

MACC Legislation Update for Conservation Commissions
September 2016

A number of bills were filed in the 2015-2016 legislative session that would affect wetlands and open space protections, the administration of the Wetlands Protection Act (WPA), and local wetland ordinances/bylaws. A summary of the bills, MACC's position on these bills, and the outcome of these bills is as follows:

H.1864 An Act relative to the effective enforcement of municipal ordinances and bylaws. This would allow a municipality, including a conservation commission, to bring court actions to collect fines and to enforce their orders in the same case in Superior Court. Now, fines go to District Court and enforcement goes to Superior Court.

We have been the leading proponent of this legislation. It would increase the efficiency and effectiveness of local government and the courts. It would aid conservation commissions in achieving the mandate required of them to enforce the WPA in their cities and towns. By allowing both types of cases to be filed and heard in the same court, time and expense for municipalities would be saved and the burden on courts would be reduced.

Outcome: The bill was reported favorably by the Joint Committee on Municipalities and Regional Government. It went to Third Reading in the House when the formal legislative session ended.

H.150 An Act relative to the disclosure of wetlands on property. This would require real estate agents, brokers, and salespeople to inform prospective buyers in writing if there is a wetland on the property and that a Notice of Intent would be required to do any work within 100 feet of the wetland.

We think the bill proponents may not understand that such notice might require wetlands delineations to be performed for some properties and might unnecessarily increase ANRAD and RDA filings with conservation commissions. The bill also has wording and definitional problems. A better alternative would be to require real estate agents to provide prospective buyers with information about the WPA rather than determine the extent of wetlands on the property.

Outcome: The bill was reported favorably by the Joint Committee on Consumer Protection and Professional Licensure. It went to Second Reading in the House when the formal legislative session ended.

H.664 An Act relative to local on-site sewage disposal systems. Inexplicably, in a bill limiting the authority of Boards of Health to adopt local septic system rules is the requirement that an appeal of a decision made under a local wetlands ordinance or by-law be made to the DEP “in accordance with the Wetlands Protection Act (G.L. Ch. 131 § 40) and regulations (310 CMR 10.00) thereunder.”

We oppose the portion of the bill concerning wetlands appeals. We think it makes no sense for decisions under local wetland bylaws or ordinances to be appealed to DEP because DEP would not be interpreting its own wetland regulations but instead the local laws of many municipalities. Those appeals currently go to court, which is the correct place for appeals of municipal ordinances and bylaws. Inserting DEP into the appeal process would add another layer before court review and increase DEP’s workload unnecessarily. DEP is already resource constrained and does not need this additional burden.

Outcome: The bill was not reported out by the Joint Committee on Environment, Natural Resources, and Agriculture at the end of the formal legislative session.

H.665 An Act providing for more efficient wetlands. This would allow local wetlands bylaws/ordinances only if they impose standards or other requirements that are more stringent than or otherwise exceed those in the WPA and regulations, and only if, prior to adoption by a municipality, DEP reviews and approves any such proposed local wetlands ordinance or bylaw based upon findings that the proposed ordinance or bylaw has a generally recognized scientific basis, is a recommended best practice technique, is necessary to protect unusual local resources that warrant special or enhanced protection, and does not conflict with the WPA and regulations. Also an appeal of a decision made under a local wetlands ordinance or bylaw goes to DEP in accordance with the WPA and regulations.

We have opposed similar bills in the past. Currently more than 190 municipalities have local wetland bylaws or ordinances. The bill would markedly increase DEP’s workload, set an unreasonable and resource intensive review standard, and reduce the ability of municipalities to make their own decisions about whether their wetland resources need more protections than those afforded by state law. It also does not indicate whether current local wetland bylaws and ordinances would require DEP approval or if only amendments or new bylaws and ordinances would require approval. See our comments on H.664 for our opposition to appeals to DEP of decisions made under local wetland bylaws and ordinances.

Outcome: The bill was not reported out by the Joint Committee on Environment, Natural Resources, and Agriculture at the end of the formal legislative session.

H.666 An Act relative to the maintenance of existing public ways and wetlands protection. This would amend the WPA to provide an exemption for work that maintains, repairs, or replaces but does not substantially change or enlarge a public way.

We oppose the bill. A public way may be much larger than the roadway surface itself, the exemption could easily have adverse impacts on wetlands, and it does not account for the impact of equipment and staging areas or provide standards for the work. WPA regulations currently allow, as minor activities in a buffer zone (i.e., no WPA regulation), vegetation cutting for road safety and maintenance, and pavement repair, resurfacing and reclamation of existing roadways within the right of way configuration – provided the work meets standards specified in the regulation. 310 CMR 10.02(2)(b)2.n. The bill would reduce protections of wetlands with no showing of necessity.

Outcome: The bill was not reported out by the Joint Committee on Environment, Natural Resources, and Agriculture at the end of the formal legislative session.

H.683 An Act relative to the Massachusetts Wetlands Protection Act. This would amend the WPA to provide an exemption for certain work for fish passage, such as removal of sediments and downed trees from streams when done by the division of marine fisheries, a herring warden, or under the auspices of an authorized public entity and not otherwise impact other interests protected by the WPA.

We oppose the bill. It presents several problems that result from the wording, which is vague, and includes terms that are undefined. There is no record of problems arising from the current regulatory framework. In addition, there appears to have been no coordination with MA DEP, Fish and Game, or Division of Marine Fisheries, which is a significant shortcoming. The bill also would provide no oversight of the work or standards to ensure no adverse impacts on wetlands or wildlife habitat. As written, the bill could have numerous unintended adverse consequences.

Outcome: The bill was not reported out by the Joint Committee on Environment, Natural Resources, and Agriculture at the end of the formal legislative session.

H.3013 An Act relative to the Massachusetts Aeronautics Division. This changes portions of the Massachusetts General Laws relating to aeronautics and would add a provision related to wetlands so that Airport Vegetation Management Projects that are required for public safety reasons to prevent vegetation from penetrating an airport approach or safety surface would be exempt from regulation by any local wetlands authority and from any local ordinance or by-law and from any rule, regulation, or order of any municipal conservation commission or other board or official. Removal of

vegetation in airport-associated wetlands would be required to comply with the WPA and the limited project provisions in the WPA regulations.

WPA regulations provide for conservation commission review of airport vegetation management plans as a limited project under 310 CMR 10.24(7)(c)5 and 10.053(3)(n). The bill would remove commission review authority as well as any local wetland bylaw requirements. The bill does not provide for review by DEP, apparently leaving airports with no oversight for the projects in wetlands. We think the bill must provide for regulatory agency review of the work. The review should remain with the local conservation commissions. DEP is already resource constrained and does not need this additional burden.

Outcome: The bill was sent to study order by Joint Committee on Transportation.

S.119 An Act improving housing opportunities and the Massachusetts economy. This bill, which would make changes to zoning, includes two provisions relating to wetlands. It would amend the WPA by adding: “No order shall be based on the exaction of monetary payment or property from the applicant or landowner unless the written order contains explicit findings of fact and conclusions demonstrating that the exaction so required or requested satisfies federal constitutional requirements.” It also includes the same wording found in H.665 requiring DEP approval of local wetlands bylaws and ordinances and appeals of decisions under local wetlands bylaws and ordinances to DEP.

We oppose the bill for the reasons we noted for opposing H.665. In addition, the exactions amendment to the WPA is unnecessary because exactions must already meet constitutional requirements.

Outcome: The bill accompanied new draft, H.4140, which was reported favorably by the Joint Committee on Housing to the House Ways and Means Committee, where it remained at the end of the formal legislative session.

S.122 An Act promoting the planning and development of sustainable communities. This overhauls and adds to the state zoning code.

We are part of a large coalition in support of zoning reform and have supported previous zoning reform bills. We have serious concerns about two sections of this bill and could not support it as currently written. Section 25 of the bill, which would deem WPA Orders of Conditions to be constructively approved if a conservation commission chair or designee misses a consolidated permit meeting, is unacceptable, and Section 26 of the bill, which would invalidate local wetland bylaws and ordinances through an after-the-fact review for inconsistency with development regulations, is also unacceptable. Both sections would significantly weaken current wetlands protections.

We have met with leaders of the coalition supporting the bill to discuss our concerns and changes to the bill that we think are essential. We are hopeful the coalition will agree to change the bill and the bill sponsors will accept those changes and amend the bill accordingly.

Other pending bills to amend the zoning code contain similar objectionable provisions that would reduce wetlands protections. We have been told those bills, including **S.116**, **S.117**, and **S.1075** will not likely move forward because S.122 is seen as the bill for zoning reform this session.

Outcome: The bill was amended, accompanied multiple new drafts, and became S.2327. It was passed to be engrossed by the Senate as S.2311. It was not acted upon by the House at the end of the formal legislative session.

S.881 An Act allowing local wetlands bylaw decisions to be appealed to land court. This bill would extend Land Court jurisdiction to hear appeals of DEP wetlands decisions and of wetland decisions made under local wetland bylaws and ordinances, regardless of the size of the project. Currently the Land Court has jurisdiction, concurrent with the Superior Court, only if the underlying project or development involves either 25 or more dwelling units or the construction or alteration of 25,000 square feet or more of gross floor area or both.

We opposed the bill. There is no good reason to extend the jurisdiction of the Land Court to small wetlands matters -- and good reason not to do so. The Superior Court handles such appeals competently and expeditiously. Giving the Land Court concurrent jurisdiction to hear all wetlands appeals would encourage plaintiffs to forum shop between the Superior and Land Courts. It would allow cases to be filed and heard in Land Court in Boston, not in the Superior Court for the municipality where the administrative decision originated. It would favor litigants with counsel in Boston and disfavor municipalities and conservation commissions that are not geographically close to Boston.

Outcome: This bill was sent to study order by the Joint Committee on the Judiciary.

S.402 and **H.623** An Act protecting the natural resources of the Commonwealth. These identical bills would mandate prior disclosure and an open and transparent process of determining whether and how to dispose of or change the use of Article 97 lands and state there should be no net loss of Article 97 conservation land.

We are part of a coalition that strongly supports this legislation. Massachusetts has a finite amount of precious conservation lands, protected for current and future generations by Article 97. All too often, Article 97 lands have been taken out of

protection and converted to other uses without an open process, a clear showing of necessity, and any meaningful consideration of replacement land.

Outcome: S.402 was sent to study order by the Joint Committee on Environment, Natural Resources, and Agriculture. H.623 was discharged from the Joint Committee on Environment, Natural Resources, and Agriculture to the House Rules Committee, which had not acted on it by the end of the formal legislative session.

H.752 and **S.1979** An Act providing for the establishment of a comprehensive adaptation management plan in response to climate change. These bills would mandate state planning to adapt to a changing climate, and other notable related provisions.

We are part of the Massachusetts Climate Change Adaptation Coalition (<http://www.massadapt.org/>), a leading proponent of this legislation, which would prepare Massachusetts for climate change impacts. The state would identify how it is most vulnerable to a changing climate and take measures to protect public health, public safety, and the economy.

Outcome: H.752 was amended, accompanied multiple drafts, and as S.1979 passed through both legislative branches and was signed into law by the Governor on April 11, 2016, as Chapter 75 of the Acts of 2016. The comprehensive adaptation management plan in response to climate change provisions were removed from the bill during the amendment process and were not in the final bill signed by the Governor.

S.1459 and **H.2587** An Act to Sustain Community Preservation Revenue. These identical bills, with some limitations, would provide for a minimum 50% Community Preservation Act (CPA) Trust Fund distribution for all CPA communities, based on filing surcharges.

We support this legislation. It would provide a higher annual trust fund distribution for all CPA communities. That is especially important as more communities join the program and because the match is predicted to be at an all-time low this fall. CPA has proven to be an invaluable tool to help communities purchase and protect open space. Conservation commissions have a seat on their local community preservation committee.

Outcome: The bills were reported favorably by the Joint Committee on Revenue and sent to the House Ways and Means Committee, where it was at the end of the formal legislative session.

H.3906 An Act to modernize municipal finance and government. Section 64 of this bill, which proposes to add Section 53K to General Laws Chapter 44, would give the

municipal chief executive officer authority to expend monies received under Section 8C of Chapter 40.

We oppose this portion of the bill. It would be inconsistent with General Laws Chapter 40 Section 8C, which provides that monies in the conservation fund “may be expended by said (conservation) commission for any purpose authorized by this section.” Further, it would authorize the municipal treasurer to create a special account to deposit such funds, even though conservation monies are designated to a separate conservation fund under Section 8C of Chapter 40. In addition, Section 64 of this bill is ambiguous as to whether it applies to permit filing fees or only to impact fees and exactions. If it applies to filing fees, it would give the chief executive officer discretion to expend permit-filing fee monies received. That would be inconsistent with Chapter 131 Section 40, which provides that filing fees received for issuance of wetlands permits “shall be expended solely by the local conservation commission for the performance of its duties under this chapter.” These ambiguities and conflicts between current law and Section 64 of House Bill 3906 would create confusion over where conservation commission monies are deposited, the authority to expend those funds, and the timing and purposes allowed for those expenditures.

Outcome: This bill was amended, accompanied multiple new drafts, and became H.4565. New draft H.4565 did not contain the section of the bill that we oppose. H.4565 passed through both legislative branches and was signed into law by the Governor on August 9, 2016, as Chapter 218 of the Acts of 2016.

H.3983 An Act to provide opportunities for all. Among its many provisions, House Bill 4483 would amend Massachusetts General Laws Chapter 40R. In so doing, it would authorize municipalities to create starter home zoning districts. Such starter home zoning districts would not be subject to municipal health and environmental rules except under limited circumstances determined by the state.

We oppose this portion of the bill. The state override of local public health and environmental standards in starter home districts is bad public policy for a host of reasons relating to environmental protection, public health, and housing production. From a wetlands perspective alone, we could expect more adverse impacts to wetlands and wildlife, and more flooding in the starter home zones near wetlands. In addition to the more obvious problems, the legislation creates a serious inequity based on class. It would allow (even encourage) cities and towns to create zones for starter homes with the requirement that people living in those zones have lesser public health and environmental protections than others have elsewhere in the community. It also would not allow a municipality to create a starter home zoning district in which its municipal health and environmental rules would apply without also showing that the rules are required by special location conditions and would not reduce housing production. Many

of those rules, however, are not required by special local conditions but instead fill in the gaps and loopholes in state law.

Outcome: This bill was amended, accompanied multiple new drafts, and became H.4569. New draft H.4569 passed through both legislative branches and was signed (in part) into law by the Governor on August 10, 2016, as Chapter 219 of the Acts of 2106. The portion of the bill that we oppose was approved by the Governor.