



Massachusetts Association of Conservation Commissions

protecting wetlands, open space and biological diversity through education and advocacy

By email to Lorraine.nessar@state.ma.us

April 28, 2017

Department of Housing and Community Development
100 Cambridge Street, Suite 300
Boston, MA 02114
Attn: Lorraine Nessar

Re: Comments on the proposed amendments to the regulation, 760 CMR 59.00 – Smart Growth Zoning Overlay District (MGL c.40R)

Dear DHCD:

These are the comments of the Massachusetts Association of Conservation Commissions (MACC) on the proposed amendments to 760 CMR 59.00 that would implement this sentence in MGL c.40R, § 6(a)(7):

In addition, a proposed starter home zoning district shall not be subject to any municipal environmental or health ordinances, bylaws or regulations that exceed applicable requirements of state law or regulation, unless the department of environmental protection has determined that specific local conditions warrant imposition of more restrictive local standards, or the imposition of such standards would not render infeasible the development contemplated under the comprehensive housing plan, housing production plan or housing production summary submitted as part of the application for such district.

As discussed in detail below, we think the proposed regulations amendments are inconsistent with the Massachusetts Constitution and with MGL c.40R, § 6(a)(7). We also think they fail to set forth a clear pathway to implementation of the above statutory provision.

For background, MACC, established in 1961, is the association of Massachusetts conservation commissions. Conservation commissions are part of municipal government. Each of the 351 cities and towns in Massachusetts has a conservation commission. More than 330 of those conservation commissions are dues-paying voting members of MACC. Conservation commissions administer and enforce the Massachusetts Wetlands Protection Act (MGL c.131, § 40) and municipal wetlands laws and regulations in their communities. They also protect conservation lands and other natural resources in their communities under the Massachusetts Conservation Commission Act (MGL c.40, § 8c). MACC provides education, training, and advocacy services to conservation commissions.

We are concerned about the proposed amendments to 760 CMR 59.00 that would implement the sentence in MGL c. 40R, § 6(a)(7), set forth above, because more than 190 municipalities in Massachusetts have adopted wetland bylaws/ordinances that are more protective of wetlands than is

the state Wetlands Protection Act (WPA) and implementing regulations.¹ Conservation commissions administer those bylaws and ordinances, which municipalities adopt under Article 89 (the “Home Rule Amendment”) of the Massachusetts Constitution and MGL c.40 and c.43B. In addition, some municipalities have adopted storm water management requirements that exceed state requirements, sometimes to meet federal mandates and sometimes because the state standards are outdated or inadequate. Depending on the municipality, the storm water requirements may be administered by the conservation commission, public works department, or another entity within the city/town.

I provided comments on March 27 at the public hearing on the proposed amended regulations. These written comments supplement and expand on those comments.

The Definition of Render Infeasible Must Be Modified

The proposed regulations amendment includes this definition of Render Infeasible at 59.02:

To prevent or add significant costs to a Project so as to impair the economic feasibility of the development of residential or Mixed-use Development Projects at the As-of-right residential density set forth in the 40R Zoning by means of any Municipal ordinance, by-law, or regulation that exceeds applicable requirements of state law or regulation.

The proposed definition is inconsistent with the statute. To “add significant costs so as to impair the economic feasibility” is not the definition of infeasible. Impair is a lower standard than infeasible. “Impair” does not prevent the project from being built. “Infeasible” would prevent the project from being built. Merriam Webster defines impair as to diminish. It defines infeasible as impracticable, which it defines as incapable of being performed or accomplished by the means employed or at command. Diminishing the economic feasibility of a development might still allow the development to be completed, albeit perhaps at less profit or with a different design than the developer contemplated.

¹ The Massachusetts Supreme Judicial Court, in *Lovequist v. Conservation Commission of Town of Dennis*, 379 Mass. 7 (1979), ruled that local regulation of wetlands is not pre-empted by the state Wetlands Protection Act (WPA) and that the WPA sets forth minimum standards only, “leaving local communities free to adopt more stringent controls.”

The WPA and its implementing regulations have their limitations. They do not protect all important wetland resources and their standards are sometimes vague or inadequate. Massachusetts continues to lose wetland acres and the functions of many wetlands are diminished. To close loopholes in the WPA, to add more certainty, and to protect local wetland resources more adequately, many Massachusetts cities and towns have adopted municipal wetland ordinances and bylaws to regulate activities in or near wetlands by imposing stronger protective measures than the WPA. Those municipal laws help ensure work in and near wetlands does not impair the benefits provided by wetlands. Examples include: adopting performance standards for work in coastal lands subject to flooding (DEP has proposed but not adopted such standards and has encouraged municipalities to adopt standards); extending riverfront protections to important intermittent streams (state law provides the protections to perennial streams but not to streams that may occasionally stop flowing); using more current storm water standards than the outdated standards DEP has acknowledged it needs to update and using standards that will be required by the new federal MS4 permit; protecting vernal pools that the state regulations do not protect due to a technicality that those pools are not in a wetland area even though they are important wildlife habitat; and creating standards governing work in buffer zones (WPA regulations acknowledge the importance of buffer zones and require conservation commission to regulate work done in buffer zones in order to protect wetlands but the regulations provide only general guidance on how to do so).

That is not the same as infeasibility of completing the development. Further, the definition should relate to the standard set forth in the statute for local requirements in starter home districts.

We suggest using this definition of Render Infeasible, which would meet the statutory mandate and is consistent with the dictionary definition of infeasible:

Render Infeasible: To prevent or result in no practicably viable project contemplated by the municipal housing plan, housing production plan, or housing production summary submitted as part of the application for the smart growth zoning district.

The Contents Required For a Municipal Application for a Starter Home Zoning District Must Be Modified

The proposed regulations amendment, at 59.03(1)(j), includes this requirement for a municipal application:

For Starter Home Zoning Districts only, copies of any Municipal environmental or health ordinances, bylaws or regulations that exceed applicable requirements of state law or regulation, which the Municipality is not proposing to waive for the Starter Home Zoning District, and sufficient documentation substantiating the Municipal's assertion of the necessity for imposing such Municipal standards on the proposed District. Such documentation shall be certified by a Municipal engineer or public works official, unless otherwise substantiated in accordance with guidance issued by DHCD.

There are significant problems with that requirement:

First, "necessity" for imposing municipal standards on the proposed district is not the statutory standard. The statutory standard is "warrant the imposition," which is a much lower threshold than "necessity." To "warrant" is defined by Merriam Webster as a justification or to give reason for. Also, the statutory standard is not warrant the imposition only in the starter home district. Those standards are municipal-wide and can be warranted anywhere in the municipality. The appropriate requirement would be to require the municipality to submit documentation explaining the specific local conditions that warrant imposition of more restrictive local standards, or the imposition of such standards would not render infeasible the development contemplated under the comprehensive housing plan, housing production plan or housing production summary submitted as part of the application for such district.

Second, it makes no sense that the documentation of "necessity" (or more properly the justification for a local health or environmental standard that exceeds state requirements) must be certified by the municipal engineer or public works official. Those positions would have little or nothing to do with the adoption or administration of those standards. The Board of Health for health standards and Conservation Commission for environment standards are the appropriate entities. The planning director or planning board, working with the Board of Health or Conservation Commission, as appropriate, might then provide documentation showing whether or not the imposition of such standards would render infeasible the development contemplated under the comprehensive housing plan, housing production plan or housing production summary submitted as part of the application for such district.

Third, the wording, "unless otherwise substantiated in accordance with guidance issued by DHCD," is too open ended. It could allow DHCD to impose requirements that might be onerous or exceed the statutory requirements. DHCD should be required to impose additional requirements through a

regulations process rather than by guidance that is not required to be subject to advance public notice and comment.

Fourth, municipalities do not have the authority to waive their environmental or health ordinances, bylaws, or regulations. That is discussed in detail in the next section, below.

We suggest this alternative:

For Starter Home Zoning Districts only, a copy of municipal environmental or health ordinances, bylaws, or regulations that exceed applicable requirements of state law or regulation and documentation explaining the specific local conditions that warrant imposition of more restrictive local standards, as provided by the Board of Health for health related standards and by the Conservation Commission for environmental related standards. Also, documentation showing whether or not the imposition of such standards would render infeasible the development contemplated under the comprehensive housing plan, housing production plan or housing production summary shall be submitted as part of the application for such district.

The Procedure for Approval, Review, Amendment, and Repeal Must Be Modified

The proposed regulations amendment, at 760 CMR 59.05(2)(e), sets forth a procedure for review and approval of an application for a Starter Home Zoning District in a municipality with environmental or health ordinances, by-laws, or regulations that exceed applicable requirements of state law or regulation. As discussed below, the proposed procedure violates the Massachusetts Constitution and statutory requirements. It also lacks an appropriate appeal option.

The proposed 760 CMR 59.05(2)(e) would require this procedure for approval of a starter home zoning district if a municipality seeks to impose municipal environmental or health ordinances, by-laws, or regulations that exceed applicable requirements of state law or regulation:

1. The Municipality must waive the local requirement or defer payment of the incentive payment until the requisite number of bonus units have been created OR
2. DHCD will issue a Letter of Conditional Eligibility requiring waiver of such Municipal standards or deferral of the Zoning Incentive Payment and providing that if the Municipality declines to waive such Municipal standards or to accept deferral of the Zoning Incentive Payment, it may request that DHCD submit to DEP a request for review and determination regarding whether the Municipality has demonstrated a reasonable, objective basis, based on documentation of specific local conditions, for imposition of such additional Municipal standards identified in the Letter of Conditional Eligibility.
3. DEP will then determine whether the Municipality has demonstrated a reasonable, objective basis, based on the documentation of specific local conditions, for imposition of such additional Municipal standards identified in the Letter of Conditional Eligibility. DEP's review of the referral from DHCD will be an informal, non-adjudicatory procedure and there is no appeal mechanism from the decision.
4. If DEP determines that the Municipality has demonstrated a reasonable, objective basis, based on documentation of specific local conditions, for imposition of such additional Municipal standards identified in the Letter of Conditional Eligibility, determine whether imposition of such standards would Render Infeasible the development contemplated under the Comprehensive Housing Plan, Housing Production Plan, or Housing Production Summary

submitted as part of the application for such District. If DHCD determines that the standards Render Infeasible such development, DHCD will issue a Letter of Denial to the Municipality. If DHCD determines that the standards do not Render Infeasible such development, DHCD will issue a Letter of Eligibility or Letter of Conditional Eligibility that does not require waiver of such standards.

5. If DEP determines that the Municipality has not demonstrated a reasonable, objective basis, based on documentation of specific local conditions, for imposition of such additional Municipal standards identified in the Letter of Conditional Eligibility, DHCD will issue a Letter of Conditional Eligibility conditioning eligibility on the Municipality waiving all such Municipal standards or, alternatively, deferring the Municipality's Zoning Incentive Payment.

There are constitutional, legal, and public policy problems with that procedure.

Municipalities do not have the authority to waive a duly adopted bylaw or ordinance. As set forth in Article 89 of the Massachusetts Constitution, municipalities may adopt, amend, or repeal local ordinances and bylaws. There is nothing in Article 89 -- and there is nothing we could find anywhere in the General Laws -- that would allow a municipality to waive the requirements of a duly adopted environmental or health bylaw or ordinance. That is the function of amend or repeal. Notably, MGL c.40R, § 6(a)(7), does not use the term, "waive," or authorize a municipality to waive any requirement in a starter home district. Further compounding the unconstitutionality of the waiver provision, the waiver would not even be voted by the city or town legislative body but could simply be part of the municipal application.

MGL c.40R, § 6(a)(7), authorizes another process, not a municipal waiver of a duly adopted bylaw or ordinance. The law also uses a different standard for review than the standard set forth in the proposed regulation amendment.

The law is clear that a proposed starter home zoning district shall not be subject to any municipal environmental or health ordinances, bylaws or regulations that exceed applicable requirements of state law or regulation unless one of two conditions occur. The ordinance, bylaw or regulation remains in effect in the district if either:

1. DEP determines that specific local conditions warrant imposition of more restrictive local standards; or
2. The imposition of such standards would not render infeasible the development contemplated under the comprehensive housing plan, housing production plan or housing production summary submitted as part of the application for such district.

The proposed regulations amendment is inconsistent with the MGL c.40R, § 6(a)(7) because it combines into one requirement those two distinct conditions, either of which allows local health and environmental requirements to remain in effect in the starter home district. The proposed regulations amendment would require DEP to make a finding even if the local standards do not render infeasible the development contemplated under the comprehensive housing plan, housing production plan or housing production summary submitted as part of the application for such district -- and it would allow for a denial even if DEP finds that the standards are warranted by specific local conditions.

The proposed regulations amendment is also inconsistent with MGL c.40R, § 6(a)(7), by requiring DEP to determine whether the Municipality has demonstrated a "reasonable, objective basis," based on the documentation of specific local conditions, for imposition of such additional Municipal standards. The

statutory standard is not “reasonable, objective basis.” Including the phrase, “reasonable, objective basis” in the regulations, when that phrase is not in statute, distorts the meaning of the statute by adding a requirement not found in the statute. That is an important distinction because the local conditions may include subjective and policy based determinations to provide additional protections to wetlands. For example, the WPA does not recognize recreation as a wetlands interest to protect even though many wetlands provide recreational opportunities. A municipality may choose to add recreation as a wetlands interest to protect based on policy considerations. Those policy considerations would be acceptable under the standard set forth in the statute but arguably not under the standard set forth in the proposed regulation amendment.

The proposed regulation amendment raises due process concerns when it would allow DHCD to defer payment of the incentive payment until the requisite number of bonus units have been created if the local health and environmental requirements remain in effect. There are many potential reasons the requisite number of bonus units may not be built, including economic and financial issues having nothing to do with local health and environmental standards. Failing to connect the number of units built to the impact of local health and environmental standards raises due process issues and unduly penalizes municipalities for conditions unrelated to local requirements that may be out of their control.

It is poor public policy to make the DEP review informal and non-adjudicatory with no means to appeal. Municipalities should have the right to make their case in person to DEP in a formal proceeding if they are dissatisfied with the initial DEP decision, and an appeal mechanism beyond the DEP review.

The approval process set forth in the proposed regulations creates disincentives for creating starter home zoning districts for municipalities with local health and environmental standards that are more protective than state law. The regulations should seek to harmonize local environmental and health regulations with the creation of starter home zoning districts and construction of starter homes, rather than force municipalities to give up those requirements if they want to participate in the program.

As we read the statute, this would be the appropriate review procedure for applications to create starter home zoning districts for municipalities with health or environmental requirements that would be applicable in a starter home district:

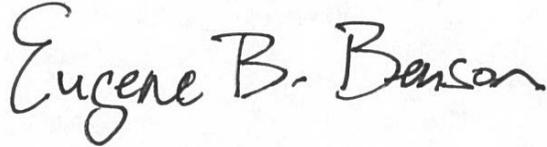
- With its application, the municipality must show one of these two: 1) the plan is rendered infeasible if the local rules remain in place; or 2) the plan is not rendered infeasible if the local rules remain in place.
- If the municipality indicates #1, then DEP would determine if the local rules are warranted by specific local conditions. If the local rules are warranted, the municipality may participate.
- If the plan is not rendered infeasible, there is no need for a DEP review and the application would be approved.

As I mentioned during my comments on March 27, I thought MACC should have been invited to participate in the stakeholder process that led to the proposed regulations amendments, which could have a significant impact on environmental protection and on conservation commissions that administer local wetlands bylaws and ordinances. If you determine to restart the stakeholder process we would appreciate being invited to participate.

Please contact me if you require additional information or if you have questions about these comments.

Thank you.

Sincerely,



Eugene B. Benson

Executive Director

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We will also take this opportunity to respond to a statement made by a housing developer who testified at the public hearing on March 27. The developer was critical of conservation commissions that restrict or impose conditions on work and projects in the buffer zones of wetlands.² He expressed his opinion that DEP knows what it is doing about wetlands and conservation commissions do not. (He did not use those exact words, but words to that effect.) The fact is that DEP has long recognized that buffer zones are important to protect wetlands. Conservation commissions have a duty under law to make sure work in buffer zones is appropriately conditioned or restricted.³ The Wetlands Protection Act regulations require that any activity in a buffer zone requires conservation commission review and approval, other than specified minor activities. 310 CMR 10.02(2)(b). The commission may impose conditions and restrictions on the work, based on the narrative standard set forth in the regulations. Many municipalities have adopted local requirements that include more specific standards and more certainty for how to condition and restrict activities proposed for wetland buffer zones.⁴

This is from the preface to the 2005 revisions to the MA Wetlands Protection Act Regulations:

Background on Buffer Zones

Since the buffer zone was adopted as a regulatory mechanism in 1983, research on the functions of buffer zones and their role in wetlands protection has clearly established that buffer zones play an important role in preservation of the physical, chemical and biological characteristics of the adjacent resource area. Although jurisdiction over work in the buffer zone remains contingent upon the conclusion of the issuing authority that

² Many types of wetlands (known as resource areas in the wetlands regulations) have 100 foot buffer zones, set forth in the regulations, where work can be conditioned or restricted by conservation commissions for the purpose of preventing the work from impacting the nearby wetlands. 310 CMR 10.02(2)(b). In effect, the 100 foot zones are used to buffer the wetlands from impacts.

³ There is some confusion among the public about the level of regulatory jurisdiction provided over the buffer zone. The 100-foot buffer zone is not protected from alteration in the same way as a wetland is protected. However, activities within the buffer zone are subject to the conservation commission's jurisdiction (i.e., mandatory review and potential permitting). The Wetlands Protection Act and Regulations do not provide any specific restrictions for buffer zones, except the requirement that any person proposing work in the buffer zone must ask the conservation commission to determine if the proposed work will alter the adjacent wetland. If the work is likely to alter the wetland, the person must file a Notice of Intent with the conservation commission and a permit must be issued by the commission before the work may begin. The permit may impose conditions and restrictions on activities within the buffer zone to protect the adjacent wetland.

⁴ The terminology used for wetlands is "resource areas."

the work near the resource areas will result in their alteration, review of work in the buffer zone is likely to contribute to the protection of the interests of the Act. The potential for adverse impacts to resource areas from work in the buffer zone increases with the extent of the work and the proximity to the resource area

Extensive work in the inner portion of the buffer zone, particularly clearing of natural vegetation and soil disturbance is likely to alter the physical characteristics of resource areas by changing their soil composition, topography, hydrology, temperature, and the amount of light received. Soil and water chemistry within the resource areas may be adversely affected by work in the buffer zone. Alterations to biological conditions in adjacent resource areas may include changes in plant community composition and structure, invertebrate and vertebrate biomass and species composition, and nutrient cycling. These alterations from work in the buffer zone can occur through the disruption and erosion of soil, loss of shading, reduction in nutrient inputs, and changes in litter and soil composition that filters runoff, serving to attenuate pollutants and sustain wildlife habitat with resource areas.

...

Standard for Work in the Buffer Zone under a Notice of Intent

The revised regulation establishes a narrative standard for work in the buffer zone performed under a Notice of Intent. Conditions on work in the buffer zone may include erosion controls, a clear limit of work, preservation of natural vegetation adjacent to the resource area, and design to avoid alteration of wetlands. Characteristics of the buffer zone at a particular site, such as the presence of steep slopes or the absence of natural vegetation, may increase the potential for adverse impacts on resource areas. The review and conditioning of activities in the buffer zone should be commensurate with the extent and location of the work in the buffer zone and its potential to alter resource areas. The standard is intended to provide better guidance to applicants, conservation commissions and DEP by identifying the measures that will ensure that adjacent resource areas are not adversely affected during or after completion of the work.