



Massachusetts Association of Conservation Commissions

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

March 23, 2016

Ellen M. Donoghue, Senate Chair
Joint Committee on Economic Development and Emerging Technologies
State House, Room 112
Boston, MA 02133

Joseph F. Wagner, House Chair
Joint Committee on Economic Development and Emerging Technologies
State House, Room 42
Boston, MA 02133

Re: House Bill 3983, *An Act to provide opportunities for all*

Dear Senate Chair Donoghue and House Chair Wagner:

We are writing to express our opposition to the part of Section 43 of House Bill 3983, *An Act to provide opportunities for all*, as filed by Governor Baker, that would reduce environmental protections in starter home zoning districts and eliminate the ability of municipalities to create such districts while at the same time maintaining protective municipal environmental laws throughout the city or town.

Section 43 of the bill would strike out sections 5-10 of G.L. c.40R and replace them with six new sections, including a new section 5 that would allow for starter home zoning districts. Subsection (7) of what would be a new G.L.c. 40R, §5, found at lines 892-901 of the bill, would override municipal wetland ordinances and bylaws currently in place in 197 cities and towns in starter home zoning districts. In so doing, it would needlessly encourage the development of starter housing in environmentally-sensitive and flood-prone areas and create conflicts between housing development and protection of our natural resources.

If your committee is favorably inclined toward Section 43 of the bill, we respectfully ask your committee to delete the second sentence of subsection (7), found on lines 894-901 of the legislation.¹ Similar provisions to undermine local protections of wetlands have been rejected in previous legislative sessions.

¹ We ask that this sentence be deleted from Section 43 of the bill: "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 regulations, unless the department has determined, after consultation with the department of environmental protection or other agency having relevant experience, that specific local conditions warrant imposition of more restrictive standards, and 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."

Wetlands Protection in Massachusetts Is a State and Local Partnership

Massachusetts is a national leader in effective wetlands protection. Every municipality in Massachusetts has established a conservation commission for the promotion and development of the natural resources and protection of watershed resources in the municipality. G.L. c.40 § 8C. Conservation commissions administer the Massachusetts Wetlands Protection Act (WPA) in their communities. G.L. c.131, §40. Anyone proposing to do work in or near wetlands and subject to the requirements of the Act must file a notice with the municipal conservation commission and receive an order of conditions (permit) to do the work. The Massachusetts Department of Environmental Protection (DEP) promulgates the WPA regulations that conservation commissions implement. Persons dissatisfied with a decision of a conservation commission may appeal that decision to DEP, which can issue an order that supersedes the order issued by the conservation commission.

Although the WPA is an effective law, it does have its limitations. It does not protect all important wetland resources and its standards are sometimes inadequate. Massachusetts continues to lose wetland acres and the functions of many wetlands are diminished.

To close loopholes in the WPA, and to protect local wetland resources more adequately, 197 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. Cities and towns have the authority to do so under Home Rule and such ordinances and bylaws have been upheld by the Supreme Judicial Court in *Lovequist v. Conservation Commission of Town of Dennis*, 379 Mass. 7 (1979).

Wetlands Protection Is Critically Important

More than half of our country's original wetland acreage has been lost to agricultural, commercial, and residential development. The cost of this loss in degraded water quality, increased storm damage, and depleted fish, wildlife, and plant populations has been well documented.

In their natural state, wetlands provide many free services to the community. Low areas serve as flood ways to convey storm and other flood waters safely away, and act as buffers to prevent damage to nearby roads and buildings. Naturally forested riverfront areas slow flood waters and trap sediment and debris. Those functions minimize the need for extensive (and often expensive) engineered flood management systems and seawalls. Wetlands also provide temporary storage of floodwaters, allowing floods to recede slowly and, in fresh water wetlands, to recharge groundwater. Any alteration of the land that reduces flood storage capacity may displace floodwaters and cause greater flooding elsewhere. Unfortunately there are too many examples of houses flooded and even lives lost through the cumulative effect of many people filling in a floodplain over the years.

With a changing climate, more damaging storms, and rising sea levels, the ability of wetlands to soak up carbon and storm water and buffer us from floods is especially significant.

Directly or indirectly, wetlands are sources of public and private drinking water supply. In addition, wetlands and vegetated riverfront lands help to purify the waters they receive from highway or agricultural runoff and other sources. They serve as natural settling areas where soils and vegetation trap sediments that bind and, in some cases, break down pollutants into nontoxic compounds. For

example, the sediments under marsh vegetation absorb lead, copper and iron. Wetlands and riverfront lands retain nitrogen and phosphorus compounds which otherwise would foster nuisance plant growth and degradation of fresh and coastal waters. Wetlands also absorb and retain carbon that would otherwise increase the amount of greenhouse gases in the atmosphere that scientists consider responsible for causing global climate change.

Wetlands are valuable to wildlife, providing food, breeding areas, and protective cover. Naturally vegetated riverfront lands also provide essential travel corridors for many species. Wetlands are home to native animals and plants, including rare and endangered species that would go extinct if not for wetlands. Shellfish beds and commercial and recreational fisheries are dependent on good water quality and healthy coastal and inland wetlands.

Wetlands provide opportunities for boating, fishing, birding, swimming, and other recreation that help support the Massachusetts economy and are part of a good quality of life that makes our state an attractive place to live, work, and visit.

Section 43 of H.3983 Would Diminish the Home Rule Authority of Cities and Towns, With a Resulting Loss of Wetlands Protections and Endangerment of Local Infrastructure

The ability of cities and towns to augment and strengthen state protections of wetlands within their boundaries is important to wetlands protection in Massachusetts. Communities may choose to expand their conservation commission's jurisdiction, add wetland values warranting local protection, tighten permit and hearing procedures, establish filing and consultant fees, allow commissions to adopt their own regulations, and clarify the power to disapprove work in or affecting wetlands and floodplains. Those are important components of our integrated state-local system that Section 43 would undermine.

Examples of the extra protections provided by municipal wetland ordinances and bylaws that Section 43 would disallow in starter home districts would include:

- In determining storm water management requirements and the location of flood-prone areas, communities may choose to use recent data released by the National Oceanic and Atmospheric Administration (NOAA) rather than outdated data in DEP stormwater documents.²
- Communities may wish to protect more than the eight interests noted in the WPA adding, for example, recreational or educational values of wetlands.
- Communities may wish to protect natural resources not protected by the WPA, such as isolated vegetated wetlands, vernal pools, and other water resources not linked to waterbodies, and also include adjacent upland areas (sometimes termed the buffer zone), which may affect wetlands

² On September 30, 2015, NOAA released Atlas 14, the long-awaited volume updating precipitation data for New England. The new Atlas provides estimated rainfall for 1 to 1,000 year storm events. Atlas 14 supersedes the 1961 Technical Paper 40 (TP-40). Atlas 14 is of great importance to Massachusetts because DEP's required extreme precipitation quantities for culvert sizing and storm sewers is based on TP-40, which was published 54 years ago following a 30-year drought. TP-40 regularly underestimated actual storm events. Precipitation events in New England in the last 15 years have repeatedly exceeded TP-40's 50- and 100-year storms. The intensity of local storms has blown out culverts and undermined roads, threatened dams, and caused historic flooding. Climate scientists and hydrologists project that the effect of these increasingly common events will result in further infrastructure failures, additional stream channel scouring, and even regional wetland changes. Municipalities can adopt their own ordinances, bylaws and regulations requiring use of Atlas 14 data to help protect their infrastructure and their residents. Section 43 would not allow those common-sense requirements to be applied in starter home districts.

and floodplains. (The WPA protects vegetated wetlands, flood prone areas, and other listed resource areas only if they border bodies of water. Vernal pools are protected only if they occur in resource areas.)

- Communities may wish to improve riverfront protection beyond that afforded by the WPA. For instance, many communities abolish the distinction between perennial and intermittent waterways to define what constitutes a river as a protectable resource, or add lakes and ponds to the list. That is especially important in areas where there has been a drawdown of an aquifer or where there has been a local drought that is not subject to a state drought declaration.
- Communities may wish to assure adequate professional review of proposed projects through filing fees and consultant fees paid by applicants, and through professional staff who can be hired for this purpose with filing fees.
- Communities may seek specialized coverage. For example, in a sparsely populated town, a bylaw applying only to large/high-impact projects could provide the extra filing and consulting fees especially useful for review of such projects. Or a community might impose requirements only in certain critical areas such as a coastal floodplain, barrier beach or barrier island, rare species habitat, zone of contribution to a wellfield, wildlife corridor, vernal pool, or state-designated Area of Critical Environmental Concern.
- Many communities choose to create a no-disturb setback that offers more protection than the 100-foot “jurisdictional” or “review area” buffer found in the WPA regulations.
- Communities may expand the topographic limit of inland banks where extra protection is needed. For example, a steep slope above the high water line (1:4 or greater) can be treated as part of the bank, by defining the term “bank” in the bylaw/ordinance as the point where the slope becomes less than 1:4. Where no alternative exists for building near banks on small lots, best available technologies may be required for erosion control.
- Communities may better protect coastal areas subject to flooding by creating strong design specifications and performance standards (currently missing from the WPA regulations) which take increased periodic flooding and sea-level rise into account. The Cape Cod Commission had prepared a good model floodplain district zoning bylaw/ordinance to deal with coastal flooding.

Criteria Set Forth in Section 43 of H.3983 Are Flawed

Section 43 would allow municipal environmental ordinances, bylaws and regulations that exceed applicable requirements of state law or regulations to remain in place in starter home zoning districts only if the department determines that two criteria have been met: 1) specific local conditions warrant the imposition of more restrictive local standards; and 2) the imposition of such standards would not render infeasible the development of the contemplated housing. There are significant problems with those criteria, which we discuss below.

Section 43 ignores that the WPA has traditionally set minimum statewide standards to protect wetlands, leaving local communities free to adopt more stringent controls.³ A community may want to provide more protections for all or some of its wetland resources, even those that are not related to specific local conditions. Section 43 would take away from cities and towns the ability to determine the

³ Since at least the early 1970’s Massachusetts courts have regarded the WPA as setting forth minimum statewide standards to protect wetlands and “leaving communities free to adopt more stringent controls.” *Golden v. Selectmen of Falmouth*, 358 Mass. 519, 526 (1970). See also, *Lovequist v. Conservation Commission of Dennis*, 379 Mass. 7 (1979); *Parkview Electronics Trust, LLC v. Conservation Commission of Winchester*, 88 Mass. App. Ct. 833 (2016).

appropriate level of protection of all their wetland resources and would make DEP regulations the ceiling for protection in starter home zoning districts, rather than a floor that can be built upon for more protection. Section 43 also turns local protection on its head, making the department the arbiter of what is important to protect in each community. The municipality, not the department, is in the best position to make that determination.

Section 43 ignores that a sustainable community is a community where natural resources and infrastructure are protected everywhere; not where there are less protections in locations where starter homes and affordable housing may be built. Starter homes and affordable housing do not need to be built in ecologically sensitive areas. Setting a lower environmental standard for starter home zoning districts is a recipe for creating conflict and dissent. It also raises serious equity concerns. Once again government would create a program putting working families and lower income people at greater risk of residential flooding and where they are more likely to degrade the natural environment. We should know better than to repeat those mistakes.

The second criterion, that the development would be rendered infeasible if the municipal ordinance is enforced, is also flawed. If a project can be built consistent with the municipal law, there would be no need to override the local law. Instead, developers, knowing that the municipal law would be overridden, would have no incentive to meet the standards required by a more protective municipal ordinance. State law should not be in the business of creating disincentives to meeting local environmental standards.

The statute should allow both. A municipality should be able to have starter home zoning districts where municipal environmental ordinances and regulations are implemented as they are throughout the community.

The Elimination of Municipal Environmental Protections in Starter Home Zoning Districts Is Unnecessary and Would Be Counterproductive To the Creation of Starter Home Zoning Districts

In past legislative sessions, development interests have often incorrectly claimed that municipal wetland ordinances and bylaws prevent the construction of affordable and starter housing. There is no good data supporting that claim. Affordable and starter housing can be -- and often is -- sited and built in coordination with wetlands protection rather than in conflict with the environment. Affordable housing need not be in ecologically sensitive areas, flood plains, or areas that provide buffer protection to wetlands -- and that may become flood plains with climate change. Also, Zoning Boards of Appeal can override or limit the impact of municipal wetland ordinances on 40B projects, allowing those affordable housing projects to be built.

The legislation would create a disincentive for creation of starter home zoning districts in the 197 municipalities that currently have their own wetland ordinances or bylaws. Municipal wetlands laws serve important functions that a municipality may not want to see diminished or limited in starter home districts, with the result that the municipality will not adopt starter home zoning districts. As noted earlier in these comments, preventing the operation of municipal environmental ordinances and bylaws in starter home zoning districts would needlessly and foolishly increase flooding risks to residents and infrastructure, threaten important natural resources, and create conflicts between housing development and resources protection. Many municipalities will not want to trade the protections they have in place for starter home zoning districts.

Conclusion

A city or town should be able to provide more protection for its natural resources than provided by state standards and create starter home zoning districts that have those protections. It simply makes no sense that cities and towns cannot do both under this bill.

This bill would be especially problematic for the 197 municipalities that currently have local wetland bylaws or ordinances and might want to create starter home zoning districts. There is no need to require them to choose between maintaining important environmental protections and creating starter home zoning districts. This bill would create that false dichotomy. Municipalities should be able to make their own decisions about whether their wetland resources need more protection than those afforded by state law and at the same time be able to create starter home zoning districts.

We request that lines 894-901 be stricken from H.3983 if your committee will report Section 53 of the bill out favorably.

We are available to provide additional information and to meet or speak with you or your staff if that would be helpful.

Thank you for your attention to this important matter.

Sincerely,



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Also signing this letter:

Charles River Watershed Association
Mass Audubon
Mass Land Trust Coalition
Massachusetts Rivers Alliance

Copy: Members of the Joint Committee on Economic Development and Emerging Technologies