to the number, shape, and size of these subdivision lots must proceed under Section 81W as a formal modification to the subdivision. In the alternative, a planning board may elect to define such modifications as minor subdivisions and adopt less stringent regulations for them.

Refer to bill sections 29, 30, 32, 35, 37, 38, and 39.

15) Parks and Playgrounds [in subdivisions]

Current Status: The Subdivision Control Law does not allow local subdivision regulations to require dedication of any land within a subdivision for park or playground use by the residents without compensation.

Proposed Reform: The prohibition is stricken and the Subdivision Control Law is modified to allow local subdivision regulations to require a dedication of up to 5% of the land in a subdivision for park or playground use by the residents. Note that this provision can't be interpreted to require transfer of ownership of such park or playground to a unit of government (similar to the existing well-accepted requirements to create a roadway right of way, but without also mandating its dedication to the municipality).

Refer to bill sections 34 and 36.

16) Subdivision Roadway Standards

Current Status: To comply with local subdivision regulations many subdivisions roadways must be built to substantially higher dimensional standards than the existing public roadways onto which they connect. This may adversely affect aesthetics, lead to increase roadway runoff volumes, and inflate the costs of housing by imposing undue burdens on the developer. The Subdivision Control law does now prohibit roadway dimensional standards in local subdivision regulations in excess of those applicable to <u>new</u> publicly-financed roadway construction in similar zoning districts. However, since new roadways are seldom built by municipalities, there are no standards in place and the prohibition is meaningless as applied to subdivision roadway standards.

Proposed Reform: Revise the language to reference the standards applicable to the construction or "reconstruction" of publically-financed roadways in similar zoning districts, which does

regularly occur. This new reference would provide specific dimensional measurements to compare against those found in the local subdivision regulations. Rather than a strict prohibition, a rebuttable presumption is established that roadways standards in excess of those applicable to reconstruction of public roadways are unlawfully excessive. Such a presumption could be rebutted for good cause. It is further stated that requirements for total travel lane widths no greater than 24 feet shall be presumed not to be excessive.

Refer to bill section 33.

17) Appeals

Current Status: The permitting process is often lengthy and expensive in Massachusetts, even for projects consistent with the state's Sustainable Development Principles. Once a municipality has made a decision on a proposed project, opponents sometimes turn to the courts in the attempt to delay or stop the proposal even if there is no merit to the appeal. Resolving appeals is often an expensive and slow route, which undermines the predictability and authority of the local process for local agencies, developers, and residents alike.

Proposed Reforms: These reforms streamline the appeals language for site plan review, special permits, and subdivisions; provides for a record-based decision (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.

Refer to bill sections 20, 40, 41, and 42.

(18) Master Planning Incentive

Current Status: Although a master plan is now required under section 81D of chapter 41, no statute requires regulatory consistency with an adopted plan. Because of this disconnection, many municipalities do not have a current master plan or any plan, and the courts generally do not take master plans into account when assessing the validity of a local zoning ordinance or bylaw.

Proposed Reform: The creation and adoption of a master plan remains an option for municipalities in the new planning section. But in order to incentivize local master planning and better defend consistent local zoning regulations derived from adopted plans, section 14A of chapter 240 is amended by inserting after the first paragraph in section 14A, the following paragraph:

"In any claim challenging the validity of any provision of an zoning ordinance or by-law, the court shall first determine if the provision challenged is consistent with the city's or town's master plan adopted pursuant to section 81D of chapter 41, if any. If the court determines that the challenged provision is consistent with the master plan, then such provision shall be deemed to serve a public purpose. A determination of inconsistency by the court or the absence of an

adopted master plan shall not for that reason alone be determinative of whether the challenged provision serves a public purpose."

Refer to bill section 43.