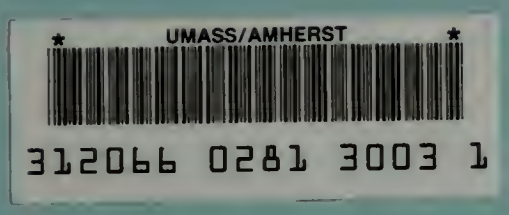

Report of
The Governor's Special Commission on
Barriers to Housing Development

January 2002

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I. Introduction

Background

While the Commonwealth of Massachusetts has experienced a strong and growing economy driving household incomes above the national average and attracting professionals from other regions, the commonwealth's economic competitiveness is weakened by a housing shortage and dramatic rises in housing costs. In October of 2000, the Executive Office for Administration and Finance released a Policy Report titled Bringing Down the Barriers: Changing Housing Supply Dynamics in Massachusetts. This report examined housing trends and barriers to housing production in the Commonwealth and outlined initiatives to remove unnecessary barriers to the development of housing affordable to households across a broad range of incomes. The report identified the inability of the private sector to produce housing at a pace that meets the growing demand as one of the key factors contributing to the housing shortage and escalating housing costs. Regulations and requirements relating to housing development that are unnecessarily restrictive, conflicting, duplicative or inconsistently interpreted and enforced by local officials and inspectors were found to impede residential development and the production of housing at the rate of demand. As a means of addressing these impediments to housing development the report proposed a special commission to recommend statutory, regulatory and operational changes to reduce unneeded barriers to housing development.

Executive Order 426

On January 23, 2001 Governor Paul Cellucci implemented this proposal by issuing Executive Order 426 (E.O. 426) Establishing The Governor's Special Commission on Barriers to Housing Development. The Governor's Special Commission on Barriers to Housing Development (the Commission) consisted of 18 appointees of the Governor, including a representative of the Executive Office of Administration and Finance, Housing and Community Development, Environmental Protection, Public Safety, Public Health, and of the Massachusetts Housing Finance Agency. Other members appointed to the Commission had knowledge and experience in municipal government, local housing issues or housing development. Ms. Jane Wallis Gumble and Mr. Gary Ruping co-chaired the Commission. A list of the members of the Commission is provided in Appendix B.

The Commission

The first meeting of the Commission was held on April 12, 2001. At this meeting members discussed the themes and findings of the Barriers Report and the charge of the Commission. They also decided that the Commission would be able to successfully investigate and propose strategies for reducing barriers to housing development by forming separate subcommittees to address issues related to Building Codes, Zoning, and Title 5. Each sub-committee met numerous times to discuss barriers to housing

development related to their specific topic, and to develop a report with recommendations for the Commission to evaluate. Representatives from the three sub-committees presented interim reports to the Commission on June 25, 2001. Notes detailing the discussions at both of these meetings are included in Appendix C of this report. The Commission met on October 9th, 16th and 23rd to discuss the final subcommittee reports and recommendations. Based on the information provided in the subcommittee and minority reports, as well as in various written comments, Commission members voted on whether or not to adopt each recommendation from the three subcommittees at these meetings. Copies of each subcommittee report, and all corresponding minority reports and written comments are included in the appendices of this report.

The Subcommittees

E.O. 426 charged the Commission with systematically reviewing and advising the Governor on which governmental requirements, as interpreted or enforced, impede the development of housing, raise housing production costs and exacerbate the Commonwealth's housing supply shortage. The Commission was also charged with making recommendations to the Governor as to specific legislative, regulatory, policy and operational changes that are required to remove or otherwise ease, such barriers to residential development so as to create housing that is affordable across a wide range of incomes and available throughout a broad spectrum of the Commonwealth's neighborhoods. The Commission was specifically directed to form two committees: the Building and Specialty Code Committee (Building Code Subcommittee) and the Septic System Regulatory Review Committee (Title 5 Subcommittee). The Commission added a third Subcommittee (Zoning) to logically divide the effort required by the language of E.O. 426.

The subcommittees were composed in such a way as to represent all stakeholders and included people beyond Commission Members with expertise on the subcommittee topic. The subcommittees each held between 5 -12 meetings, with information sent out between meetings. There was ample opportunity to provide feedback to the subcommittee members.

The Building Code Subcommittee consisted of 21 individuals representing interests from state regulatory agencies, municipal government, professional trade and licensing organizations, the State Fire Marshal's office and local building and fire inspectors. They met four times to identify and discuss specific barriers regarding interpretation, enforcement and processes related to the state building code and local bylaws that act like the building code and to propose recommendations to overcome those barriers. In addition, DHCD representatives who staffed the subcommittee held two focus groups - one was with the Southeastern Massachusetts Building Officials Association and the other one was with the Fire Prevention Association of Massachusetts.

The Title 5 Subcommittee consisted of 19 individuals representing interests from local and regional boards of health and planning agencies, state agencies, environmental protection organizations, and private housing developers. They met five times to

determine whether local municipalities have regulations or by-laws relating to Title 5 that vary from the state's requirements, and if so, whether such variations are justified by sound scientific principles. If they found it necessary, they were asked to make recommendations to ensure that Title 5 is addressed and enforced on the local level in accordance with sound scientific principles so that housing development is not unnecessarily impeded.

The Zoning Sub-Committee of the Barriers to Housing Commission consisted of 21 individuals representing interests of both for-profit and non-profit developers, banks, municipalities, and local and regional planners. They met 11 times to examine local land use regulatory issues affecting housing production and to develop recommendations to overcome those barriers.

How to Read This Report

The recommendations from each Subcommittee and any related amendments proposed by the Commission are detailed in the following pages. The recommendations are grouped by subcommittee and then by general topic. A brief summary statement written in **bold** typeface precedes each recommendation from the various subcommittees. Three headings follow the summary statement: Recommendation, Dissenting Views, and Commission Vote. The exact text of the recommendation as presented by the subcommittees to the Commission appears next to the "**Recommendation**" heading. In some cases the commission adopted new recommendations or amendments that were not part of the Subcommittee's original recommendation. Any amendment to a subcommittee recommendation that was adopted by the Commission appears in *italic underlined* typeface within the text of the recommendation. Any aspects of the recommendation that were opposed are discussed under the "**Dissenting Views**" heading. The "**Commission Vote**" heading reflects how the Commission voted on the subcommittee's recommendation and discusses any related amendments proposed or adopted by the Commission.

II. Recommendations of the Building Code Subcommittee

The Building Code Subcommittee proposed the following recommendations to the Commission. The Fire Prevention Association of Massachusetts submitted a Minority Report. The Board of Examiners and Electricians, the Board of Examiners of Plumbers and Gas Fitters and the Division of Professional Licensure jointly submitted comments. The Building Code Subcommittee Report, the Minority Report and the Jointly Submitted Comments are included in Appendices D, E, and F respectively. The recommendation of the Commission and an explanation of any minority or dissenting views follow each of the Building Code Subcommittee's proposed recommendations. Any amendments proposed or adopted by the Commission are noted in the discussion of the Commission Vote.

CONFLICTING AND DUPLICATIVE CODES

II.1. File Legislation to create a Code Coordinating Council at the state level to coordinate the building and specialty codes, and create a forum for discussing the processes for the promulgation of regulations, licensing, inspections and appeals. Recommend that the Secretary of Administration and Finance will chair this Code Coordinating Council.

Recommendation: Create a Code Coordinating Council at the state level to coordinate the building and specialty codes, and create a forum for discussing the processes for the promulgation of regulations, licensing, inspections and appeals. Recommend that the Secretary of Administration and Finance will chair this Code Coordinating Council.
The Council shall:

- Address areas of overlap in the promulgation of the various codes to prevent conflict and duplication.

- In addition, the Code Coordinating Council may also look at areas related to the administration of the building and specialty codes to insure systemic coordination of related procedures such as licensing, inspections and appeals within the required statutory framework. Examples of issues that came up during the subcommittee meetings that would be appropriate to address include:

    - Develop a shared understanding of the roles, expectations and limits of authority of the various code promulgating authorities defined by statute.
    - Perform a comprehensive analysis of the administrative appeals processes for all promulgating agencies and boards to insure that there is an appeals process across those agencies and boards. Furthermore, that in cases where an efficient and accessible appeals process is unavailable to the public, make specific recommendations regarding the

development of such appeals process for the specific board or promulgating agency. Suggest legislation if necessary.

- Review the existing timeframes for permitting and appeals and suggest modifications that logically consider licensing procedures in the building process.
- Establish a guidebook for communities, which present a model protocol to promote the coordination of the permitting, licensing, inspections, and other processes necessary prior to the issuance of certificates of occupancy.

Proposed Legislation:

AN ACT CREATING THE COMMONWEALTH'S CODE COORDINATING COUNCIL

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same as follows:

Section 1. Chapter 7 is hereby amended by inserting after section 4P thereof, the following section, Section 4Q.

There is hereby established within the Executive Office for Administration and Finance, A Code Coordinating Council.

Said Council shall review the state building code and the various specialized codes of the Commonwealth to coordinate and make recommendations which will eliminate redundancy, minimize inconsistencies and conflicts and maximize the efficiency of the code promulgation process. The Council shall consist of the Secretary or his designee, the State Fire Marshal or his designee, the Commissioner of the Department of Public Safety or his designee, the Chairman of the Board of Fire Prevention Regulations or his designee, the Chairman of the State Board of Electrical Examiners or his designee, the Chairman of the Board of Building Regulations and Standards or his designee, the Chairman of the State Board of Plumbers and Gasfitters or his designee, the Commissioner of the Department of Public Health or his designee, the Chairman of the Architectural Access Board or his designee, the Chairman of the Elevator Board or his designee and the Attorney General or his designee.

The Secretary of the Executive Office for Administration and Finance shall serve as Chairman and will have the exclusive responsibility for the conduct of the Council. The Chairman may employ such technical experts and other assistants as may be required for the Council to perform its duties. The Chairman may from time to time request the advice and input from local officials and other interested parties.

The Chairman may promulgate such rules and regulations that govern the conduct of the Council as may be reasonably necessary to effectuate the provisions of this Section.

Dissenting Views: The Minority Report agreed with the need to establish a code coordinating council to assist in streamlining the regulatory process, but expressed concern that the committee's efforts were biased towards the Building Code and stressed the need for neutrality among the various codes. The Jointly Submitted Comments supported the establishment of this council as long as the Electrical and Plumbing Boards were included, noting their concern that the council had the potential to promulgate code without recognizing and preserving the specialized codes.
Commission Vote: The Commission unanimously passed the recommendation and the proposed legislation.

INCONSISTENT INTERPRETATION AND ENFORCEMENT OF CODES

II.2. In order to achieve consistent interpretation and enforcement of building codes, require minimum training and continuing education requirements for local officials, regulators, design professionals and practitioners.

Recommendation: Require minimum training and continuing education requirements for local officials, regulators, design professionals and practitioners. Offer joint training for overlapping topics and topics that are often sources of conflict or confusion. Offer separate and specific training for inspectors, promulgation officials, developers, architects, builders and other affected trades. Establish minimum and continued educational requirements for inspector certification and professional licensure. Note: All fire certification is done by Fire Training Council pursuant to statute. Standardize the term of certification. Note: All fire certification is done by Fire Training Council pursuant to statute. Establish a dedicated funding stream to pay for this training and education.
Dissenting Views: The Minority Report noted that regulatory groups have extremely limited budgets that don't allow for training. The Minority Report noted the need to establish a funding source for this training. It also noted that by statute, minimum qualifications for fire officials are established by the Training Council.
Commission Vote: Passed Unanimously

INADEQUATE USE OF CURRENT TECHNOLOGY

II.3. Use current technology to make code compliance and enforcement a more user-friendly efficient process by implementing computerized permitting and tracking in every community and by creating a state code website.

Recommendation: Use current technology to make code compliance and enforcement a more user-friendly efficient process. Provide every community with equipment and software for computerized permitting and tracking. Develop a single website with all the state codes and the capacity to keyword search all of them. Develop the capacity at Secretary of States office for electronic public access of information.
Dissenting Views: None
Commission Vote: Passed Unanimously

INADEQUATE LOCAL STAFFING

II.4. Recommend staffing requirements for state regulating agencies and local communities commensurate with housing activity and responsibilities to ensure sufficient resources to process applications and inspections efficiently.

Recommendation: Recommend staffing requirements for state regulating agencies and local communities commensurate with housing activity and responsibilities to ensure sufficient resources to process applications and inspections efficiently. Consider the staffing levels recommended by the Insurance Services Organization (ISO). Recommend a process for continually monitoring manpower requirements for proper code enforcement at the state and local level. It was also recommended that the money collected by towns from building fees be dedicated to funding local officials' departments/staff, or be passed along to the general fund where it would be used to fund the training of local officials.
Dissenting Views: The Jointly Submitted Comments supported this recommendation, but noted that they would oppose any efforts to privatize state and local inspectional functions.
Commission Vote: Passed Unanimously

INADEQUATE STATE LEVEL STAFFING

II.5. Establish six (6) Regional Code Support Centers.

Recommendation: The Department of Public Safety in conjunction with the Department of Fire Services shall establish six (6) Regional Code Support Centers. The Objectives of the Centers are:

- To provide a regional resource for local officials for technical assistance on State Building Code and specialty codes as they relate to specific projects within the region.
- To provide a regional presence, for the support of local municipalities in the event on an emergency situation occurring within the region.

- To provide a source for initial mediation of construction or design issues prior to the formal filling of an appeal with the appropriate appeals board time saving issues.
- To develop and deliver regional joint training of local officials who enforce state codes.
- To provide regional reference document resource for local officials.
- Align Building and Fire Districts within state for unified approach on code related issues.
- It is recommended that each Regional Code Support Center be staffed with appropriate personnel from the appropriate state regulatory agencies to provide services.
- These recommendations are subject to funding for appropriate staffing levels.

Dissenting Views: None
Commission Vote: Passed Unanimously

LOCAL REQUIREMENTS THAT EXCEED MUNICIPAL AUTHORITY

II.6. Provide appropriate training for municipal regulators, planning boards and legal counsels in an effort to prevent the creation of local building codes that represent a barrier to building construction, especially residential development.

Recommendation: Provide appropriate training for municipal regulators, planning boards and legal counsels in an effort to prevent the creation of conflicting local building codes that represent a barrier to building construction, especially residential development. In cases where municipalities have adopted conflicting building code-like language in contradiction to c.802 of the Acts of 1972, as amended and/or MGL c.143 §§ 93-100 as applicable, the Attorney General shall submit written notification to communities and work with the subject communities, to rectify the identified legal conflicts.

In order to accomplish this, the investigation and evaluation of conflicting local building code-like requirements must be completed and documented in a Final Report. The Attorney General must review all findings to determine if such local regulations, requirements, policies, conflict with the requirements of c.802 of the Acts of 1972, as amended and/or MGL c.143 §§ 93-100, as applicable.
Dissenting Views: Minority Report suggested legal counsel for BBRS and the specialized codes meet with the Attorney General's Office to discuss how the issue of Home Rule Authority would affect the implementation of this recommendation. The Jointly Submitted Comments noted that the analysis of the data collected would require legal review due to the complexity of the laws concerning zoning and local versus state authority.
Commission Vote: Passed Unanimously

III. Recommendations of the Title 5 Subcommittee

The Title 5 Subcommittee proposed the following recommendations to the Commission. A Minority Report was submitted by members of the Title 5 Subcommittee to the Commission as well as written comments from the Massachusetts Association of Realtors, the Massachusetts Audubon Society, the Charles River Watershed Association, and the Environmental League of Massachusetts. The Title 5 Subcommittee Report, the Minority Report and all written comments are included in Appendices G, H, and I respectively. The recommendation of the Commission and an explanation of any minority or dissenting views follow each of the Title 5 subcommittee's proposed recommendations. Any amendments proposed or adopted by the Commission are noted in the discussion of the Commission Vote.

BURDENSOME LOCAL LIMITATIONS

III.1. Require local boards of health to file a copy of bylaws/regulations in excess of Title 5 to DEP with an explanation of the need to exceed Title 5.

Recommendation: It is recommended that M.G.L. c. 111, section 31 be amended. Under the amendment the local board of health would be required to identify the local conditions which exist or reasons for exceeding such minimum requirements must specify the scientific, technological or administrative need to support the change in the regulations. Second, the board of health would have to file the regulation and supporting information with the DEP within thirty (30) days in order for the regulation to become effective. The statute should take effect one year after the date of enactment. There needs to be additional discussions and debate with the stakeholders and as part of the legislative process on whether or not to make this requirement retroactive. During the one year between enactment and the effective date of the amendment, DEP should issue guidance to boards of health indicating that in its opinion the above types of regulations do not, on their face, appear to be based on science. Boards would be advised to examine their regulations and if they contain these types of condition they should obtain the necessary scientific documentation, if they haven't already done so, or eliminate them. DEP should collaborate with the Massachusetts Association of Health Boards (MAHB) and the Massachusetts Health Officers Association on providing guidance and training to local boards of health to assist them in improving their local regulations and practices and complying with the new requirements.

Dissenting Views: The Minority report opposed this recommendation citing the lack of empirical data to support the recommendation and supporting the authority of Boards of Health to implement Title 5. Other written comments opposed this recommendation citing infringement of home rule authority, and need for discussion of pros and cons of regulations in terms of objectives they seek to address.

Commission Vote: The Commission rejected this recommendation and asked DHCD to draft an alternative that would require DEP approval of bylaws more stringent than Title 5. See III.2 below.

III.2. Require DEP review and approval of local bylaws in excess of Title 5
(This recommendation is an alternative to the rejected III.1 recommendation, and would require Boards of Health to submit documentation of the need to exceed the requirements of Title 5 to DEP for approval.)

Commission Recommendation: It is recommended that MGL Chapter 111, Section 31, be amended to require that Boards of Health document the local conditions, or the technological, scientific or administrative reasons, that make it necessary to pass local regulations that exceed the minimum requirements contained in Title 5. Further, it is recommended that Boards of Health be required to submit proposed regulations and supporting documentation to DEP *according to a defined set of regulatory standards [Commission amendment]* for review and *approval* prior to their becoming effective. The recommended statutory change should take effect one year after enactment. During the one year period, DEP should issue guidance materials to all boards advising them of the types of regulations which on their face, do not appear to be based on valid local conditions, or technological, scientific or administrative reasons. Upon the effective date of the statutory change, board regulations for which no supporting documentation has been received, reviewed and approved by DEP would no longer be in effect. Finally, it is recommended that DEP be provided with sufficient resources to carry out the responsibilities required by the statutory change.
Dissenting Views: DEP opposed this recommendation citing concern that DEP approval of a particular local bylaw would be interpreted as setting a new statewide regulation, with a potential for increased difficulty in development
Commission Vote and Amendment: The Commission voted 5:5 on this recommendation. Then an amendment was proposed during the meeting to insert "according to a defined set of regulatory standards" after the word DEP in the second sentence. The Commission adopted the amended version with a vote of 9:1. Then a second amendment was proposed to strike the word "approval" from the second sentence. The Commission rejected this amendment with a vote of 3:7.

PROHIBITIONS ON ALTERNATIVE SYSTEMS AND SHARED SYSTEMS

III.3. DHCD and DEP should work collaboratively on the implementation of alternative technologies and shared systems.

Recommendation: DEP and DHCD should build on past collaborative efforts to identify other ways in which the two agencies can collaborate on the implementation of alternative technologies and shared systems. These efforts should include, at a minimum, an evaluation on how these systems are performing and whether there are ways to simplify the procedures.
Lead: DEP

Cost: Minimal
Dissenting Views: The Charles River Watershed Association noted that limits to innovate and alternative technologies and prohibitions to shared or community systems may have much to do with the infrastructure within a community and the ability to oversee and maintain such facilities.
Commission Vote: Passed Unanimously

TECHNICAL EDUCATION

III.4. Fund an update of the DeFeo-Wait Report that addresses the deficiencies identified by the subcommittee and collection of literature from other relevant sources. *Much of the science used in developing the 1995 revisions to Title 5 was based on the Defeo-Wait Report. That report is now over 10 years old and while it was very comprehensive, there have been advancements in science as well as significant experience gained by DEP as a result of implementing Title 5.*

Recommendation: The Commission recommends funding an update to the DeFeo-Wait Report *that addresses the deficiencies identified by the subcommittee* [Commission Amendment] and collection of literature from the other states and relevant sources. An advisory group should be created by DEP to assist in compiling existing science and as a forum for technical discussions on updated scientific discussions. *The advisory committee shall recommend when the report needs updating* [Commission Amendment]. Lead: DEP, Cost: Consulting contract less than $100,000
Dissenting Views: The Environmental League of Massachusetts noted that not all parties agree that the DeFeo, Wait, and Associates Report was comprehensive.
Commission Vote and Amendment: The Commission unanimously passed the original text of this recommendation. The Commission then proposed amending the recommendation by inserting " that addresses the deficiencies identified by the subcommittee" after the word Report in the first sentence, and by inserting "The advisory committee shall recommend when the report needs updating" after the second sentence of the recommendation. The Commission's amendment was passed unanimously.

III.5. Publish a guidance document similar to the DEP Stormwater Guidance document that addresses the technical questions associated with Title 5 and provides the science and literature that addresses related issues.

Recommendation: A guidance document similar to the DEP Stormwater Guidance document should be published that addresses the technical questions associated with Title 5 and provides the science and literature that address these issues. The Advisory Committee would oversee the update and assist in the presentation of the science and literature. Lead: DEP, Cost: Contract for training for approximately $100,000

Dissenting Views: The Environmental League of Massachusetts suggested that any guidance document for Title 5 implementation makes clear that more stringent local bylaws are allowed.
Commission Vote: Passed unanimously

III.6. Develop a process for education of local boards of health to accompany publication of a guidance document, as well as any amendment to the board of health enabling statute.

Recommendation: A process for education of local boards of health should be developed to accompany publication of a guidance document, as well as any amendment to the board of health enabling statute. Lead: DEP, Cost: Contract for training for approximately $100,000
Dissenting Views: None
Commission Vote: Passed Unanimously

ACCESS TO RESOURCES

III.7. Employ circuit riders for assisting local boards of health and their agents in implementing Title 5.

Recommendation: The Commission recommends funding for the use of circuit riders for assisting local boards of health and their agents in implementing Title 5.
Lead: DEP, Cost: Five FTEs per year for four circuit riders and one coordinator.
Dissenting Views: None
Commission Vote and Amendment: Passed Unanimously

CROSS-BOARD TRAINING

III.8. Fund programs for cross-board training on general Title 5 for conservation commissions, planning and zoning boards, and boards of selectmen.

Recommendation: The Commission recommends funding to develop programs for cross-board training on general Title 5 for conservation commissions, planning and zoning boards, and boards of selectmen. Lead: DEP, Cost: Consulting contract less than $100,000
Dissenting Views: None
Commission Vote and Amendment: Passed Unanimously

III.9. Expand existing efforts, such as the Local Capacity Building Partnership and ongoing work of DEP and DHCD to provide assistance to local boards.

Recommendation: The Commission recommends expanding existing efforts, such as the Local Capacity Building Partnership and ongoing work of DEP and DHCD to provide assistance to local boards. Lead: DHCD
Dissenting Views: None
Commission Vote and Amendment: Passed Unanimously

INTEGRATED WASTEWATER MANAGEMENT

III.10. Develop guidance for use by communities on the role of typical on-site systems, shared and alternative systems and septage management districts as part of integrated solutions to wastewater management.

Recommendation: The Comprehensive Water Resources Management Guidance currently being developed by DEP for use by communities should include guidance on the role of typical on-site systems, shared and alternative systems and septage management districts as part of integrated solutions to wastewater management. The guidance should include examples of successes that have occurred and samples of acceptable legal instruments that are often required. Lead: DEP, Cost: Minimal
Dissenting Views: None
Commission Vote: Passed Unanimously

B HORIZON

III.11. In order to eliminate a barrier to new housing construction, the same type of permeable subsoils (B Horizons) that are allowed in the remediation of existing systems should be allowed in the construction of new systems.

Recommendation: DEP should develop a policy to allow for the use of B horizons, that are sufficiently permeable, in new soil absorption systems. Lead: DEP, Cost: Minimal
Dissenting Views: None
Commission Vote: Passed Unanimously

NITROGEN SENSITIVE AREAS

III.12. Title 5 contains a provision requiring additional treatment in nitrogen sensitive areas. As a result of conducting scientific evaluations, communities are allowed to designate additional nitrogen sensitive areas. However, the regulations do not specify the nature of the scientific evaluation required to designate areas as nitrogen sensitive. In order to consistently apply this provision, DEP should develop a guidance document on the scientific procedures for designating an area as nitrogen sensitive.

Recommendation: DEP should develop a guidance document on the nature and extent of the scientific evaluations necessary to designate an area to be nitrogen sensitive as well as the procedures necessary to adopt such a designation. Lead: DEP, Cost: Consulting contract less than $100,000
Dissenting Views: None
Commission Vote: Passed Unanimously

CHANGE IN MAXIMUM PERCOLATION RATE

III.13. In order to allow more participation in its demonstration program, to evaluate slower percolation rates, DEP should streamline the application process.

Recommendation: DEP should streamline the application procedure for applicants wishing construct septic systems where the percolation rate is between 31-60 minutes per inch, provide a better information packet and outreach component to explain the application procedure to developers and lending institutions, reduce the perceived risks involved, revisit the monitoring requirements and allow at least 20 but not more then 50 applications per year for two to three years. At the end of two to three years DEP should present the results of the monitoring information it has gathered to a group of stakeholders and determine if the implementation of slower percolation rates under the general provisions of Title 5 should be allowed. Lead: DEP
Cost: Two additional FTEs to review additional applications and review monitoring results.
Dissenting Views: The Minority Report and the Environmental League of Massachusetts objected to this recommendation of allowing 50 applicants per year for slower-than-30-minute percolation rates and the elimination of the fee. They noted the current application procedure did not seem particularly onerous, and opposed reducing the list of requirements. They also noted their belief that the logical reason for lack of applications is the increased cost associated with yearly monitoring, and the delay caused by review of the application and proposed plans.
Commission Vote: Failed by a vote of 1:6. However, an alternative version was proposed and adopted by the Commission. See II.14 below.

III.14. DEP should modify its regulations to provide for the implementation of slower percolation rates, not more than 60 minutes per inch, under the general provisions of Title 5.

Commission Recommendation: DEP should modify its regulations to provide for the implementation of slower percolation rates, not more than 60 minutes per inch, under the general provisions of Title 5.
Dissenting Views: Some subcommittee members voiced concern of the impacts of opening so much land for development on the ground water supply.

Commission Vote: This recommendation was proposed by the Commission as an alternative to the recommendation above (II.13). The Commission adopted this recommendation with a vote of 6:1.

III.15. In order to better understand the impact of allowing a slower percolation rate, DEP, in cooperation with the Massachusetts Association of Health Boards (MAHB) and the Massachusetts Health Officers Association (MHOA), should gather and review information from local boards on their experience with low percolation rate systems installed for remedial purposes.

Recommendation: DEP, in cooperation with the MAHB and MHOA, should gather and review information from local boards on their experience with low percolation rate systems installed for remedial purposes. ~~DEP should incorporate the results of this effort into its presentation on the above monitoring program~~. Lead: DEP, Cost: Minimal contracts with MHAB and MHOA.

Dissenting Views: None

Commission Amendment and Vote: The Commission proposed amending this recommendation by striking "DEP should incorporate the results of this effort into its presentation on the above monitoring program." The Commission passed this recommendation with the Commission's amendment with a vote of 8:1.

TRAINING FOR PROFESSIONALS

III.16. In anticipation of a revision to Title 5 that will accommodate up to 60 minutes per inch percolation rates, DEP should implement a training program for the certification of Soil Evaluators, system designers and contractors for the design and installation of septic systems in slower soils.

Recommendation: DEP should implement a training program for the certification of Soil Evaluators, system designers and contractors for the design and installation of septic systems in slower soils, in anticipation of a revision to Title 5 that will accommodate up to 60 minutes per inch percolation rates.Lead: DEP, Cost: Two FTEs for two years and one FTE per year thereafter.

Dissenting Views:

Commission Vote: Passed Unanimously

IV. Recommendations of the Zoning Subcommittee

The Zoning Subcommittee proposed the following recommendations to the Commission. The recommendation of the Commission and an explanation of any minority or dissenting views follow each of the Zoning subcommittee's proposed recommendations. Two minority reports were submitted by members of the Zoning Subcommittee. The two minority reports are referred to as The First Minority Report (Broadrick Minority Report) and The Second Minority Report (Smolak Minority Report) as this is the order in which they were submitted. In Addition, The Department of Environmental Protection (DEP) and the Metropolitan Area Planning Council (MAPC) submitted written comments regarding the recommendations of the Zoning Subcommittee. Copies of The Zoning Subcommittee Report, both minority reports and the written comments are included in appendices J, K, L, M, and N respectively.

MUNICAL COST BURDEN

IV.1. In order to defray municipal costs associated with new housing, reallocate portion of existing local aid and establish local aid impact fund.

Recommendation: The state should establish a comprehensive model for local aid which, on a community by community basis, assesses the impact of new housing. Such a model may reallocate some portion of existing aid and establish a state local aid impact fund to defray the true impact of new housing construction on cities and towns.
Dissenting Views: The First Minority Report (Broadrick Minority Report) did not support the re-allocation of local aid.
Commission Vote: Passed unanimously

DENSITY REGULATIONS

IV.2. Design housing programs that encourage communities to engage in friendly 40Bs and reward them by defraying municipal costs incurred by housing production.

Recommendation: The Commonwealth should encourage communities to use the 40B process as a way of increasing production of market housing as well as affordable housing. The Commonwealth should design programs that reward communities that use this process in a friendly manner by defraying the municipal costs incurred by increased housing production.
Dissenting Views: MAPC opposed this recommendation on the basis that developers currently use the comprehensive permit process to circumvent local zoning.
Commission Vote: passed unanimously

IV.3. Identify ways to increase housing produced through housing programs

Recommendation: Examine all existing housing programs to evaluate their market demand and to determine if there are ways they can be revised to further increase housing production.
Dissenting Views: None
Commission Vote: Passed unanimously

IV.4. Support zoning for higher density housing near commercial & transit uses.

Recommendation: Encourage local adoption of zoning regulations that support higher density housing near commercial and transit uses.
Dissenting Views: None
Commission Vote: Passed unanimously

IV.5. Establish a committee to recommend programs, legislation, and planning tools that will increase housing production in the Commonwealth.

Recommendation: Establish a committee via legislation that includes local officials, developers, planners and housing advocates for the purpose of recommending programs, legislation and planning tools that will increase housing production in the Commonwealth. Such programs, legislation and planning tools should be available at local option so as to maintain local autonomy.
Dissenting Views: None
Commission Vote: Passed unanimously

IV.6. In order to discourage "sprawl development", encourage further study of density regulations.

Commission Recommendation: Encourage further study of density regulations.
Dissenting Views: None
Commission Vote: The Commission proposed this recommendation and it was passed unanimously.

GROWTH CONTROL BYLAWS

IV.7. In order to discourage the use of growth control bylaws to limit housing production, require municipal growth control by-laws to: a) identify a specific problem(s) and include a reasonable stated duration; and b) contain a strategic plan to address the problem(s) and be approved by DHCD. *This may require legislation to empower DHCD to do this. Currently, all town (not city) bylaws are reviewed by the Attorney General for conflict with existing statutes.*

Recommendation: Any municipal growth control by-law must: a) identify a specific problem(s) and include a reasonable stated duration; and b) contain a strategic plan to address the problem(s). The plan, which must be approved by DHCD, shall address the specific problem(s) and propose a timetable for solving the problem(s). Should the community seek to extend the bylaw for another duration, the community must revise its plan to explain the rationale
Dissenting Views: The First Minority Report (Broadrick Minority Report), and MAPC opposed citing erosion of local community control. The Second Minority Report (Smolak Minority Report) supported this recommendation, but noted there needs to be some mechanism to ensure that a municipality proposing growth controls does so in a reasonable manner and undertakes measures to resolve the problem within a reasonable amount of time.
Commission Vote: Passed unanimously

IV.8. Exempt dwelling units of two bedrooms or less from local growth control measures enacted.

Recommendation: Exempt dwelling units of two bedrooms or less from growth control measures enacted based on municipal finance concerns as there are likely to be few children living in these types of units, but they are vitally needed for young adults and seniors.
Dissenting Views: The First Minority Report (Broadrick Minority Report) opposed citing number of children likely to live in these units.
Commission Vote: Passed unanimously

MUNICIPAL FEES

IV.9. Amend Section 53G of Chapter 44 to allow developers a choice of review consultants, and to provide administrative appeal on the reasonableness of the scope of work to be performed by the consultant and the cost of such work. *Municipalities may require developers to pay consultants to perform design review on behalf of the town. Many times, the level of consultant time required by a community may exceed what is reasonably necessary to review a project. Moreover, some municipalities provide an applicant only one choice of review agent when at least four choices would be reasonable. Further, some municipalities charge permit fees that are well in excess of the reasonable cost in administering the permit program.*

Recommendation: Amend Section 53G of Chapter 44 to allow developers a choice of not fewer than four review consultants. To avoid the appearance of a conflict and using the Conflict of Interest Law, MGL, Chapter 268A, as a guide, it is recommended that the list cannot include an individual who has worked for the developer in the past year and that the selected consultant must agree not to work for the developer for at least one year after the conclusion of the review. In addition, Section 53G of Chapter 44 should provide an administrative appeal

to the city council or board of selectmen on the reasonableness of the scope of work to be performed by the consultant, and the reasonableness of the consultant costs to be expended on the review of a project.
Dissenting Views: The First Minority Report (Broadrick Minority Report) and MAPC opposed citing potential threat to local control.
Commission Vote: Passed unanimously

IV.10. Amend Section 53G of Chapter 44 to authorize conservation commissions to impose reasonable fees for the employment of outside consultants.

Recommendation: If the recommendation above to allow developers choice in review consultants is enacted by the Legislature, then Section 53G of Chapter 44 should also authorize conservation commissions to impose reasonable fees for the employment of outside consultants.
Dissenting Views: The First Minority Report (Broadrick Minority Report) and MAPC opposed citing potential threat to local control.
Commission Vote: Passed unanimously

IV.11. In order to create some uniform standards, DHCD should develop a model outside consultant review bylaw that can be readily adapted by a municipality.

Recommendation: DHCD should develop a model outside consultant review bylaw that can be readily adapted by a municipality.
Dissenting Views: MAPC opposed citing potential threat to local control.
Commission Vote: Passed unanimously

IV.12. Revise local permit fee structure to reflect the reasonable costs of permit program administration and require communities to provide a rationale for local permit fees.

Recommendation: Revise local permit fee structure to reflect the reasonable costs of permit program administration, to prevent them from being used as a mechanism to generate revenue in excess of the costs of administration for a particular board, commission or department. Communities should be required to provide a rationale for the fees charged, demonstrating the relationship between such fees and the cost of providing the particular service.
Dissenting Views: None
Commission Vote: Passed unanimously

SUBDIVISION CONTROL REGULATIONS

IV.13. Excessive road and infrastructure design and construction standards add substantial cost and create a significant barrier to creation of housing. Establish working group of stakeholders to recommend design and construction standards for roadways.

Recommendation: Establish a working group of stake holders, including developers, municipal officials, environmental planners and engineering consultants to recommend design and construction standards for roadways. This committee should also prepare a guidebook containing the suggested standards for distribution to cities and towns.
Dissenting Views: None
Commission Vote: Passed Unanimously

IV.14. Communities that substantially adopt the suggested construction standards as an action will earn a point toward E.O. 418 housing certification.

Recommendation: The Department of Housing and Community Development shall include substantial adoption of the suggested construction standards as an action that can be used by a community to qualify toward obtaining housing certification pursuant to Executive Order 418.
Dissenting Views: None
Commission Vote: Passed unanimously

LOCAL WETLAND PROTECTION BYLAWS

IV.15. A significant barrier to housing development is related to how wetlands are regulated in the Commonwealth. Require DEP approval of local wetlands regulations more stringent than the state regulations.

Recommendation: The State Wetlands Act should be the primary authority for the regulation of Wetlands in the Commonwealth. A municipality should have the ability to enact more stringent regulations if based on science and approved by the DEP.
Dissenting Views: DEP and MAPC opposed the original recommendation citing separate home rule authority.
Commission Vote: The Commission passed this recommendation 7:2, however the Commission also adopted the amendment proposed in the Smolak Minority Report. See IV.16 below.

IV.16. Establish a wetlands bylaw review process requiring local conservation commissions (or municipalities) to provide the DEP with copies of proposed local bylaws, including generally-recognized scientific justification for their enactment, and the unique local conditions meriting a deviation from the uniform code, prior to bylaw enactment. *Wetlands are regulated both under the State Wetlands Act and local wetlands bylaws enacted pursuant to the State Wetlands Act. Some local wetlands bylaws have introduced certain "no-build" and "non-disturbance" areas located either within a wetlands resource area buffer zone or beyond the buffer zone and in upland resource areas in excess of*

what may be necessary for environmental protection. In addition, some local wetlands bylaws include stormwater management guidelines in excess of the DEP Stormwater Management Guidelines.

Commission Amendment: Require that the State Wetlands Protection Act and Regulations serve as a uniform code. Proposed local wetlands bylaws, which are more stringent than standards described under the State Wetlands Act and Regulations shall be based on generally recognized scientific principles and include regulation of subject matter defined in the State Wetlands Act and Regulations. In order to enforce these requirements, establish a wetlands bylaw review process which would require local conservation commissions (or municipalities), prior to bylaw enactment, to provide the DEP with copies of proposed local bylaws, including generally-recognized scientific justification for their enactment, and the unique local conditions meriting a deviation from the uniform code. The Department of Environmental Protection, in turn, should be charged with reviewing the proposed bylaw to ensure that such bylaws are consistent with the state regulatory requirements, are scientifically justified and are based upon unique local circumstances. Such review procedure should be instituted regardless of whether the local wetlands bylaw is enacted under home rule authority or otherwise. Provide additional resources to implement this recommendation.
Dissenting Views: This was an amendment proposed by The Second Minority Report (Smolak Minority Report) to the previous recommendation. The First Minority Report (Broadrick Minority Report) noted there is no need for DEP to have final say over local bylaws, DEP opposed noting separate home rule authority and concern that DEP approval of stricter regulations for one community would be interpreted as a new higher standard for all communities.
Commission Vote: The Commission passed 6:3

IV.17. In order to streamline the permitting process, combine dual wetland bylaw appeal process

Recommendation: In communities where local wetlands bylaws have been enacted, the current dual appeal process should be combined by creating a consolidated appeal process to be administered by DEP.
Dissenting Views: DEP opposed citing need to determine for further analysis.
Commission Vote: Due to concerns raised regarding the legality of the recommendation the Commission rejected this recommendation with a vote of 1:5 and enacted an amendment. See IV.18

IV.18. Conduct further analysis to determine whether a statutory mechanism can be created to combine the appeals process, to create a uniform standard of review, and to create uniform appeal periods.

Commission Amendment: Conduct further analysis to determine whether a statutory mechanism can be created to combine the appeals process, to create a uniform standard of review, and to create uniform appeal periods. We all

recognize the problem and the barrier it creates to housing creation, but the recommended solution to this problem will require much more substantive analysis.

Dissenting Views: None

Commission Vote: This recommendation was proposed by the Commission in response to a similar one proposed in the Smolak Minority Report. It was unanimously passed by the Commission

APPEALS PROCESS

IV.19. Mandate the court to impose on non- municipal plaintiffs the requirement to post a surety or cash bond in a sum between $2,000 and $15,000. *It is very inexpensive for communities and abutters to appeal subdivision approvals and tie up housing projects for years, yet costly for developers to litigate arbitrary decisions by boards. Currently the appeals process provides a powerful tool to anti-housing interests, since arbitrary and frivolous appeals can be lodged with little or no basis, cost or risk. This recommendation seeks to balance this appeals process by reducing the number of unwarranted appeals.*

Recommendation: Amend Section 17 of Chapter 40A to mandate the court to impose on non- municipal plaintiffs the requirement to post a surety or cash bond in a sum between $2,000 and $15,000 to secure the payment and award of court costs to the applicant in appeals of decisions approving special permits when the court determines the appellant acted in bad faith or with malice in making the appeal to the court.

Dissenting Views: The First Minority Report (Broadrick Minority Report) and MAPC opposed citing erosion of public process and negative impact on those with smaller financial resources.

Commission Vote: Passed Unanimously

IV.20. Amend Section 81BB to provide the applicant with the right to file an immediate, special motion to dismiss an appeal of an approval of a special permit and /or definitive subdivision plan approval if the applicant feels it can demonstrate that the appellant acted in bad faith or with malice in making the appeal to the court. *Under current law appeals of special permit approval can take up to one to three years for a final decision. Only the largest building companies have the cash flow to support the costs for these suits. This recommendation seeks to reduce the misuse of the appeals process and improve the efficiency with which genuine issues are resolved.*

Recommendation: In addition, or as an alternative, to requiring appellants to post a surety or cash bond, Chapter 40A, Section 17 and Chapter 41, amend Section 81BB to provide the applicant with the right to file an immediate, special motion to dismiss an appeal of an approval of a special permit and /or definitive subdivision plan approval if the applicant feels it can demonstrate that the appellant acted in bad faith or with malice in making the appeal to the court. In such circumstances when the court grants such special motion to dismiss based upon its findings of bad faith or malice, the court shall award the

applicant both costs and reasonable attorneys fees including those costs and fees incurred for the special motion and any related discovery matters.
Dissenting Views: The First Minority Report (Broadrick Minority Report) and MAPC opposed.
Commission Vote: Passed unanimously

IV.21. Enact Senate Bill No. 810 of 2001

Recommendation: Legislature should enact, and the Governor should support, Senate Bill No. 810 of 2001, amending MGL, Chapter 183 to give precedence to any civil action or proceeding involving real estate permits or any similar legislation that would expedite litigation involving residential construction.
Dissenting Views: The First Minority Report (Broadrick Minority Report) and MAPC opposed.
Commission Vote: Passed unanimously

DENSITY BONUS REGULATIONS

IV.22. DHCD should develop a model affordable housing density bonus bylaw package.

Recommendation: In order to encourage the use of the density bonus incentive to create additional units of affordable housing without having to go through the Chapter 40B process, DHCD should develop a model affordable housing density bonus bylaw package which includes: a model inclusionary housing bylaw, a model affordable housing restriction, recommended marketing and sales practices, recommended process for managing the affordable units, and a step-by-step guide for the developer and municipality which describes the process for establishing and maintaining affordable units.
Dissenting Views: None
Commission Vote: Passed unanimously

IV.23. Amend The Zoning Act, to specifically allow municipalities to enact zoning provisions permitting housing density bonuses as a matter of right.

Recommendation: Amend C. 40A, The Zoning Act, to specifically allow municipalities to enact zoning provisions permitting housing density bonuses as a matter of right.
Opposing Views: None
Commission Vote: Passed unanimously

MIXED USE DEVELOPMENT PROJECTS

IV.24. Create incentives for companies looking to relocate to the Commonwealth and/or looking to undertake mixed-use developments which create housing to complement the commercial development.

Recommendation: The Commonwealth should provide incentives to companies looking to relocate to the Commonwealth and/or looking to mixed-

use development which creates housing to complement the commercial development. Such incentives could include enhanced tax increment financing which could be expanded to include housing creation as part of a mixed use development package. Other financing incentives which link commercial development incentives with housing creation could expand housing opportunities, and result in the creation of a revenue neutral project. Such incentives could be targeted for developments which locate in existing commercial/industrial areas as well as areas located adjacent to mass transit corridors.
Dissenting Views: MAPC opposed noting a pre-emption of local regulations.
Commission Vote: Passed unanimously

IV.25. Allow the abandoned building tax credit to be used to encourage the redevelopment of urbanized blighted areas into new neighborhoods.

Recommendation: Allow the abandoned building tax credit to be used to encourage the redevelopment of urbanized blighted areas into new neighborhoods.
Dissenting Views: None
Commission Vote: Passed unanimously

BROWNFIELDS GRANT, LOAN, AND TAX PROGRAMS

IV.26. There are many good financing grant and tax incentive programs for commercial development on brownfields. Where brownfields are suitable for residential development, authorize such housing projects as eligible for state brownfields programs and related incentives to redevelop urbanized areas into housing for all income levels.

Recommendation: Where brownfields are suitable for residential development, authorize such housing projects as eligible for state brownfields programs and related incentives to redevelop urbanized areas into housing for all income levels. For example, subsidized environmental insurance can provide incentives for redevelopment of housing and the cleanup of hazardous materials. The Brownfields Tax Credit and Municipal Tax Abatement programs would also provide incentives to both remediate contamination and create additional housing opportunities.
Dissenting Views: None
Commission Vote: Passed unanimously

URBAN REDEVELOPMENT CORPORATION

IV.27. Create an incentive for more urban reinvestment by amending Chapter 121A the statute that regulates urban renewal development to increase the return on investment from a maximum of 8% to mirror the amount allowed under other programs.

Recommendation: Amend Chapter 121A to increase the return on investment from a maximum of 8% to mirror the amount allowed under certain programs under Chapter 40B (i.e., 20% of development costs for non-rentals, and 10% of equity for rental housing).
Dissenting Views: None
Commission Vote: Passed unanimously

REGIONAL HOUSING SUPPLY PLANNING

IV.28. Examine the applicability of regulatory tools, such as those of the Cape Cod Commission, as a way to direct housing production to areas of greatest need, while protecting natural resources and assuring an adequate public transportation network and infrastructure for the housing to be built.

Recommendation: In addition to supporting the planning efforts supported by Executive Order 418, the Commonwealth should examine the applicability of regulatory tools, as a way to direct housing production to areas of greatest need, while protecting natural resources and assuring an adequate public transportation network and infrastructure for the housing to be built. *The Commission further recommended that the Regional Planning Agencies (RPAs) be used to develop tools to help communities plan for and create increased housing supply. Such tools should not add further regulatory barriers.*

Dissenting Views: MAPC noted the need to encourage the use of planning tools with the help of Regional Planning Agencies.
Commission Vote and Ammendment: The recommendation was passed unanimously. The Commission proposed amending the recommendation by adding "The Commission further recommended that the Regional Planning Agencies (RPAs) be used to develop tools to help communities plan for and create increased housing supply. Such tools should not add further regulatory barriers. " The amendment was unanimously passed.

V. APPENDICES

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EXECUTIVE ORDER # 426

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THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE DEPARTMENT
STATE HOUSE BOSTON 02133
(617) 727-4600

ARGEO PAUL CELLUCCI
GOVERNOR

JANE SWIFT
LIEUTENANT GOVERNOR

BY HIS EXCELLENCY
ARGEO PAUL CELLUCCI
GOVERNOR
EXECUTIVE ORDER NO. 426

ESTABLISHING THE GOVERNOR'S SPECIAL COMMISSION
ON BARRIERS TO HOUSING DEVELOPMENT.

WHEREAS, the supply of housing in the Commonwealth has not kept pace with the demand, resulting in an escalation of housing prices and a shortage of housing supply;

WHEREAS, unnecessarily strict zoning, permitting, septic system standards and other local requirements can, at times, unreasonably deter the development of much needed housing;

WHEREAS, residential development can be further impeded by state building codes and other regulations that pertain to buildings and structures which are overly restrictive, conflicting, duplicative or inconsistently interpreted and enforced by local building and fire prevention officials as well as by local plumbing, gas, electrical and health inspectors;

WHEREAS, regulations and requirements relating to housing development that are unnecessarily restrictive, conflicting, duplicative or inconsistently interpreted and enforced may constitute an unreasonable financial and administrative burden on builders and housing developers without advancing public health, public safety and environmental protection goals;

WHEREAS, such regulations and requirements can frustrate their original purpose to protect housing consumers of the Commonwealth by driving purchase and rental prices of housing upwards, limiting options for safe and desirable housing; and

WHEREAS, the citizens and businesses of the Commonwealth will be better served by eliminating (i) unduly restrictive local zoning and permitting requirements, (ii) overly strict and inconsistent septic system requirements, (iii) conflicting and duplicative building regulations, and (iv) inconsistent interpretation and enforcement of such regulations.

NOW THEREFORE, I, ARGEO PAUL CELLUCCI, Governor of the Commonwealth of Massachusetts, by virtue of the authority vested in me as Supreme Executive Magistrate, do hereby order as follows:

Section 1. There is hereby established the Governor's Special Commission on Barriers to Housing Development (the 'Commission"). The Commission shall systematically review and advise the Governor on which governmental requirements, as interpreted or enforced, impede the development of housing, raise housing production costs and exacerbate the Commonwealths housing supply shortage. The Commission shall make recommendations to the Governor as to specific legislative, regulatory, policy and operational changes that are required to remove, or otherwise ease, such barriers to residential development so as to create housing that is affordable across a wide range of incomes and available throughout a broad spectrum of the Commonwealth's neighborhoods.

Section 2. The Commission shall consist of no less than thirteen (13) members appointed by the Governor, including a representative of the Executive Offices of Administration and Finance, Housing & Community Development, Environmental Protection, Public Safety, Public Health and of the Massachusetts Housing Finance Agency. The Governor shall appoint the Co-Chairs of the Commission. The remaining members shall have knowledge of and experience in local housing issues or housing development. The members shall serve at the pleasure of the Governor.

Section 3. The Co-Chairs of the Commission shall establish two committees the Building and Specialty Code Coordinating Committee ("BSCCC")and the Septic System Regulatory Review Committee ("SCRRC") and appoint a chairperson to each such committee. The committees' membership shall be determined at the discretion of the Co-Chairs of the Commission. Each such committee will meet at such times and places as established by its chairperson.

Section 3(a). The BSCCC shall submit a report of its findings and recommendations to the Commission, on such date as set by the Commission. As part of its study, the BSCCC shall:

- Identify duplication in the state administration of the state building code and related regulations and recommend how such administration may be made more efficient and cost-effective with regard to housing development.

- Identify existing state code provisions and related regulations that are inordinately restrictive or burdensome to housing developers and recommend how such restrictions might be eased to facilitate the development of new and affordable houses.

- Assess how local officials interpret the state building code and related regulations and identify, if necessary, what measures are needed to ensure that local officials are accurately, consistently and fairly interpreting the state building code to promote and not impede residential development.

- Identify how zoning requirements may inhibit the development of affordable housing and recommend how municipalities may strike a balance between the desire for minimum lot size requirements and the need to ease those requirements in order to allow for moderate housing options.

Section 3(b). The SCRRC shall submit a report of its findings and recommendations to the Commission, on such date as set by the Commission. As part of its study, the SCRRC shall:

- Identify whether local municipalities have regulations or by-laws relating to Title 5 which governs on-site subsurface sewage systems - that vary from the state's requirements, and if so, whether such variations are justified by sound scientific principles.

- Make such recommendations, if found necessary, to ensure that Title 5 is addressed and enforced on the local level in accord with sound scientific principles so that housing development is not unnecessarily impeded.

Section 4. The Commission shall be responsible for framing and directing the tasks to be undertaken by the committees. In addition to those tasks set forth above, the Commission shall identify and address such additional tasks that must be accomplished in order for the Commission to meet its objective stated in Section 1.

Section 5. The Commission shall meet at such times and places as established by the Co-Chairs. It shall prepare and submit its written report, together with those recommendations and findings of the committees that it adopts, to the Governor by June 30, 2001.

Given at the Executive Chamber in Boston this 23 day of January in the year two thousand one.

(Argeo Paul Cellucci)
Argeo Paul Cellucci, Governor
Commonwealth of Massachusetts

William Francis Galvin
Secretary of the Commonwealth

GOD SAVE THE COMMONWEALTH OF MASSACHUSETTS

Members of the Special Commission on Barriers to Housing

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Governor's Special Commission on Barriers to Housing Development
Meeting Minutes
April 12, 2001
2:00 PM

Commission Members:

Jane Wallis Gumble	Director, DHCD
Gary Ruping	President, Ruping Builders, Inc.
Stephen Crosby (Absent)	Secretary, Admin & Finance
Lauren Liss	Commissioner, DEP
Thomas Rogers (Absent)	Chief of Inspection, DPS
Howard K. Koh, M.D.	Commissioner, DPH
Steven D. Pierce (Absent)	Executive Director, MHFA
Senator Richard Tisei	Senator, Commonwealth of MA
Representative Anthony Verga	Representative, Commonwealth of MA
The Honorable Peter J. Torigan	Mayor, City of Peabody
Daniel Webster, Esq.	Chair, Hanson Board of Selectmen
Jeanne Pinado	Madison Park Community Development
Paul Douglas	Executive Director, Franklin County Housing & Redevelopment Authority.
Mark Leff	Sr. Vice President, Salem Five
John C. McBride	Private Home Builder
Richard D. Pedone	Private Home Builder
Isabel Barbara Castro	Realtor
Gregg P. Lisciotti	Chair, Leominster Housing Authority

Other Attendees:

Benjamin Fierro	Lynch & Fierro LLP; Counsel to Mass. Homebuilders Association
Brian Gore	Technical Director, EOPS
Fred Habib	Chief of Staff, DHCD
Glenn S. Haas	Director, Division of Watershed Management, DEP Bureau of Resource Protection
Judith Otto	Director, Office of Community Development & Planning, City of Peabody
Kristen Olsen	Research Assistant, DHCD
Linn Torto	Assistant Secretary, Admin & Finance
Robert Ebersole	Deputy Director, DHCD
Sarah B. Young	Deputy Director of Policy, DHCD
Steve Ryan	Mass. Association of Realtors
Thomas Riley	Program Manager, EOPS Board of Building Regulations and Standards
Tom Gleason	Deputy Director, MHFA
Tony Verga	State Representative

Distributed Materials:

- Agenda
- Executive Order No. 426 "Establishing the Governor's Special Commission on Barriers to Housing Development"
- An Outline of the Existing Research and Recommendation for Reducing the Barriers to Affordable Housing
- Boston Globe Article, "Apartment Developers see Barriers to Building"
- List of the Boards of Health with regulations exceeding Title 5
- An Economic Analysis of the Causes of High Housing Prices in Massachusetts, Commonwealth Research Group, Inc. Dec 1, 2000

Discussion:

Ms. Jane Wallis Gumble, Director of the Department of Housing and Community Development, brought the meeting to order and asked both Commission Members and attendees to introduce themselves. Once the introductions were complete, Ms. Gumble reminded Commission Members of the need to be sworn in. She then noted that the limited supply of housing, as evidenced by the fact that the Commonwealth of Massachusetts is ranked #47 in housing starts nationwide, is driving up housing costs and negatively impacting the economy. The Commission has been charged with the task of reducing barriers to housing development in order to increase the housing supply.

Mr. Gary Ruping, President of Ruping Builders, Inc., compared inflation rates in Massachusetts with the national average, and warned that rising housing costs could place MA out of the market.

Ms. Gumble introduced a list of barriers to housing, emphasizing that it is not a comprehensive list, but a starting point for the Commission. The document is titled "An Outline of the Existing Research and Recommendations for Reducing the Barriers to Affordable Housing". Ms. Sarah B. Young, Deputy Director of Policy for DHCD explained that Ms. Kristen Olsen, Research Assistant for DHCD, developed the document by gathering information from existing research on housing issues in Massachusetts. Ms Young then recommended the Commission review and identify any glaring omissions in the document.

Mr. Thomas Riley, Program Manager for Board Of Building Regulations and Standards (BBRS), informed the Commission that the inability to recreate housing lost to fire in the inner city under the existing zoning and permitting regulations is a barrier to development.

The Honorable Peter Torigan, Mayor of the City of Peabody, stated that in order to successfully reduce barriers to housing, the Commission must include local officials in its work and train them about the need to build affordable housing.

Ms. Gumble noted the correlation of the Commission's task with the Chapter 40B Comprehensive Permit Law. She described how a recent regulation change is helping to notify communities of upcoming Comprehensive Permit Applications and to educate local officials of the need for housing and the benefits of working with developers on Comprehensive Permit Projects.

Mr. Torigan noted that communities always perceive Ch. 40B as the back door to zoning by developers. Ms. Gumble then noted that the converse side of Mr. Torigan's statement is that developers see zoning as the backdoor way to stop development. Ms. Young added that the community planning aspect of Executive Order 418 (EO 418) will help educate communities on the importance of affordable housing and best practices for planning and developing housing.

Mr. Brian Gore, Technical Director for BBRS, noted that while affordable housing is important, the overall housing supply is in need of expansion. Ms. Gumble explained that EO 418 is really about increasing the housing supply because it requires communities to create units in 4 years for certification. She added that $364 million in state funding is subject to EO 418 certification, and some programs require communities to be EO 418 certified as a threshold requirement for funding.

Mr. Paul Douglas, Executive Director of the Franklin County Housing & Redevelopment Authority, stated that he was interested in learning the degree to which the state can require communities to provide validation of the need of any additional zoning or building regulations. Mr. Ruping noted that many local bylaws are not based on environmental science, but on political science. Ms. Linn Torto noted that EOAF and BBRS will be working with interns to conduct a survey of towns and create an inventory of local bylaws and regulations that exceed state codes.

Mr. Mark Leff, Sr. Vice President of Salem Five, stated that in writing a recent article he found the current methodology for determining educational costs of new growth to be overstated. He also noted that he was supportive of the state's efforts to fill the gap of additional educational costs resulting from new housing.

Mr. Riley stated that the Commission needs to involve somebody from a planning board in its work. Ms. Gumble noted that it would be appropriate to include planning board members as participants in Commission's sub-committees.

Ms. Young noted that the next topic of the outline was building codes.

Mr. Brian Gore, Technical Director of BBRS, stated that many organizations have the authority to develop building codes in MA, and the cost of permitting in MA is unrelated to the services provided to the developer.

Mr. Riley noted two building code problems that commonly occur at the local level: 1) local addition to state building code, and 2) misinterpretation of state building code due

to insufficient funding and educational requirements for regulatory enforcement. He noted that the dilemma of one stop shopping for permitting is that it requires very specialized training to determine when something is built wrong. He added that in order to have one-stop shopping for permitting, you need to have one-stop inspection.

Mr. Torigan commented on the frequent conflicts that develop between Fire Prevention Officials and the Building Commission. Mr. Gore explained that while the Building Commission is the final authority, they are often in conflict with Fire Prevention Officials. Mr. Torigan stated that there is a need for further clarification of the roles and responsibilities of the two groups. Mr. Gore observed that this issue is nationwide and not just a problem in MA.

Ms. Gumble and Mr. Riley agreed that the Commission clearly should include Mr. Steve Coan and some Fire Prevention Officials in the work of the sub-committees.

Ms. Jeanne Pinado, of Madison Park Development, stated that the conflicts between Fire Prevention Officials and the Building Code Commission results in increased costs for developers. A problem that is exacerbated by the costs of meeting unanticipated public utility requirements, she said. She stated that it is important to record the costs developers incur from meeting building codes and public utility requirements.

Ms. Gumble asked the Commission to look at the list of people who may be interested in participating in the sub-committees. Ms. Young suggested that the Commission members to choose the sub-committees that they would like to participate in and then discuss the list of potential participants.

Ms. Pindado noted that other barriers to affordable housing include land and resource limitations and difficulty in accessing tax-title properties. Ms. Young noted that the Commission is charged with focusing on barriers to all housing development, not necessarily affordable housing. She added that the issues of availability of land will be taken up in the debate of the Surplus Land Bill filed by the Administration; and the issue of accessing tax title properties has been addressed in CHAPA's recent publication "Back on the Rolls".

Mr. Ebersole stated that the CHAPA Tax Title report also indicates the lack of training at the local level to deal with these issues as a source of the problem and a potential means of alleviating them.

The Commission members then selected the sub-committees in which they would participate. Each of the three sub-committees gathered in a different part of the room and identified non-Commission members to include in the Commission's work and discussed possible meeting times and dates. The next page contains a list of the Commission members and DHCD staff participating in each sub-committee.

Sub-Committees:

- **Building Codes:**
  The Honorable Peter Torigan
  Tom Riley
  Brain Gore
  Sarah B. Young
  Gary Ruping
  Judy Otto

- **Permits and Zoning:**
  Mark Leff
  Tom Gleason
  Daniel Webster
  Gregg Lisciotti
  Jeanne Pinado
  Fred Habib

- **Title 5:**
  Lauren Liss
  Tony Verga
  Isabel Castro
  Steve Ryan
  Glenn Haas
  Robert Ebersole
  Paul Douglas

Governor's Special Commission on Barriers to Housing Development
Meeting Minutes (Revised)
June 25, 2001
10:00 AM

Commission Members:

Jane Wallis Gumble	Director, DHCD
Gary Ruping	President, Ruping Builders, Inc.
Stephen Crosby (Absent)	Secretary, Admin & Finance
Lauren Liss (Absent)	Commissioner, DEP
Thomas Rogers (Absent)	Chief of Inspection, DPS
Howard K. Koh, M.D.	Commissioner, DPH
Steven D. Pierce	Executive Director, MHFA
Senator Richard Tisei (Absent)	Senator, Commonwealth of MA
Representative Anthony Verga (Absent)	Representative, Commonwealth of MA
The Honorable Peter J. Torigan (Absent)	Mayor, City of Peabody
Daniel Webster, Esq. (Absent)	Chair, Hanson Board of Selectmen
Jeanne Pinado	Madison Park Community Development
Paul Douglas	Executive Director, Franklin County Housing & Redevelopment Authority.
Mark Leff	Sr. Vice President, Salem Five
John C. McBride (Absent)	Private Home Builder
Richard D. Pedone (Absent)	Private Home Builder
Isabel Barbara Castro	Realtor
Gregg P. Lisciotti (Absent)	Chair, Leominster Housing Authority

Other Attendees:

Danielle Black	Intern, Administration & Finance/BBRS
Lisa Golbobski	Intern, Administration & Finance/BBRS
Anna Frantz	For Mayor Torigan, City of Peabody
Lou Martin	Director CDBG, DHCD
Kristen Olsen	Research Assistant, DHCD
Brian Gore	Technical Director, BBRS
Thomas Riley	Program Manager, EOPS Board of Building Regulations and Standards
Jane Sergi	Planner, DHCD
Linn Torto	Assistant Secretary, Admin & Finance
Robert Ebersole	Deputy Director, DHCD
Sarah B. Young	Deputy Director of Policy, DHCD

Distributed Materials:

- Building Code Subcommittee Draft Recommendations
- Draft State Agency Organizational Chart For Building Code Oversight
- Barriers to Housing Zoning Sub-Committee Interim Report
- Barriers Commission Subcommittee on Title 5 Draft Report
- Letter from the Attorney General to cities and towns requesting information to help identify inconsistencies in local zoning and State Building Code

Discussion:

Ms. Jane Wallis Gumble brought the meeting to order at 10:00 AM. Ms. Gumble explained that the purpose of the meeting was for each Subcommittee to present a summary of the progress they had made thus far. She explained that the administration had granted a deadline extension, and noted that the Commission should be prepared to submit a preliminary report to Governor Jane Swift in mid September. She then asked each subcommittee to present their respective interim-reports.

Copies of the interim reports prepared by the Title 5 Subcommittee, the Building Code Subcommittee and the Zoning and Permitting Subcommittee were distributed.

Building Code Subcommittee:

Ms. Young presented the interim report for the Building Code Subcommittee. She explained that the Building Code Subcommittee includes representatives from the Board of Health, the Fire Chiefs Association, the Homebuilders Association, the Massachusetts Municipal Association (MMA), and DHCD staff. She added that this working group included individuals from the promulgating, regulating and regulated communities.

Ms. Young then discussed each of the Building Code Subcommittee's recommendations. She explained that the Subcommittee's first recommendation is to create a Code Coordinating Council at the state level. This council would be charged with strengthening the lines of communication for code promulgation, addressing overlapping codes, defining roles and limits of authority of the various boards involved in the permitting process, suggesting modifications of the time limits for issuing permits to match developer experience and eliminate conflicts, and developing a guidebook to assist communities in coordinating local boards through the permitting and zoning process. She added that the staffing requirements for the creation of this Council still need to be determined.

Ms. Young then discussed the Building Code Subcommittee's second recommendation which is to offer additional training opportunities, and continuing education requirements for local officials, regulators, and inspectors. She noted that an inventory of existing training needs to be conducted, and costs and funding sources for this training need to be determined.

Ms. Young then discussed the Building Code Subcommittee's third recommendation, which is to recommend staffing requirements for state regulating agencies and local communities commensurate with housing activity and responsibilities to ensure sufficient resources to process applications and inspections efficiently. She noted that part-time staff could be a barrier to housing development, and that the Insurance Services Organization (ISO) tracked information on local staffing levels.

Ms. Young then discussed the Building Code Subcommittee's fourth recommendation, which is to use current technology to make code compliance and enforcement a more user-friendly efficient process. She noted that the Subcommittee specifically recommends providing each community with the computers and software needed to track and do permitting electronically, developing a single website to look-up and key-word search all the codes, and developing the capacity at the Secretary of State's office for electronic public access of information. She added that the costs of computerization and training still needed to be determined.

Ms. Young then noted that MGL c. 802 created a technical code council, but this provision has never been implemented. She explained that from this stemmed the fifth recommendation of the Building Code Subcommittee; to conduct a review of MGL c.802 to determine if revisions are needed to conform to the recommendations of the Commission.

Ms. Young then discussed the sixth recommendation of the Building Code Subcommittee; Conduct a review of all local zoning bylaws to identify communities that are using zoning laws to supersede State Building Code. She noted that The Executive Office of Administration and Finance (ANF) in conjunction with the Board of Building Regulations and Standards (BBRS) and the Attorney General's Office has hired two interns to work on this project. She also distributed a copy of the letter sent by the Attorney General's office to all cities and towns requesting copies of all their local regulations, rules and policies.

Mr. Brian Gore noted that in 1975 MGL c. 802 eliminated any codes competing with state building codes, and provided a means of local adoption of bylaws to meet community-specific alterations through BBRS. He added that in recent years BBRS or the Attorney General's Office has denied about 50 or so applications for local alteration. He also noted that BBRS has designed a database to track all local zoning bylaws, and that staff are currently word searching bylaws to identify those that act like building code.

Ms. Gumble asked what action developers could take when they realize a town's local bylaws are in violation of c. 802.

Mr. Gore explained that developers could submit an appeal to the State Building Code Appeal Committee. He noted that this usually takes about 4-5 weeks, a delay that many developers can't afford, especially since the outcome is uncertain, so they simply comply.

Mr. Gary Ruping added that in his experience, he usually complies with requirements because delays cause added expenses and affect the bottom line.

Ms. Gumble then noted that if people were unaware of c. 802, perhaps it would be appropriate to make more information available on it.

Mr. Thomas Riley added that more often than not, BBRS does not hear of these conflicts in codes. He noted that it would be helpful to have a hotline that developers could call when they run into a code conflict or duplication.

Mr. Steven Pierce asked if a developer had ever successfully appealed a local bylaw acting as building code. Mr. Gore responded that BBRS usually rules in favor of the developer.

Ms. Young noted that the Building Code Subcommittee would be producing a comprehensive report on these issues for the Commission.

Mr. Pierce noted that surveying the towns was a terrific idea, but was concerned about how to deal with the culture of local autonomy in the future.

Ms. Young explained that this concern would be addressed by including local boards and town councils in the trainings to keep them informed of their responsibilities and limits of authority. She then distributed an organizational chart prepared by DHCD staff, that illustrates the relationship between the various code promulgating agencies.

Zoning Subcommittee:

Next, Ms. Jane Sergi presented the interim report for the Zoning Subcommittee. Ms. Sergi noted that the Zoning Subcommittee has met five times and consists of several developers, planners, and individuals in the real estate community. Ms. Sergi discussed the topics identified by the Zoning Subcommittee as key land-use issues that are factors of zoning barriers. She noted that the group is putting together recommendations and will be voting as to which ones to follow through.

Lou Martin added that there was significant municipal representation in the Zoning subcommittee, and that thus far the discussion had focused on the municipal impacts of housing development, such as education costs. Lou Martin also observed the conflict between Home Rule and the desire/need to produce housing, specifically noting the waste of land that can result from local zoning. Lou Martin stated that another priority of the Zoning Subcommittee is to address the lengthy appeals process which currently delays projects for as long as 5-7 years and add significant costs.

Mr. Gary Ruping noted his experience with the Wetland Appeal Process in Lexington where it was a 12-18 month process to appeal a violation of the Wetland Protection Act and then an additional 3-4 years in the court system. He added that when you go to court with these issues, the decision is not based on concise scientific reasons, and asked if

there was any possibility of routing appeals to the Land Court or the Dept. of Environmental Protection.

Mr. Ruping then asked if the Zoning Subcommittee was addressing zoning that had been adopted in the 50's that were no longer appropriate for today.

Ms. Sergi added that the Zoning Subcommittee was considering recommending expanding the funds affected by EO 418 in order to provide communities additional motivation to review their zoning.

Ms. Jean Pinado suggested possibly requiring consolidated plans or significantly increasing the percentage of money for the Community Preservation Act.

Ms. Sergi noted the need to be aware that planning boards and local staff often have other full-time jobs and don't necessarily have the time to take advantage of the resources available.

Lou Martin noted that the real question is how to encourage greater/better land use with greater density. He also noted that the Massachusetts Municipal Association has created a land-use subcommittee and is very interested in the progress of the Barriers Commission.

Title 5 Subcommittee:

At this point the discussion turned to the progress of the Title 5 Subcommittee. Mr. Glenn Haas explained that the Title 5 Subcommittee had met about 5-6 times and included individuals from The Massachusetts Homebuilders Association, environmental groups, realtors and health agents. He noted that there are some legitimate reasons to adjust the setbacks, but it is not necessary to adjust Title 5.

Mr. Haas continued to say that the Title 5 Subcommittee had identified some options to consider as possible recommendations to the Governor. He stated that the first option is to require communities to state the reason for alteration or additional requirements to Title 5 and file this with DEP for approval. The second option would be to provide a list of regulations that do not meet the science requirement. The third option would require communities to file Title 5 additions with DEP, but not require DEP approval. A fourth option would be to issue guidance for the scientific requirements.

Mr. Haas explained that a number of issues within Title 5 kept coming up, specifically altering the percolation rate from 30 to 60 minutes. He noted that this would open a large amount of land to development, but would require very good maintenance and installation. He also noted that a shared-system could be used only if it was demonstrated that another Title 5 system could be put in each lot. He explained that this was required in order to avoid a large number of failing or improperly maintained shared septic systems in the future.

Lou Martin questioned the need to go through the process of demonstrating the ability to have individual systems before building a shared system. Mr. Haas explained that this was needed in order to ensure a back-up plan to avoid unsanitary homes in case the shared system failed.

Ms. Pinado suggested developing a carrot and stick approach to housing development and housing plans.

Ms. Gumble asked that the members of the Commission review the draft recommendations submitted and provide comments and feedback at the next scheduled meeting on Tuesday, August 21, at 2:00 PM. She then thanked everyone for all his or her work and adjourned the meeting.

Governor's Special Commission on Barriers to Housing Development
Meeting Minutes
January 3, 2002
1:30 PM

Commission Members:

Jane Wallis Gumble	Director, DHCD
Gary Ruping	President, Ruping Builders, Inc.
Stephen Crosby (Absent)	Secretary, Admin & Finance
Glen Hass for Lauren Liss	Commissioner, DEP
Thomas Rogers (Absent)	Chief of Inspection, DPS
Howard K. Koh, M.D. (Absent)	Commissioner, DPH
Tom Gleason	Executive Director, MHFA
Senator Richard Tisei (Absent)	Senator, Commonwealth of MA
Lee Moniz for Representative Anthony Verga	Representative, Commonwealth of MA
The Honorable Peter J. Torigan (Absent)	Mayor, City of Peabody
Daniel Webster, Esq. (Absent)	Chair, Hanson Board of Selectmen
Jeanne Pinado	Madison Park Community Development
Paul Douglas	Executive Director, Franklin County Housing & Redevelopment Authority.
Mark Leff	Sr. Vice President, Salem Five
John C. McBride	Commons Development Group
Richard D. Pedone	Private Home Builder
Isabel Barbara Castro (Absent)	Realtor
Gregg P. Lisciotti (Absent)	Chair, Leominster Housing Authority

Other Attendees:

Jane Santosousso	DHCD
Kristen Olsen	DHCD
Siobhan Coyne	Representative Cahill's Office
Chris Hardy	Massachusetts Audubon Society
Geoff Richeleu	Representative Mary Jane Simmons/ Commission on Local Affairs
Matthew Feher	Massachusetts Municipal Association
Pam Dibona	Environmental League of Massachusetts
David Wluka	Massachusetts Audubon Society
Benjamin Fierro	Lynch & Fierro LLP
Michael Jonas	MassInc
Steve Rourke	Department of Fire Services
Stephen Ryan	Massachusetts Association of Realtors
Brian Gore	Technical Director, Board of Building Regulations and Standards
Thomas Riley	Program Manager, EOPS Board of Building Regulations and Standards
Sarah B. Young	DHCD
Fred Habib	DHCD

Distributed Materials:

- Written comments on the final draft of the Commission's Report submitted by Mr. John Smolak

Discussion:

Mr. Fred Habib brought the meeting to order and asked both Commission members and attendees to introduce themselves. Mr. Habib stated that DHCD had received written comments from Mr. John Smolak regarding the Draft Report of the Governors Special Commission on Barriers to Housing Development. He distributed copies of Mr. Smolak's comments asked Ms. Sarah B. Young discuss the comments with the Commission.

Ms. Young noted that Mr. Smolak's written comments proposed four changes. She discussed each of Mr. Smolak's comments with the Commission. Below are each of Mr. Smolak's comments *(in italics)* and the Commission's discussion of them.

1. *The Smolak Minority Report -- I would suggest that you entitle this minority report as the Second Minority Report, and the minority report prepared by Steve Broderick, et als. should be titled the First Minority Report. I had assistance with the prep. of the minority report I issued but I believe that a more generic labeling of the minority reports would be more appropriate.*

   Ms. Young noted that since the Commission members and subcommittee participants had been referring to these documents as the Broderick Minority Report and the Smolak Minority Report, it could be confusing to change the names completely.

   Based on Mr. Smolak's comments, Ms. Young proposed the following:
   - Refer to the Minority Report as The First Minority Report (Broderick Minority Report) in the Commission's report
   - Refer to the Smolak Minority Report as the Second Minority Report (Smolak Minority Report) in the Commission's report

   The Commission unanimously voted to adopt Ms. Young's proposal.

2. *Pg. 16 [Municipal Cost Burden, IV.1] You should probably delete the sentence regarding the Smolak Minority report because I did not comment on several issues, including this issue, because I was in agreement with the majority report.*

   Ms. Young recommended deleting the above referenced statement from the Commission's report.

   The Commission unanimously voted to delete the statement.

3. *P. 23 [IV.23. under Recommendation, type and should read C.40A, and not 41A.*

   Ms. Young recommended making this correction

   The Commission unanimously voted to make this correction.

4. *P. 25 [IV.28. Regional Housing Supply Planning -- I believe this is not quite accurate. I don't believe the Commission agreed that the Commonwealth should employ Cape Cod Commission regulatory tools, but that it should use the resources of the regional planning agencies but not create an additional regulatory/approval layer which would furtherdelay permitting.*

   Lastly, the Zoning Subcommittee did make these recommendations to reduce the barriers to housing development, and I think you may want to include a sentence or two regarding how the Commission feels barriers would be reduced by these proposed changes.

   Mr. Mark Leff noted that at the last meeting, the Commission agreed that they did not want to add layers of regulation. Mr. Stephen Ryan agreed with Mr. Leff and added he did not think that using the Cape Cod Commission as an example in this recommendation was appropriate.

   Mr. Pedone proposed striking "such as those of the Cape Cod Commission" from IV.28, and adding "Such tools should not add further regulatory barriers" to the end of the recommendation.

   The Commission unanimously voted to adopt these changes.

Mr. Habib then asked if anybody had any other comments on zoning.

Mr. Haas noted that the discussion of the Dissenting Views for recommendations IV.16 and III.2 should include the concerns that DEP lacked the resources need to implement those recommendations that were previously expressed by DEP and ELM. He emphasized that his concern was presenting an accurate record of the discussion that led up to the Commission's vote on these recommendations.

Mr. Tom Gleason noted that he thought that these concerns were addressed in the recommendations' language, which noted the need for additional resources.

Ms. Pam Dibona questioned whether the description of the Commission's vote on recommendation IV.7 was accurate. Ms. Young explained that she did not have a copy of the voting record at the meeting, but would check. (Mr. Haas clarified by email that DEP did not have a dissenting opinion on this item.) That reference will be struck from the report

Mr. Habib asked if anybody had Building Code related comments. There were none.

Mr. Habib asked if anybody had Title 5 related comments.

Mr. Ryan noted that the language of the dissenting views in recommendation III.14 was misleading. Mr. Pedone proposed adding the word "Some" before subcommittee members to clarify that not all subcommittee members shared that concern.

The Commission voted unanimously to adopt this change.

Mr. Habib then asked if anybody had general comments on the report.

Mr. Matthew Feher noted that he thought that due to the scheduling of this meeting so close to the holidays, there was not ample time to review and comment on the report.

Mr. Pedone and Mr. Leff both expressed that they felt the Commission and DHCD staff did an admiral job on this project and in preparing the report.

Ms. Gumble noted that she was proud of the report as it fairly represented the diversity of opinions on all the issues. She noted that in pursuing individual agendas and interests, people tend to overlook the very real housing shortage in Massachusetts and this report will help to address the shortage.

Mr. Ruping noted that this report would show the Governor that there are ways to address the housing shortage.

Mr. Habib then stated that based on the discussion at the meeting it was clear that the Commission had adopted the report.

Ms. Gumble then explained that the word "Draft" would be removed from the report, the changes would be made that were agreed upon at the meeting, and the final report would be posted on the web. This concluded the meeting.

Building Code Subcommittee Report

Process

The Building Code Subcommittee was charged with identifying specific barriers regarding interpretation, enforcement and processes related to the state building code, the specialty codes and local bylaws that act like the building code and to propose recommendations to overcome those barriers. The subcommittee was made up of twenty-one individuals representing interests from state regulatory agencies, municipal government, professional trade and licensing organizations, the State Fire Marshal's Office, the Board of Building Regulations and Standards (BBRS), and local building and fire inspectors. (See Exhibit 1). The Subcommittee met four times to identify and discuss the ways in which the building and specialty codes impacted the various local and state regulators and users. In addition, DHCD representatives who staffed the subcommittee held two focus groups - one was with the Southeastern Massachusetts Building Officials Association and the other one was with the Fire Prevention Association of Massachusetts.

Problem Statement I: Conflicting and Duplicative Building Codes

In October 2000, The Executive Office of Administration and Finance issued a policy report, entitled Bringing Down the Barriers: Changing Housing Supply Dynamics in Massachusetts. In it the authors identified the regulatory environment for residential development as a possible area for improving our ability to preserve and develop much needed housing in the Commonwealth. One key area identified was the promulgation and enforcement of the building and specialty codes in an effort to identify and recommend ways to improve this condition the report states:

> *Many of the codes that regulate building construction, i.e. the State Building Code (780 CMR) and the specialty codes, are independently promulgated by each relevant board and state agency. As a result, the Commonwealth will sometimes put into place regulations that are conflicting or duplicative...*
> *As a result, builders trying to comply with the Commonwealth's regulations sometimes face multiple local officials enforcing rules promulgated or inconsistently interpreted by multiple state government jurisdictions.*[1]

The conflict between codes has been a recognized problem for many years. In 1971 the Massachusetts Department of Community Affairs prepared a "Report Relative to the

[1] *Bringing Down the Barriers: Changing Housing Supply Dynamics in Massachusetts*, Massachusetts Executive Office of Administration and Finance (October 2000), p. 25

Development, Administration and Enforcement of a Uniform Building and Housing Code". The result was the Acts of 1972 Chapter 802, which was signed into law in July 1972. MGL c. 802 established the first Statewide Building Code, and repealed all conflicting local codes in effect prior to January 1975. When MGL 143, §98 was enacted it provided a mechanism for local communities to seek enhanced safety for the community through more stringent construction requirements than those currently established in the building code. (A discussion on local codes is addressed later in this report). In 1984, the legislature further clarified its intent and passed MGL 143, §96, which states:

> "The state building code **shall** [emphasis added] incorporate any specialized construction codes, rules or regulations pertaining to building construction, reconstruction, alteration, repair or demolition promulgated by and under the authority of the various boards which have been authorized from time to time by the general court.
>
> The specialized codes referred to in the section shall include, but not be limited to, the state plumbing code, electrical code, architectural barriers regulations, fire safety code, fire prevention regulations and elevator regulations."

The mandate established by the legislature in 1984 by passing MGL 143, §96 was to incorporate the specialty codes into the state building code and to clarify the jurisdiction and assign responsibility for promulgation of the various codes. The legislature at that time recognized that it would be easier for the state building code to incorporate the specialty codes rather than the specialty codes incorporating the state building code.

Chapter 802 also established a "Technical Code Council" that was charged with the task of recommending revisions to the state building code – specifically excluding the independent specialty codes. These specialty codes include:

- **Plumbing and Gasfitters Code** - 248 CMR
  Promulgated and enforced by the local Plumbing and Gas Inspectors.
- **Sanitary Code** - 105 CMR
  Promulgated and enforced by the Massachusetts Department of Public Health.
- **Fire Prevention and Electrical Codes** - 527 CMR
  Promulgated by the Board of Fire Prevention Regulations and enforced by the fire department and local electrical inspector respectively.
- **Handicap Accessibility Code** - 521 CMR
  Promulgated by the Architectural Access Board and Enforced by the Local Building Official.
- **Drinking Water Regulations – Cross Connections Control** – 310 CMR 22.00
  Promulgated by the Department of Environmental Protection.
- **Elevator Code** – 524 CMR
  Promulgated and Enforced by the Board of Elevator Regulations.
- **Boiler Regulations** – 522 CMR
  Promulgated and Enforced by Board of Boiler Rules.

- **The Department of Telecommunications and Energy**

The chart in Exhibit 2 shows graphically how complicated the structure of the code development and enforcement system is and explains why many local officials, developers, contractors and architects have difficulty navigating their way through the process of new housing development and renovation.

c. 802 of the Acts of 1972 as amended and MGL 143, §93-100 was enacted to create building code uniformity and avoid potential conflict and duplication by incorporating the specialty codes into the state building code. However, the process contemplated by the establishment of the Technical Code Council was not utilized effectively and did not incorporate the specialty codes - the specialty codes are still promulgated separately and independently. The logical resolution is to follow the original legislative directive to have the building code incorporate the specialty codes to eliminate conflict.

Since the inception of the State Building code in 1975, there have been other studies and special reports making recommendations encouraging a more centralized system of code coordination. These reports were produced in 1980 and in 1990, however the recommendations were not implemented. In most local communities one person, usually the building commissioner, is charged with the responsibility of all building code enforcement officials in a city or town. At the same time, other local officials have independent enforcement over their issues affecting building construction. The fire chief has the responsibility to enforce the state fire code. The boards of health and conservation commissions have independent enforcement over their issues. All of these are clearly identified in the state regulations and general laws to ensure the various boards have control over their enforcement. In addition, the groups all report to chief elected political officials or boards in their municipalities. The result being the code promulgation structure varies from the enforcement structure and the enforcement is potentially affected by the agenda of the incumbent political leadership in a community. This enforcement may be further fractionalized when elected boards promote policies that differ from one another.

The Board of Building Regulations and Standards (BBRS) is required by statute to update the State Building Code. The board has begun the process of preparing the 7th edition of this code. To accomplish this the board has voted to use the International Code Conference International Building Code model as its standard. This model is an outgrowth of the BOCA National Model building code that has been utilized for the basis of the Massachusetts State Building Code since its original implementation. In addition the Board of Fire Prevention Regulations (BFPR) has recently voted to utilize NFPA 1 to update its regulations. Since the potential for further conflict may exist as a result of the updating of these two documents, it is even more important than ever to create a viable code coordinating council that can identify areas of duplication and conflict and make recommendations to clearly and concisely publish the building code as well as the related specialty codes.

Building Code Subcommittee Report

Recommendation I: Create a Code Coordinating Council at the state level to coordinate the building and specialty codes, and create a forum for discussing the processes for the promulgation of regulations, licensing, inspections and appeals. Recommend that the Secretary of Administration and Finance will chair this Code Coordinating Council. The Council shall:

- Address areas of overlap in the promulgation of the various codes to prevent conflict and duplication.

In addition, the Code Coordinating Council may also look at areas related to the administration of the building and specialty codes to insure systemic coordination of related procedures such as licensing, inspections and appeals within the required statutory framework. Examples of issues that came up during the subcommittee meetings that would be appropriate to address include:

- Develop a shared understanding of the roles, expectations and limits of authority of the various code promulgating authorities defined by statute.
- Perform a comprehensive analysis of the administrative appeals processes for all promulgating agencies and boards to insure that there is an appeals process across those agencies and boards. Furthermore, that in cases where an efficient and accessible appeals process is unavailable to the public, make specific recommendations regarding the development of such appeals process for the specific board or promulgating agency. Suggest legislation if necessary.
- Review the existing timeframes for permitting and appeals and suggest modifications that logically consider licensing procedures in the building process.
- Establish a guidebook for communities, which present a model protocol to promote the coordination of the permitting, licensing, inspections, and other processes necessary prior to the issuance of certificates of occupancy.

<u>Proposed Legislation:</u>

AN ACT CREATING THE COMMONWEALTH'S CODE COORDINATING COUNCIL

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same as follows:

Section 1. Chapter 7 is hereby amended by inserting after section 4P thereof, the following section, Section 4Q.

There is hereby established within the Executive Office for Administration and Finance, A Code Coordinating Council.

> Said Council shall review the state building code and the various specialized codes of the Commonwealth to coordinate and make recommendations which will eliminate redundancy, minimize inconsistencies and conflicts and maximize the efficiency of the code promulgation process. The Council shall consist of the Secretary or his designee, the State Fire Marshal or his designee, the Commissioner of the Department of Public Safety or his designee, the Chairman of the Board of Fire Prevention Regulations or his designee, the Chairman of the State Board of Electrical Examiners or his designee, the Chairman of the Board of Building Regulations and Standards or his designee, the Chairman of the State Board of Plumbers and Gasfitters or his designee, the Commissioner of the Department of Public Health or his designee, the Chairman of the Architectural Access Board or his designee, the Chairman of the Elevator Board or his designee and the Attorney General or his designee.

The Secretary of the Executive Office for Administration and Finance shall serve as Chairman and will have the exclusive responsibility for the conduct of the Council. The Chairman may employ such technical experts and other assistants as may be required for the Council to perform its duties. The Chairman may from time to time request the advice and input from local officials and other interested parties. The Chairman may promulgate such rules and regulations that govern the conduct of the Council as may be reasonably necessary to effectuate the provisions of this Section.

Problem Statement II: Inconsistent Interpretation and Enforcement of Codes

Another issue identified in The Executive Office of Administration and Finance's policy report, entitled Bringing Down the Barriers: Changing Housing Supply Dynamics in Massachusetts dealt with the imposition of restrictive requirements of well-intentioned local officials. As has been discussed earlier, the various boards have been charged under state law with promulgating the state building code and the related specialty codes, but it is the responsibility of local officials to interpret, inspect and enforce these codes. It is not surprising that opportunity exists for inconsistent interpretation or misunderstanding of these codes. This can add delays and extra cost to housing construction. The report states:

> *Without knowledge of the basis of these regulations, some local officials impose additional requirements that they believe will promote public safety. This lack of understanding by local officials can also result in the misinterpretation of state codes. In addition, while most local officials are skilled at identifying code violations after a building has been constructed, some officials are not fully trained in reading architectural and engineering plans and, therefore, cannot effectively identify code violations within those plans.* [2]

[2] Ibid. p. 26

Building Code Subcommittee Report

The current organizational structure for the promulgation and enforcement of the Commonwealth's building codes and specialty codes allows for varied certification requirements and training for inspectors. For example BBRS requires certification for local building inspectors along with continuing education to maintain the certification whereas other inspectors, health agents, as an example have no standard certification or education requirements. Clearly, certification and a structured methodology for maintaining certification over a given period of time is an effective way of insuring there are appropriately trained inspectors at the local level. While there has been a concerted effort to increase certification requirements for other inspectors in the specialty fields including action in the areas of plumbers and gas fitters and electricians certification for all inspectors has not been achieved.

The committee determined that there is a need for continued and expanded training for inspectors and the initiation of cross training across disciplines. The various agencies responsible for code promulgation and enforcement do provide ongoing training, however, continuing education is not yet mandatory for all local officials who are charged with regulatory enforcement. Since most training is provided by the individual agencies responsible specific to their areas responsibility there is very little cross training of disciplines. This need for cross training was pointed out both by members of the subcommittee and through feedback gleaned from focus groups from the Southeastern Massachusetts Building Officials Association and the Fire Prevention Association of Massachusetts. In the codes there are gray areas that require the interaction of the various inspectors. For instance, the installation of a boiler can often require the expertise of the plumbing, electrical and fire inspectors. Fire sprinkler installation is another area where cross training of responsible parties could not only increase understanding of requirements but also facilitate faster approval through the preconstruction phase.

A second tier of training that would be helpful in decreasing the approval time for design plans is code training for architects and engineers. Through meetings with local building and fire officials it was determined that some professionals as well as contractors are not proficient in the current Massachusetts regulatory requirements. This lack of proficiency can ultimately translate into problems where plans are not in conformance with these Massachusetts requirements. While architects and engineers are licensed professionals, there are no continuing education requirements to maintain their status. However, continuing education could be included and negotiated with their respective professional organizations for them to maintain their good standing. Should there be a coordinated education program developed, curriculum could be developed to assist contractors and developers with compliance issues and best practices to facilitate the approval process.

In order to facilitate multi-discipline training there needs to be a dedicated funding source that can insure that the courses that are offered are provided on a regional basis, are given with appropriate frequency, effectively administered, and meet the needs of the construction/regulators population. Currently, the state agencies that provide training provide this service through their operating budgets. A potential revenue stream that could provide adequate funding to administer a comprehensive training program would

be to dedicate a percentage of each permit fee collected. This percentage would need to be established based upon the final estimated costs for a comprehensive training program. Unlike building officials, fire officials collect little or no fee by statute (capped at $10) to rely upon as a source of training funding. Fire officials would need either appropriation from the legislature or a portion of the building permit fee.

Recommendation II: Require minimum training and continuing education requirements for local officials, regulators, design professionals and practitioners.

- Offer joint training for overlapping topics and topics that are often sources of conflict or confusion.
- Offer separate and specific training for inspectors, promulgation officials, developers, architects, builders and other affected trades.
- Establish minimum and continued educational requirements for inspector certification and professional licensure. Note: The Fire Training Council does all fire certification pursuant to statute.
- Standardize the term of certification. Note: The Fire Training Council does all fire certification pursuant to statute.
- Establish a dedicated funding stream to pay for this training and education.

Problem Statement III: *Technology has not been adequately utilized to support building code and specialty codes compliance and administration.*

The various codes in the Commonwealth are not consistently available on the web and code related sites are maintained on the independent state agency home pages. This lack of coordination can be burdensome to both, the building professionals as well as contractors and developers. Each code should be digitized and be available on line. All code related information should be centrally located on a single state web site with appropriate links to other pertinent information. This site should also include links the boards that agencies that promulgate the codes and to municipal web sites that include local officials information.

Computerization and standard permitting was discussed by the subcommittees and while soliciting the feedback from local building and fire officials. Local officials did not believe that a single standard permit, provided by the state would shorten the length of time in the construction process significantly to warrant the creation of this form. However, the contractors and developers did indicate a desire to have a standard permitting form, since they work in multiple municipalities and see variation between these forms. State regulations do insure that all permits issued in the Commonwealth require the same information but not in standard format. In addition, there was some interest for allowing contractors to fill out permits on line. This is not available in most municipalities at this time and would require dedication of sufficient technological resources at the municipal level to provide this service.

If a revenue stream were to be provided by a percentage of all permits issued in the commonwealth for training or other purposes, then an adequate tracking system would have to be devised. Many other states are currently tracking permits statewide and this tracking software is already commercially available. However, all municipalities would need to have, or be provided a personal computer to maintain this permit-tracking database. Such a database would provide details of all types permits being issued and could also be use to planners in anticipating needs and impacts that directly relate to construction and land use.

Recommendation III: Use current technology to make code compliance and enforcement a more user-friendly efficient process.

- Provide every community with equipment and software for computerized permitting and tracking.
- Develop a single website with all the state codes and the capacity to keyword search all of them.
- Develop the capacity at Secretary of States office for electronic public access of information.

Problem Statement IV: *Inadequate staffing at the local level.*

In order to get an understanding of the problems faced by local officials, we conducted two focus groups. One was with the Southeastern Massachusetts Building Officials Association and the other one was with the Fire Prevention Association of Massachusetts. We distributed a survey (see Exhibit 3) that asked a variety of questions related to what problems they encountered with their role of interpreting, inspecting and enforcing the building and specialty codes. In addition to the desire for more training and education as discussed above, many inspectors complained of inadequate staffing to perform the multitude of tasks for which they are responsible. Some officials noted that MGLs required the building official to be responsible for administrative duties that they felt were irrelevant, such as: deed research to determine if a proposed building site is former railroad land; verification that applicants have worker's compensation; insuring proper disposal of debris; and determination that a project does not interfere with airport approaches.

This lack of staffing capacity is exacerbated in good economic times when building activity increases, making it difficult for local officials to perform their jobs efficiently. And it is even more difficult for part time officials to perform all their duties and it makes coordination with other departments more difficult and time consuming. Building department officials noted that they are the only group required by statute to issue a building permit within 30 days, and that other departments either had no time limitation or differing timetables and felt that all other regulating departments (e.g., Fire Department, DPW, DEP, etc.) should be put on a timetable that fits within theirs. The issue of an appropriate time frame for the overall process should be considered by the code coordinating council.

Recommendation IV: Recommend staffing requirements for state regulating agencies and local communities commensurate with housing activity and responsibilities to ensure sufficient resources to process applications and inspections efficiently. Consider the staffing levels recommended by the Insurance Services Organization (ISO). Recommend a process for continually monitoring manpower requirements for proper code enforcement at the state and local level. It was also recommended that the money collected by towns from building fees be dedicated to funding local officials' departments/staff, or be passed along to the general fund where it would be used to fund the training of local officials.

Problem Statement V: *Inadequate staffing at the state level.*

At the state level, it was noted that there are advantages to having a regional state presence in order to provide technical assistance to local officials and to expedite appeals. Currently there are 15 fire districts and 5 building districts in the state. It was suggested that it would be beneficial to align these districts. The group discussed the fact that additional building inspectors, fire inspectors and engineers, electrical investigators, and plumbing investigators should be added to provide regional capacity in expediting code interpretation and appeals.

Recommendation V: The Department of Public Safety in conjunction with the Department of Fire Services shall establish six (6) Regional Code Support Centers.

The Objectives of the Centers are:

- To provide a regional resource for local officials for technical assistance on State Building Code and specialty codes as they relate to specific projects within the region.
- To provide a regional presence, for the support of local municipalities in the event on an emergency situation occurring within the region.
- To provide a source for initial mediation of construction or design issues prior to the formal filling of an appeal with the appropriate appeals board.
- To develop and deliver regional joint training of local officials who enforce state codes.
- To provide regional reference document resource for local officials.
- Align Building and Fire Districts within state for unified approach on code related issues.
- It is recommended that each Regional Code Support Center be staffed with appropriate personnel from the appropriate state regulatory agencies to provide services.

These recommendations are subject to funding for appropriate staffing levels.

Building Code Subcommittee Report

Problem Statement VI: *Local requirements are imposed that are beyond a municipality's authority.*

In the Executive Office of Administration and Finance policy report, entitled Bringing Down the Barriers: Changing Housing Supply Dynamics in Massachusetts, the authors determined that one set of impediments to building construction arises from "*formally imposed requirements that are beyond a municipality's authority*"[3]. This statement reflects Chapter 802 of the Acts of 1972 as amended which repealed all conflicting local building codes and gave authority to write a State Building Code to the Board of Building Regulations and Standards. Conflicting amendments to the State Building Code are not permitted without express permission of the BBRS (MGL c. 143 § 98).

In response to this report, the Office of the Attorney General, the Executive Office of Administration and Finance and the State Board of Building Regulations and Standards undertook a project to attempt to establish the extent to which local municipalities may have inadvertently introduced conflicting building code-like regulations into their local zoning bylaws and other regulations and policies. (Refer to Exhibit 4 for the methodology and the project status.)

Although it is not be possible to definitively quantify all locally conflicting building code like regulations (as many regulations are imposed at the time of special permit applications or plan review meetings), information received to date reveals that many municipalities have incorporated conflicting building code-like language into local zoning bylaws (see Exhibit 5).

The Office of the Attorney General is empowered to review local zoning by-laws for consistency with state law. The Attorney General, upon completing the review, is authorized to approve or disapprove such by-laws within 45 days of its submittal. It is the position of the Attorney General's office that the State Building Code may preempt many local bylaws and has disapproved many local zoning by-laws which have attempted to regulate in ways that conflict with state regulations.

The same review process is not provided for city ordinances, local general by laws, policies, rules and regulations, which, oftentimes are promulgated by well-intentioned boards, commissions or department heads. Such conflicting regulations however cannot result in the creation of local building codes or local municipality amendment to the State Building Code as the sole authority to promulgate a building code for the Commonwealth resides with the BBRS. Because of the lack of oversight many municipality boards, commission and agency heads have indeed, albeit inadvertently, promulgated conflicting building regulations without the legal authority to do so.

Recommendation VI: Provide appropriate training for municipal regulators, planning boards and legal counsels in an effort to prevent the creation of conflicting local building codes that represent a barrier to building construction, especially residential

[3] Ibid. p. 83

development. In cases where municipalities have adopted conflicting building code-like language in contradiction to c.802 of the Acts of 1972, as amended and/or MGL c.143 §§ 93-100 as applicable, the Attorney General shall submit written notification to communities and work with the subject communities, to rectify the identified legal conflicts.

In order to accomplish this, the investigation and evaluation of conflicting local building code-like requirements must be completed and documented. The Attorney General must review all findings to determine if such local regulations, requirements, policies, conflict with the requirements of c.802 of the Acts of 1972, as amended and/or MGL c.143 §§ 93-100, as applicable.

Building Code Subcommittee Report

EXHIBIT 1

PARTICIPANTS IN BUILDING CODE SUB-COMMITTEES TO SPECIAL COMMISSION ON THE BARRIERS TO HOUSING DEVELOPMENT

NAME	AFFILIATION
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Brian Gore, P.E.	Technical Director Executive Office of Public Safety One Ashburton Place, Room 1301
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Steve Houle, President	Building Office of Western, MA Building Commissioner, Town of Ludlow 488 Chapin Street

Building Code Subcommittee Report

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Charles Dinezio	8 Auburn Street Charlestown, MA 02129
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Vernon Woodworth	The Sullivan Code Group The Boston Society of Architects 343 Commercial Street Boston, MA 02109
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James Fahey	Executive Secretary Board of State Examiners of Electricians 239 Causeway St. Boston, MA 02114
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Deb Ryan	Architectural Access Board 1 Ashburton Place, Room 1310 Boston, MA 02108

Building Code Subcommittee Report

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EXHIBIT 2
Massachusetts Building and Specialty Code Enforcement and Regulatory

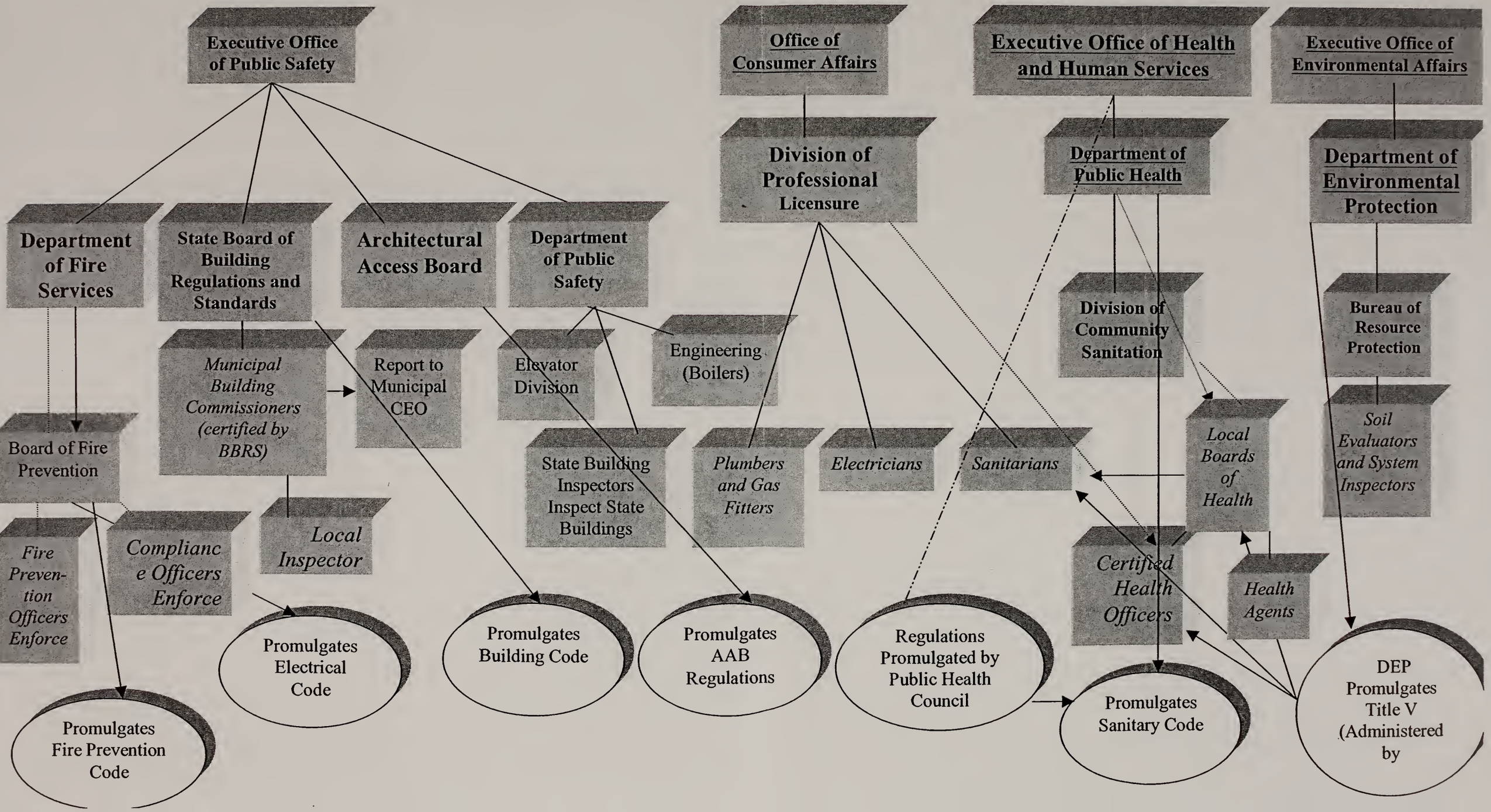

EXHIBIT 3

Survey for Fire Prevention Association Meeting
July 10, 2001

Is the building community knowledgeable and responsive to the fire prevention requirements for new construction and rehab? If not, how could this be improved?

What suggestions do you have to better coordinate with the other local officials that are responsible for permitting and approvals, i.e. conservation, health, building, etc.?

What types of training would be beneficial for fire officials, other than what is currently provided (e.g. blueprint reading)?

Would joint training with other agency (electrical, building etc?) officials be helpful?

Staffing resources for Fire Officials. Is staffing (lack of administrative support, inspectors, etc.) an issue locally, particularly in high growth communities?

Would standard building permit forms, provided by the state, be helpful?

What suggestions do you have to better coordinate regulations, roles/responsibilities at the state level?

Survey for Southeastern Mass Building Officials Association Meeting

Please take a moment to answer the following questions.

1. How can you better coordinate with the other groups that are responsible for permitting and approvals, i.e. conservation, health, fire protection, etc.?

2. Is there additional training for local building officials, other than those that are currently provided, that would be helpful?

3. Would joint training with other agency (electrical, fire, etc.) officials be helpful?

4. Architectural Access Board requirements. Is there additional assistance (communication, training) needed in the area of accessibility requirements?

5. Staffing resources for Building Officials. Is staffing (lack of administrative support, inspectors, etc.) an issue locally, particularly in high growth communities?

6. Would standard building permit forms, provided by the state, be helpful?

7. Are there roles and responsibilities that are currently being performed by building officials that are, or should be another group's responsibility?

8. Are there other types of assistance that could help you do your job more effectively?

EXHIBIT 4

Methodology for the Review of Local Bylaws, Policies & Procedures

The following describes the tasks undertaken to accomplish this Special Project:

- Gathering zoning, general by-laws, policies, procedures from all 351 municipalities of the Commonwealth.

- Analysis of the information for building code like language using, where appropriate, selection of words and word phrases associated with the regulations of the Massachusetts State Building Code. (Refer to Attachment 1 for the list of words and word phrases utilized);

- The development of a Database to manage and to track what kinds of information are received from what municipalities and the identification of what rules, regulations, bylaws, policies, etc., might inadvertently compete with requirements of the State Building Code;

- Review of all city and town zoning bylaws (and general bylaws, when available), relative to the concern of inadvertent building code-like language;

- Review of all city and town regulations, rules, policies, etc., relative to the concern of inadvertent building code-like language;

- Identification, on a town and city basis, specific possible problem zoning bylaws, regulations, rules, policies, etc., to be forwarded to the Office of the Attorney General for assessment of legal standing relative to law creating the State Building Code (refer to Attachment 3 for specific examples of possible problematic zoning bylaws);

- Communication, by the Office of the Attorney General, to applicable cities and towns regarding problematic bylaws, regulations, rules, policies, etc.

The following are examples of words and phrases found in zoning bylaws, which may compete with the requirements of the state building code (alphabetical).

"certificate of occupancy"
"construction type"
"exit"
"fire alarm"
"fire detection system"
"heat detector"
"smoke detector"

"sprinkler"
"swimming pool fence"
"use group"

Complete list of words and word phrases utilized for the zoning bylaw review and which will also be utilized in review of policies, regulations, etc.

Note that those words and word phrases marked with an asterisk (*) are words and phrases that have, in the past, been identified with zoning bylaw building code-like language that resulted in certain bylaw disapprovals by the Attorney General.

alternative energy	fire alarm*	inspection
affordable housing	fire code*	installation permit
auxiliary system	fire detection system*	issuance of a building permit*
building code*	fire permit	master box*
building permit*	fire prevention code	occupancy permit
certificate of occupancy	fire protection system*	pull station*
construction	flood*	smoke detector*
construction type	foundation*	sprinkler*
egress*	heat detector*	structural
exit	height and area	swimming pool fence*
energy conservation	housing	use group

Status the Review of Local Bylaws, Policies & Procedures Project

- The zoning bylaws of all 351cities and towns have been screened.

- Additionally, as of the end of August, 189 communities have provided information (for other than zoning bylaws) relative to regulations, rules or policies adopted by local boards and departments that are related to zoning, land use, construction or development, as well as copies of standard conditions, written policies or other relevant documentation in the city or town's regulatory scheme that could have these areas as their focus.

- Of the 162 communities (351 - 189 = 162) that have not provided regulations, rules, policies, etc., interns have spoken to city or town agents from 98 of these communities requesting further information as applicable, but 64 (162 - 98 = 64) communities have still not responded to phone queries.

- Review and assessment of other than zoning bylaws; i.e., rules, policies, etc. continues.

- Formal documentation of potentially problematic zoning bylaws, regulations, policies, etc., for transmittal to the Office of the Attorney General for possible action, has yet to be done.

EXHIBIT 5

Specific examples of possible problematic zoning bylaw language.

Certificate of Occupancy - The Town of W---- bylaw reads: *A new certificate of occupancy shall be required if there are any major structural alterations involving an increase in the total square footage, of greater than twenty-five (25) percent, or substantial variation from the operations referred to in the original Building Permit.*

NOTE THAT CERTIFICATE OF OCCUPANCY REQUIREMENTS ARE SET FORTH IN THE STATE BUILDING CODE, CHAPTER 1, SECTION 120.

Construction type (the word "construction" is actually at issue) - The Town of X--- bylaw, in part, reads: *For all new construction and substantial improvements, fully enclosed areas below the lowest floor...subject to flooding shall be designed to automatically equalize hydrostatic flood forces...*

NOTE THAT FLOOD RESISTANT DESIGN REQUIREMENTS ARE SET FORTH IN THE STATE BUILDING CODE, CHAPTER 31, SECTION 3107 (note also that methods of construction are not to be incorporated into zoning bylaws per MGL c.40A, § 3).

Fire alarm - The Town of G--- bylaw, in part, reads: *All new housing or other buildings that may create a danger to life or property from fire shall be consistent with the town-wide comprehensive fire protection code. The Fire Chief may make recommendations for fire prevention measures including, but not limited to fire ponds, dry hydrants, sprinkler systems, and alarm systems per the National Fire Prevention Association Standards.*

WITH THE EXCEPTION OF CERTAIN MGL c.148 LAWS, ALL FIRE ALARM REQUIREMENTS FOR ALL USE GROUP BUILDINGS, INCLUDING RESIDENTIAL BUILDINGS ARE FOUND IN THE STATE BUILDING CODE, CHAPTER 4, OR CHAPTER 9 OR CHAPTER 34 OR CHAPTER 36, AS APPLICABLE.

Exit - The Town of D--- bylaw, in part, reads: *Every subsidiary apartment shall have two separate exits, one of which may be an emergency fire exit available at all times.*

NOTE THAT REQUIRED MEANS OF EGRESS CRITERIA (which includes requirements for "exits") ARE SET FORTH IN THE STATE BUILDING CODE, IN CHAPTER 4 OR CHAPTER 10 OR CHAPTER 34 OR CHAPTER 36, AS APPLICABLE.

Fire detection system - The Town of H--- bylaw, in part, reads: *Every multifamily development, whether condominium or rental, built after 1984 shall install an automatic fire-*

detection system in each building...The automatic fire-detection system shall be wired into the fire station...

WITH THE EXCEPTION OF CERTAIN MGL c.148 LAWS, ALL FIRE DETECTION REQUIREMENTS FOR ALL USE GROUP BUILDINGS, INCLUDING RESIDENTIAL BUILDINGS ARE FOUND IN THE STATE BUILDING CODE, CHAPTER 4, OR CHAPTER 9 OR CHAPTER 34 OR CHAPTER 36, AS APPLICABLE; ADDITIONALLY, THE SUPERVISING OF SUCH SYSTEMS IS ALSO DEFINED VIA CHAPTER 9, SECTION 923.

Heat detector - The Town of B--- bylaw, in part, reads: *The smoke and heat detectors shall be located in the immediate vicinity of, but outside of, all sleeping rooms and in attic space and cellars.*

WITH THE EXCEPTION OF ONE RETROFIT MGL c.148 LAW, THE PLACEMENT OF SMOKE AND HEAT DETECTORS (IF APPLICABLE AT ALL) IS DELINEATED IN THE STATE BUILDING CODE AND ITS DEFAULT REFERENCE STANDARDS. THE STATE BUILDING CODE IN BOTH CHAPTERS 9 AND 36 REQUIRES SMOKE DETECTORS IN ALL BEDROOMS (typically smoke detectors should never be placed in attics as attic ambient temperature swings can exceed the ambient temperature listing of the detector and dust accumulation subjects the device to false alarming - although currently under discussion, heat detectors for one and two-family buildings are not yet required in the State Building Code due to earlier ambient temperature listing issues should such devices be placed either in unheated garages or in unheated attics where ambient temperatures may swing from below zero to well above 150 degrees Fahrenheit thus exceeding traditional device listing temperature requirements).

Smoke detector - The Town of W--- bylaw, in part, reads: *A copy of the sketch of the building, showing location of the smoke detectors...shall be forwarded to the chief of the fire department for review. Said fire chief shall make recommendations, as he deems appropriate...*

THE BUILDING PERMIT APPLICATION PROCESS AND REQUIREMENTS FOR SMOKE DETECTORS ARE SET FORTH IN THE STATE BUILDING CODE - THE BUILDING OFFICIAL CAUSES FORWARDING OF PERMIT APPLICANT FIRE PROTECTION SYSTEM LAYOUT FOR REVIEW TO THE HEAD OF THE FIRE DEPARTMENT BUT THE CRITERIA FOR SMOKE DETECTOR LAYOUT IS NOT THE PURVIEW OF EITHER THE FIRE CHIEF OR THE BUILDING OFFICIAL - SMOKE DETECTOR LOCATION REQUIREMENTS ARE SET FORTH IN THE STATE BUILDING CODE IN CHAPTERS 4 OR 9 OR 34 OR 36 IN CONJUNCTION WITH REQUIREMENTS OF THE APPLICABLE REFERENCE STANDARDS.

Sprinkler - The Town of G--- bylaw, in part, reads: *All new housing or other buildings that may create a danger to life or property from fire shall be consistent with the town-wide comprehensive fire protection code. The Fire Chief may make recommendations for fire*

prevention measures including, but not limited to fire ponds, dry hydrants, sprinkler systems, and alarm systems per the National Fire Prevention Association Standards.

("**sprinkler**", continued from previous page)
WITH THE EXCEPTION OF CERTAIN MGL c.148 LAWS, ALL FIRE SPRINKLER REQUIREMENTS FOR ALL USE GROUP BUILDINGS, INCLUDING RESIDENTIAL BUILDINGS ARE FOUND IN THE STATE BUILDING CODE, CHAPTER 4, OR CHAPTER 9 OR CHAPTER 34 OR CHAPTER 36, AS APPLICABLE (it is not the purview of either the fire chief or building official to unilaterally decide whether sprinklers are required or where they shall be located; such is established by the State Building Code and its default to applicable reference standards).

Swimming pool fence - The Town of A--- bylaw, in part, reads: *Outdoor swimming pools having a capacity of 4,000 gallons or more shall be completely surrounded at all times by a fence or wall not less than four feet in height above grade...*

FENCING REQUIREMENTS FOR SWIMMING POOLS ARE FOUND IN THE STATE BUILDING CODE, CHAPTER 4, SECTION 421.

Use group - The Town of H--- bylaw, in part, reads: *Floors of occupancies in any use group, other than use group R (residential) below the base flood elevation may conform to 780 CMR 3107.5.4 as an alternative.*

NOTE THAT FLOOD RESISTANT DESIGN REQUIREMENTS ARE SET FORTH IN THE STATE BUILDING CODE, CHAPTER 31, SECTION 3107 (when applicable, the requirements of Section 3107 are not optional).

Fire Chiefs' Association of Massachusetts, Inc.

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Chief Thomas E. Garrity
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28 September, 2001

Sarah Young, Deputy Director for Policy Development
Department of Housing and Community Development
One Congress Street, 10th Fl.
Boston, MA 02114

RE: Minority Report

Dear Ms. Young:

Attached is a minority report developed jointly by the Fire Chiefs Association of Massachusetts and Fire Prevention Association of Massachusetts. The purpose of this report, which is being submitted to the full board, is to address the following points that have been brought out at the subcommittee level but not fully addressed at the full committee.

The major points are:

We are in agreement on the formation of a Code Coordinating Council to streamline the process, however, the approach to date has been on-sided. The adoption of a model building code has lead to many conflicts with the specialized codes. This process had been slanted toward the building code and needs to be uniformly neutral in looking at all codes. Training and staffing are important at all levels, both state and local. This area needs to be addressed completely.

Although we don't disagree with the approach of reviewing by-laws, we believe that this should be a slow and methodical process. There is a substantial amount of legal work that needs to be completed, and should be completed by inexperienced interns. Legal counsel for all code board should complete this process. Further, it is felt that the cities and towns have the legal right through Home Rule authority, to further regulate conditions. These issues have been brought out through the Department of Environmental Protection (DEP), as well.

In conclusion we look forward to the meeting on October 9, 2001 to further express our concerns/options.

Sincerely,

H. H. Boswell Jr.

Hobart H. Boswell, Jr.
President
Fire Chiefs' Association of Massachusetts, Inc.

"United To Face The Future"

Fire Prevention Association of Massachusetts, Inc.

P.O Box 111, South Yarmouth, MA 02664-0111
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Established February 1974
255-0050
Steven P. Edwards, President – William A. Greene, Jr., Secretary – Sheldon C. Hamblin, Treasurer

Building Code Subcommittee Working Group Tasks
8/3/01

I. Create a Code Coordinating Council at the state level to coordinate codes, and the processes for the promulgation of regulations, licensing, inspections and appeals. Recommend that the Secretary of Administration and Finance will chair this Code Coordinating Council. The Council will also:

- Address overlapping code promulgating jurisdictions to prevent conflict and duplication.
- Suggest modifications to existing timeframes for permitting and appeals that logically follow standard building practice.
- Clearly define roles, expectations and limits of authority of the various boards involved in the permitting process.
- Establish a guidebook for communities, which presenrt a model protocol to promote the coordination of the building process from permitting, ti insspections to issuing certificates of occupancy.

Minority Report:

We are in agreement with the need to create a code coordinating council to assist in streamlining the regulatory process. The one key missing in this list of activities and what has been completed to date is the need to look at all codes. The committee is focusing on what is conflicting with the building code. However, with the adoption of a model building code the building code is currently conflicting with many of the specialized codes. These specialized codes were protected by the legislature in 1975 when the State Building Code was first adopted. The legislature mandated that the building code incorporate these specialized codes. Over the years the building code has tried to further regulate in areas overlapping with these codes.

Again, we support the idea, but not the one sided approach currently being taken. As has not been the case with this process, it is important to remain neutral throughout. This process has been slanted to the building code viewpoint. Further, the first several meetings took place with only building officials. It is imperative that this process be open to all fire, electrical, plumbing, etc..

We believe that the approach to this has been negotiated recently and is reflected in the proposed draft legislation creating the code coordinating council, will go a long way in providing an equitable methodology to address these problems.

II. Offer additional training opportunities, and continuing education requirements for local officials and regulators.

- Offer joint training for overlapping topics and topics that are often sources of conflict and confusion.
- Offer separate and specific training for inspectors, promulgation officials, developers, architects, and builders.
- Establish minimum and continued educational requirements for inspector certification.
- Establish a dedicated funding stream.

Minority Report:

In looking at the regulations there is nothing more important that the need for training to officials on the regulatory front. The part this is missing is the funding associated with this training. Currently, all the regulatory groups have extremely limited budgets that don't allow for training. In many cases, outside "experts" are the necessary training tool, but there is no funding stream. Fire officials may require an appropriation to cover cost of training as there is no identifiable retained revenue source.

Although we support minimum training and certification requirements, it must be pointed out that the establishment of minimum qualifications for fire officials is protected by statue. This statue specifically gives the Training Council the authority to establish these standards. Further, establishing minimum qualifications for fire officials will force the cities and towns into an unfunded mandate by the state. As such, the state must be aware and willing to provide funds to accomplish this task. This willfurther be complicated by the fact that there are numerous call/volunteer fire departments that will be adversely affected. As part of this proposal it may be important to review minimum staffing levels for areas and encourage the need to coordinate between towns a minimum staffing level.

III. Recommended staffing requirements for state regulating agenciesand local communities commensurate with housing activity and responsibilities to ensure sufficient resources to process applications and inspections efficiently. Recommend a process for continually monitoring manpower requirements for proper code enforcement at the state and local level.

Minority Report:

One of the largest aggrevations of both the regulated community and the regulators is the lack of support on a statewide level. Both the regulated and regulator needs to have adequate manpower and resources to assist in the interpretation of the regulations. This statewide level of assistance is further necessary to allow for a personnel to be on site. This statewide level needs coordination amongst the various state groups. The resources that are necessary are at times of a technical nature. The state needs to provide support to the regulated of a professional and technical nature. The state needs to provide a

Assistance in areas of engineering. This is one of the largest concerns at a local level. Developers tend to bring in all kinds of experts to sometimes intimidate the local offiials into believing their position is correct. It must be remembered that these "experts" are paid for by the developers and will attempt to accomplish the developer's needs.

The state also needs to review the hiring and pay process. It is necessary for the state to recruit talented individuals. The state hiring process is extremely cumbersome and also fails to pay for qualified individuals. The state needs to remain competitive in the Commonwealth's market place. Under no circumstances should the critical function of public safety inspection be privatized. This in essence would be having the fox guard the proverbial chicken coop. Public officials serve only one master, the public and the public safety free from the pressures of profit and expediancy.

IV. Use current technology to make code compliance and enforcement a more user friendly efficient process.

- Provide every community with equipment and software for computerized permitting and tracking.
- Develop a single website with all the state codes and the capacity to keyword search all of them.
- Develop the capacity at Secretary of State office for electronic public access of informatrion.

Minority Report:

We agree with this process.

V. Conduct a review of all local zoning bylaws to identify communities that are using zoning laws to supersede State Building Code.

Minority Report:

Although we do not disagree with the general goal of reviewing local by-laws to eliminate unlawful conflict, we suggest a slow and thoughtful approach be taken as the area of preemption is not black and white. There is substantial body of opinion in the legal community for example that would argue that cities and towns have further authority to regulate building conditions either by special permit or through Home Rule Authority. We would suggest legal counsel for BBRS and the specialized codes meet to discuss this issue with the Attorney Generals office.

9/26/01

To: Sarah Young
Linn Torto

From: Michael Kass, Board Counsel

Re: Comments for final report of Barriers Commission Recommendations

The following comments are on behalf of the Board of Examiners of Electricians, the Board of Examiners of Plumbers and Gas Fitters and the Division of Professional Licensure.

I. Create a Code Coordinating Council at the state level to coordinate codes, and the processes for the promulgation of regulations, licensing, inspections and appeals. Recommend that the Secretary of Administration and Finance will chair Code Coordinating Council.

The Division and our Boards are in favor of the creation of this Council. We support the make up of the Council as proposed in Linn Torto's 9/12-draft memo. As I stated in comments regarding Linn's memo, The Division and the Boards support the fact that both the Electrical and Plumbing Boards are members of the Council. If either Board were removed from the list of members, the Division and the Boards would withdraw our support of the make up of the Council. The Plumbing Board promulgates and enforces the state Plumbing Code and acts as a forum for appeals from decisions of local plumbing inspectors. The Electrical Board is not only the primary authority for the interpretation of Electrical Code issues, it promulgates regulations (237 CMR) governing the practice of electricians (including permitting and inspection issues), enforces the state Electrical Code through adjudicatory proceedings and serves as the board of Electrical Appeals. The Board of Appeals hears all appeals from decisions made by local electrical inspectors regarding local level code interpretation and enforcement and has the statutory authority to uphold, reverse or revise decisions made by local inspectors of wires. Since the Electrical Board and Plumbing Board are the front line Plumbing and Electrical Code boards, they certainly have the most expertise to make recommendations to eliminate redundancy, minimize inconsistencies and conflicts and maximize the efficiency of the code promulgation process.

The Boards and the Division are concerned that this Council has the potential to become skewed in favor of promulgation that adopts a national "model building code" without recognizing and preserving distinctions in the specialized codes that we feel are crucial to public safety. The specialized codes were protected by the legislature in 1975 when the statewide Building Code was first promulgated. There is a reason that such specialized codes are protected. The plumbing and

electrical industries are independently regulated in order to ensure and maintain public safety. The individual Boards retain the technical expertise to best protect the public from shock, fire, explosion and sanitary hazards. That is why we feel it is so crucial that the Plumbing and Electrical Boards remain on this Council. Additionally, the Division and the Boards applaud the fact that Secretary of A & F is the Chairman with "exclusive responsibility for the conduct of the Council." Having A & F head up the Council as opposed to any particular promulgating agency allows each contributing code agency to contribute its full level of expertise and insight and eliminates the fear that any one agency is attempting to control or "take over." A & F is not only a "neutral" player in the Code playing field - A & F has the authority to allocate resources where needed.

II. Offer additional training opportunities and continuing education requirements for local officials and regulators.

The Division and the Boards very much support this recommendation including joint training on overlapping topics; separate and specific specialized training, establishment of minimum continuing ed. requirements for inspector certification and the establishment of a dedicated funding stream.

Recent legislation went into effect with the support of the Plumbing Board requiring mandatory continuing education for plumbing inspectors. The Electrical Board requires con. ed. for all electricians and supports proposed legislation requiring inspector certification.

The Division and the Boards recognize that local plumbing and electrical inspectors are the front line of defense for citizens and consumers to protect them from safety and health hazards, incompetence and fraud. We support all efforts to enhance the knowledge and professionalism of local inspectors.

III. Recommend staffing requirements for state regulating agencies and local communities commensurate with housing activity and responsibilities to ensure sufficient resources to process applications and inspections efficiently. Recommend a process for continually monitoring manpower requirements for proper code enforcement at the state and local level.

The Division and the Boards are in favor of any effort to increase inspectional resources. We strongly believe additional resources are greatly needed at the state level in order to allow the Division and the Boards to better serve the public and better serve the local inspectional community. Local inspectors turn to our boards on a daily basis seeking technical, code interpretation, investigative and enforcement assistance. Our resources are stretched extremely thin. Each board currently has only two inspectors and very limited staff to cover inspectional, code enforcement and licensing issues that arise statewide. This being said, it must also be stressed that the Boards are extremely opposed to any efforts being

made to privatize state and local inspectional functions. Plumbing and Electrical inspections are a critical function of public safety. Such a public safety enforcement role is one of the main missions of government. The Boards feel it would be extremely careless and dangerous and lead to conflicts of interest to entrust such a vital function of government to the profit driven private sector.

IV. Use current technology to make code code compliance and enforcement a more user-friendly efficient process.

We are very much in favor of providing every community with equipment and software for unified computerized permitting and tracking and the development of unified websites. We also feel very strongly that it would help improve efficiency of code and regulation promulgation, compliance and enforcement to develop the capacity at the secretary of State's office for electronic public access of information including all related regulations and their promulgation process.

V. Conduct a review of all local zoning bylaws to identify communities that are using zoning laws to supersede State Building Code.

We believe gathering data is good idea. However, we also believe that the analysis of such data will require in depth legal review. The laws concerning zoning and local verses state authority are complex at best. Legal analysis of such data and recommendations from the analysis should probably be tasked to a group consisting of the attorneys from the various code agencies and representatives from the Attorney General's Office and the MMA.

Barrier's Commission Subcommittee on Title 5

Introduction

The subcommittee on Title 5 of the Special Commission on Barriers to Housing has met, shared experiences with both state and local regulations for the design and construction of on-site sewage disposal systems and reviewed a number of examples of such regulations. In summary, one could say all of these regulations in some way restrict land from being used for housing or, at least, add some cost to housing.

There are varying conditions across the state and local regulations that are based on science may produce better functioning systems, promote sanitation and protect important ecologic resources. Communities are facing severe limits on their ability to provide adequate water to drink and an environmentally sound method of disposing of their wastewater. Properly operating on-site systems provide an effective way to dispose of wastewater and recharging groundwater.

Local boards of health presently have the authority to enact more stringent regulations than the present Massachusetts Sanitary Code found at 314 C.M.R.15.00. Local boards must enact these regulations under their general rule making authority pursuant to M.G.L. c.111, Section 31. They are required to file the regulations with the Department of Environmental Protection (DEP) for a central register. Not all boards of health comply with this requirement. While we are not aware of any legal challenges, presently the failure to file regulations with DEP is not fatal to the legal validity of the municipal regulations. Under Tortorella v. Board of Health of Bourne, 39 Massachusetts Appeals Court 277, (1995) the Massachusetts Supreme Court upheld the rights of the Board of Health to enact more stringent regulations.

The subcommittee identified several reasons why municipalities adopt standards stricter than Title 5. First, local environmental conditions may warrant it. Second, there continues to be debate about the science behind some parts of Title 5, such as setbacks, and municipalities may feel justified in going beyond the standards based on their own interpretation of the science. Third, communities may perceive that zoning regulations and other planning tools do not provide adequate means to properly manage growth. They may use local Title 5 regulations to fill this gap. The implication here is that the local regulations are not always based on science. Fourth, local boards may lack the resources or training to fully implement Title 5, so they misapply the regulations or prohibit some things allowed by the state. Finally, there are gaps in policy and implementation at the state level that may have led communities to adopt their own regulations.

This report makes recommendations addressing all but the first and second identified reasons. Where local environmental conditions legitimately require standards stricter than Title 5, there is a presumption that those environmental protections will be honored. Regarding the second issue, technical literature contains the results of studies that have

found varying rates of survival for pathogens traveling through saturated and unsaturated soils and also variations in soluble nutrient concentrations measured in the groundwater down gradient from on-site disposal systems. There is no consensus about safe or adequate setbacks from water supplies or environmentally sensitive lands and waters. The subcommittee chose not to debate science-based regulations regarding setbacks from resources but instead to evaluate requirements that had little apparent scientific foundation. However, it should be noted, that while supposedly science-based, there are numerous examples of regulations that appear to adopt the philosophy that doubling, tripling or even quadrupling Title 5 will provide a margin of safety. This multiplier concept may result in overly conservative regulations that could restrict land for housing.

1. Burdensome Local Limitations

1.1 Local Limitations

The subcommittee, relying extensively on their collective experiences, considered numerous local regulations adopted under M.G.L. c.111 sec. 31 and found common categories of conditions that constitute barriers to housing without a readily apparent public health or environmental benefit. Some subcommittee members felt that the local limitations are driven by a local initiative to limit or control growth and a desire for the board of health, through its regulatory powers, to overcome perceived weaknesses in local land use regulations. M.G.L. c.111, Section 31 requires boards of health to report the conditions that trigger stricter local requirements at a public hearing. While boards are required to file their local regulations with DEP, they are not required to state how science supports the limitations nor are they required to file that information with DEP. The Department has on file local regulations from 125 communities. The subcommittee did not try to resolve why the limitations were put in place. The restrictions that are summarized below exceed the Title 5 requirements, add costs, restrict land and can be barriers to housing without having, in the opinion of the majority of the subcommittee members, a demonstrable public health or environmental protection benefit.

(a) **Process Limitations** - Towns have enacted regulations limiting the time of year soil evaluations and percolation tests may be observed. Given that soil evaluators must be certified by the state and are taught to recognize soil features that are indicative of seasonal high groundwater, many of these time restrictions are unnecessary and delay without environmental or public health benefit. Other process limitations include seasonal limitations on construction of on-site systems, requiring system designs based upon "policies", not publicly available regulations or good engineering practices and lack of agent availability to witness soil testing or schedule design reviews.

(b) **Oversizing Requirements** - This is a very common feature of local regulations that clearly adds to the cost of housing and may, in fact, reduce treatment efficiency. Oversizing requirements include increased flow allowances – calculate per Title 5 then add 50% or double; over-counting

bedrooms – all rooms above the first floor shall be considered bedrooms; and directly boosting the long term acceptance rate of soil from that required in Title 5.

(c) **Reserve Area Requirements** - Communities have enacted regulations that require expanding setbacks between primary and reserve areas, especially for trench systems. Some communities require the reserve area be cleared and graded when the primary area is built and, at least in one case, to require the reserve area to be actually constructed with the primary area but not connected or used until a future failure, if ever, occurs. These requirements add substantial cost compared to Title 5 and appear to have limited environmental benefit.

(d) **Percolation Rate Limits** - While Title 5 allows building on lots with a sufficient area of soils having field-tested percolation rates of 30 minutes per inch or less, some communities have limited maximum rates to 20 minutes per inch thereby reducing land that would be otherwise buildable. Other communities have placed limits on sites where the percolation rates are too rapid and disallowed sites with rates less than 2 minutes per inch instead of requiring the design measures provided in Title 5. There is limited scientific reason for restricting percolation rates from those listed in Title 5 as long as proper design measures are followed.

(e) **Limiting or Prohibiting Mounded Systems** - A number of communities limit or prohibit the construction of disposal systems in fill to obtain the required separation between the bottom of the disposal system and the maximum groundwater level. These frequently include excessive off-grading requirements or setbacks from property lines, which can add significant costs. Many effectively prohibit mounded systems by requiring four feet of "naturally occurring" suitable material to be above the maximum groundwater elevation; several require 6 feet of separation. Some require 6 feet of naturally occurring soils, which would eliminate much of a mound. These effectively eliminate building lots with seasonal high water tables, conditions for which there are well-established engineering and construction solutions.

(f) **Limiting Innovative or Alternative Technologies for Systems** - Some communities have local restrictions on the use of innovative or alternative Title 5 systems. These systems, which provide a higher level of treatment, can be effectively used to address difficult remedial cases, especially near sensitive lands. This will allow additional existing housing stock into the marketplace.

(g) **Prohibiting Shared or Community Systems** - Title 5 allows individual homes to share a common disposal system within certain limits on flow and level of treatment. Many local regulations do not. This local prohibition limits remedial options where neighborhood problems exist. While there may be public hesitation to accept these community systems and legal arrangements are needed, there is no scientific or engineering reason why they cannot provide well-functioning systems that achieve a high level of environmental protection.

Recommendation

It should be noted that the subcommittee felt that there are in some circumstances science based reasons for having stricter local limitations and therefore rejected the idea of prohibiting communities from adopting their own standards. In response to concerns that some of the above restrictions might be anecdotal, DEP reviewed randomly selected local regulations from 12 communities to determine if any contained the above type restrictions. The results of that review are summarized in the attached table.

It is recommended that M.G.L. c. 111, section 31 be amended. Under the amendment the local board of health would be required to identify the local conditions which exist or reasons for exceeding such minimum requirements must specify the scientific, technological or administrative need to support the change in the regulations. Second, the board of health would have to file the regulation and supporting information with the DEP within thirty (30) days in order for the regulation to become effective. The statute should take effect one year after the date of enactment. There needs to be additional discussions and debate with the stakeholders and as part of the legislative process on whether or not to make this requirement retroactive.

During the one year between enactment and the effective date of the amendment, DEP should issue guidance to boards of health indicating that in its opinion the above types of regulations do not, on their face, appear to be based on science. Boards would be advised to examine their regulations and if they contain these types of condition they should obtain the necessary scientific documentation, if they haven't already done so, or eliminate them. DEP should collaborate with the Massachusetts Association of Health Boards (MAHB) and the Massachusetts Health Officers Association on providing guidance and training to local boards of health to assist them in improving their local regulations and practices and complying with the new requirements.

Lead: DEP
Cost: Two ftes and small contracts with MAHB and MHOA to provide guidance and training.

Results of Random review of Board of Health Regulations More Stringent than Title 5

TOWN	Process Limitations	Oversizing Requirements	Overbuilding Requirements	Percolation Rate Limits	Limit or Prohibit Mounded Systems	Limit I/A Technologies	Prohibit Shared or Community Systems
Billerica	X	X				X	
Bolton	X	X	X		X		
Boxborough	X		X	X	X		X
Deerfield		X	X				
Dennis	X	X	X		X		X
Dover	X	X	X	X	X		
Leverett			X	X	X		
Marion		X					
Norwell	X		X		X		
Rowley	X	X	X	X	X		
Stow	X	X			X		
Wendell	X		X				
Total	**9**	8	**9**	4	8	1	2

The total number of towns in the Commonwealth with known local board of health regulations or by-laws supplementing Title 5 is 125. The above data represents the review of approximately 10% of the towns with such regulations or by-laws for the seven criteria listed in Section 1.1.

1.2 Prohibitions on Alternative Systems and Shared Systems

Some communities have passed regulations barring the use of alternative technologies under Title 5 and/or use of Shared Systems. State government should renew its focus on these approaches because they have the potential to ensure high quality wastewater treatment and to encourage clustered residential development, groundwater recharge, and land conservation. Additionally, these systems can alleviate the incidences of perceived Title 5 problems (from the municipality's perspective), such as mounding or the need for larger than standard reserve areas and leach fields. They also offer the developer a less expensive option to installing many individual systems, thereby clearing the way for more affordable housing developments. In spite of these benefits, there are some barriers

to using Shared Systems, namely land use approval, liability, and long-term maintenance of systems. DHCD and DEP have worked together in the past to identify these issues, therefore, the next step is to identify feasible solutions.

Recommendation

DEP and DCHD should build on past collaborative efforts to identify other ways in which the two agencies can collaborate on the implementation of alternative technologies and shared systems. These efforts should include, at a minimum, an evaluation on how these systems are performing and whether there are ways to simply the procedures.

Lead: DEP
Cost: Minimal

2.Improved Science and Education

2.1 Technical Education

The subcommittee is aware that one important way to achieve more efficient board of health operations would be the increased access to science and training from DEP to the local boards of health. Advocates have worked hard to provide training for their members and the subcommittee would like to support these efforts. Board of health members with access to science and training are more likely to identify the public health issues and make informed decisions.

Much of the science used in developing the 1995 revisions to Title 5 was based on the Defeo-Wait Report. That report is now over 10 years old and while it was very comprehensive, there have been advancements in science as well as significant experience gained by DEP as a result of implementing Title 5. Improved science and technical information in the form of a guidance document would be useful to all parties in the Title 5 review process, namely; DEP, local boards of health, environmentalists, and the development community,

Recommendation

The Commission should consider funding an update to the DeFeo-Wait Report and collection of literature from the other states and relevant sources. An advisory group should be created by DEP to assist in compiling existing science and as a forum for technical discussions on updated scientific discussions.

Lead: DEP
Cost: Consulting contract less than $100,000

Recommendation

A guidance document similar to the DEP Stormwater Guidance document should be published that addresses the technical questions associated with Title 5 and provides the science and literature that address these issues. The Advisory Committee would oversee the update and assist in the presentation of the science and literature.

Lead: DEP
Cost: Consulting contract less than $100,000

Recommendation

A process for education of local boards of health should be developed to accompany publication of a guidance document, as well as any amendment to the board of health enabling statute.

Lead: DEP
Cost: Contract for training for approximately $100,000

2.2 Access to Resources

Boards of health across the state have varying levels of capability to implement Title 5. This capacity is primarily limited by the individual and collective knowledge and experience of the local board. Additionally, capacity is limited by access to resources, including training, funding, and personnel; perceptions on the part of board members regarding priorities and realities; circumstances within their jurisdictions, including landscape, natural resources, type of development occurring, etc.; time available to handle the job duties; and extent of their responsibilities. The characteristics of a community also factor in: natural resources, political circumstances, socio-economic situation, development priorities, demographics, etc. Boards of Health are especially vulnerable to a lack of capacity because their mission is very broad -- it covers public health and environmental management -- *and* they have regulatory authority.

Training itself can address some of the artificially strict Title 5 regulations. For instance, it is one solution to the problem of boards of health prohibiting alternative systems if they don't understand them and feel unprepared to regulate them. Training can also clarify what special resource issues might exist in a community that would warrant stricter regulations.

Recommendation

The Commission should consider the use of circuit riders for assisting local boards of health and their agents in implementing Title 5.

Lead: DEP
Cost: Five ftes per year for four circuit riders and one coordinator.

2.3 Cross-Board Training

While this subcommittee is primarily concerned with boards of health because they are the ones responsible for implementing Title 5, we are also working in the context of Title 5 as a barrier to development. The boards that are normally responsible for managing development are planning boards, zoning boards, and boards of selectmen. These are the boards that are trained in community development, while boards of health are trained in public health and environmental regulations. When Title 5 is used as a means to control development, it puts boards of health in the position of policing growth without having the benefit of training or experience in this area.

Recommendation

The Commission should consider providing funding to develop programs for cross-board training on general Title 5 for conservation commissions, planning and zoning boards, and boards of selectmen.

Lead: DEP
Cost: Consulting contract less than $100,000

Recommendation

The Commission should consider expanding existing efforts, such as the Local Capacity Building Partnership and ongoing work of DEP and DHCD to provide assistance to local boards.

Lead: DHCD

2.4 Integrated Wastewater Management

Wastewater management problems confronting communities today are comprised of complex and interrelated issues. Most remaining problems defy single solutions. Instead they require at least the consideration, and most likely the selection, of integrated solutions. DEP expects that proposals to manage complex wastewater management and water resources problems will incorporate a combination of traditional on-site disposal, moderately sized cluster systems and central collection and treatment technologies. The use of such an approach offers communities the chance to lower costs, keep water local and avoid some of the pitfalls that arise when attempting to site a single large discharge for all effluent. Title 5 plays an integral role in the state's effort to properly manage its water resources.

Recommendation

The Comprehensive Water Resources Management Guidance currently being developed by DEP for use by communities should include guidance on the role of typical on-site systems, shared and alternative systems and septage management

districts as part of integrated solutions to wastewater management. The guidance should include examples of successes that have occurred and samples of acceptable legal instruments that are often required.

Lead: DEP
Cost: Minimal

3. Title 5 Regulations and Policies

While the subcommittee on barriers focused on issues related to local Title 5 regulations, on several occasions, topics within Title 5 itself came up in the subcommittee's discussions. The subcommittee feels that it should include the results of those discussions it its report.

3.1 B Horizon

Based on the definition of impervious material, the DEP has interpreted Title 5 as excluding the B horizon, or subsoil, from use in soil absorption systems. This interpretation was based in part due to the fact that subsoil layers in Massachusetts vary considerably in thickness, texture and organic content. The B horizon, however, can be sufficiently permeable to be used in soil absorption systems. In addition, use of sufficiently permeable B horizon can provide some biological treatment of the septic tank effluent. DEP has recognized this and adopted a policy allowing for use of the B horizon for remedial use only. The science involved in developing the policy is also applicable to the installation of new systems.

Recommendation

DEP should develop a policy to allow for the use of B horizons, that are sufficiently permeable, in new soil absorption systems.

Lead: DEP
Cost: Minimal

3.2 Nitrogen Sensitive Areas

Title 5 contains a provision requiring additional treatment in nitrogen sensitive areas. It designates nitrogen sensitive areas as Interim Wellhead Protection Areas and mapped Zone IIs of public water supplies. The regulations also allow additional areas to be designated nitrogen sensitive as a result of scientific evaluation and incorporation within Title 5 and the Massachusetts Water Quality Standards. The regulations do not specify the nature of the scientific evaluation. However, some communities have required, through local regulations, additional treatment in areas they feel are nitrogen sensitive by creating their own procedures for designating nitrogen sensitive areas without guidance from Title 5.

Recommendation

DEP should develop a guidance document on the nature and extent of the scientific evaluations necessary to designate an area to be nitrogen sensitive as well as the procedures necessary to adopt such a designation.

Lead: DEP
Cost: **Consulting contract less than $100,000**

3.3 Percolation Rate

3.3.1 Change in Maximum Percolation Rate

Prior to the revisions of Title 5 in 1995, a lot was considered not buildable if the percolation rate of the soils available were slower than 30 minutes per inch as determined by a percolation test. The revisions to Title 5 in 1995 contained provisions for DEP to obtain information on the advisability of allowing the construction of onsite septic systems in situations where the percolation rate is slower than 30 minutes per inch.

Massachusetts is one of only two states that set a percolation rate limit of 30 minutes per inch. Most use 60 minutes per inch for the slowest acceptable field-tested rate. At the time of the last revisions to Title 5, the issue of raising the maximum percolation rate to 60 minutes per inch was left for further review by DEP after their analysis of 3 years experience with the then new regulations. Increasing the maximum allowable percolation rate to 60 minutes per inch would make available significant land areas of glacial till soils that have percolation rates over 30 minutes per inch.

DEP established a procedure for applicants to apply under a program that would permit up to "20 single family dwellings per year..." in situations where the percolation rate was slower than 30 minutes per inch. This procedure involves:

- Completing and submitting an application;
- Submitting plans and soil evaluations in accordance with Title 5;
- Obtaining and submitting a letter of support from the local approving authority;
- Submitting a monitoring plan that includes at least one annual inspection for seven years;
- Submitting an application fee of $450.

To date, with the potential for more than 120 applicants (20 per year x 6 years), DEP has received a total of less than 15 applications under this procedure. Some members of the subcommittee felt that the application procedures deter developers from exercising this option.

Although some individuals on the subcommittee favored changing Title 5 to accommodate the slower percolation rates, the regulator participants considered this ill advised. The provisions of Title 5 were meant to provide information to DEP on the

advisability of such a change; however, the lack of applicants has not afforded the opportunity for clear information. Subcommittee members pointed out that there have been slow percolation rate systems installed for some time now for remedial purposes and that a review of these systems could provide valuable information.

A primary concern of DEP has been that installation of on-site systems in high percolation rate soils requires specialized considerations in the design and construction of the systems as well as with the inspections of the installations and while there is experience in some parts of the state with the installation of systems in high percolation rate soils for remedial purposes, there is a lack of widespread experience among the practitioners within the state. Therefore it was felt that at least for the first several years there was a need for DEP oversight as training and experience developed for practioners.

The compromise position is to allow at least 20 but not more than 50 applicants per year to apply under this program, and provide better outreach and assistance to potential applicants. While the actual number of applications allowed will be set through the regulatory revision process, 50 was selected as the upper limit as it would only require minimal additional resources for DEP.

The reasons for the lack of applicants to the existing program are not clear. Some subcommittee members felt that the application was too similar to a Pilot Application, and hence required too much monitoring and was associated with the increased risks of that program and made lending institutions wary. An application packet could be developed that explained the program more completely, the application procedures could be streamlined and the regulations could be amended to remove some of the liabilities involved so that potential lending institutions would not assign the project a higher risk.

Recommendation

DEP should streamline the application procedure for applicants wishing construct septic systems where the percolation rate is between 31-60 minutes per inch, provide a better information packet and outreach component to explain the application procedure to developers and lending institutions, reduce the perceived risks involved, revisit the monitoring requirements and allow at least 20 but not more then 50 applications per year for two to three years. At the end of two to three years DEP should present the results of the monitoring information it has gathered to a group of stakeholders and determine if the implementation of slower percolation rates under the general provisions of Title 5 should be allowed.

Lead: DEP
Cost: Two additional ftes to review additional applications and review monitoring results.

Recommendation

DEP, in cooperation with the MAHB and MHOA, should gather and review information from local boards on their experience with low percolation rate systems installed for remedial purposes. DEP should incorporate the results of this effort into its presentation on the above monitoring program.

Lead: DEP
Cost: Minimal contracts with MHAB and MHOA.

3.3.2 Monitoring and Inspection Form

One deterrent of any permit program is the cost of the required monitoring, inspection and reporting. The intent of monitoring program being required by DEP is to ensure systems installed DEP in the slower percolating soil areas functioned hydraulically (since the treatment ability of slower soils is in general superior to faster percolating soils). DEP should include in the previously mentioned application packet a one-page inspection form that will meet the reporting requirements of the slower percolation rate areas.

Recommendation

Produce guidance for the monitoring program required in slower percolating soils and prepare a new inspection form.

Lead: DEP
Cost: Consulting contract less than $100,000

3.3.3 Training for Professionals

The initial reluctance of DEP to allow septic systems in slower percolating soils was due in part to the lack of proper system installation training received by members of the design and contract communities. While DEP has embraced the soils-based approach to septic system design, it realizes design and construction in tighter slower-percolating soils requires a higher level of oversight in all phases of the septic system installation. Training appropriate professionals can ensure proper design and construction.

Recommendation

DEP should implement a training program for the certification of Soil Evaluators, system designers and contractors for the design and installation of septic systems in slower soils, in anticipation of a revision to Title 5 that will accommodate up to 60 minutes per inch percolation rates.

Lead: DEP
Cost: Two ftes for two years and one fte per year thereafter.

3.3.4 Waiver of Fee

In the period between now and the possible implementation of slower percolation rates, under the general provisions of Title 5, all applications with this feature should continue to be reviewed and approved by DEP. The $450 application fee was meant to compensate, in part, for the time required by personnel to review individual projects. If, as some contend, the application fee deters potential applicants of affordable housing, the application fee could be either eliminated or waived on the basis of each applicant's financial status or some other objective criteria.

Recommendation

Remove the $450 Application fee for this permit or waive the fee based on some affordability criteria.

Lead: DEP
Cost: Up to $67,500 in lost revenue over three years.

3.3.5 Local Approval

Some on the subcommittee felt that local jurisdictions were using regulatory controls outlined in Title 5 inappropriately as a growth control. This requirement of the Variance from Percolation Rate provisions is an obvious opportunity for local Boards of Health to exert control. Although the septic system plan will receive full review by DEP, the Committee did not reach a consensus on whether or not to delete the requirement for local approval.

4. Minority Reports

The subcommittee received one minority report and several sets of comments from members, copies of which are attached to this report. The subcommittee met to discuss the issues raised in these attachments and the appropriate response. While all comments were considered, the subcommittee agreed that, in general, the comments focussed upon four major issues which needed to be addressed and explained to the Commission.

4.1 Local Title 5 regulations are used for land control.

While many members of the subcommittee felt the Title 5 regulations were used for land control and one health board member admitted that it had happened in his community, the subcommittee did not have evidence that this generally the case. The report has been edited appropriately.

4.2 The MA Association of Health Boards (MAHB) and MA Health Officers Association (MHOA) were not represented on the subcommittee.

While the subcommittee included representatives of health boards and health agents, MAHB and MHOA were not contacted and asked to appoint a representative. Both associations have since been contacted, provided an opportunity to comment and participate in future meetings. DEP is meeting with the leadership of both associations to discuss the subcommittee report and their concerns.

4.2 Local limitations are isolated occurrences.

The claim was made that the local limitations discussed in Section 1 of this report were isolated occurrences. DEP reviewed 12 local regulations, 10 percent of those on file, randomly selected from around the state, to determine which, if any, contained the types of local limitations cited. The results of that review demonstrate that the limitations are not isolated occurrences. The results have been summarized in a table and incorporated into this report.

4.4 Disagreement with the recommendation on increasing the maximum percolation rate.

Concerns were raised on the basis for increasing from twenty to fifty the number of slow percolation rate systems allowed per year and whether sufficient data could be obtained over the three-year interim period. The text has been modified to reflect that fifty slow rate systems per year is the maximum number of systems that could be reviewed by DEP with minimal additional resources. It has also been clarified to reflect that any increase in the current allowance for twenty slow rate systems would need to be part of a regulation revision process. Further a recommendation has been added to have DEP in cooperation with MHAB and MHOA canvas local boards of health on their experience with slow rate percolation systems installed for remedial purposes, a long standing practice.

5. Conclusion

There is a belief, among some, that the requirements of Title 5 alone are adequate to provide for the public health, safety and welfare in all on-site wastewater disposal situations. The Barriers to Housing Report raised the issue of whether local boards of health regulations are unnecessary and often unduly burdensome on applicants who wish to exercise reasonable use of their real property and therefore all local regulations should be repealed or made void.

It was found that many local regulations proceed with sound basis and are in agreement with the provisions of Title 5, specifically 310 CMR 15.003(1) & (3) which states: "In general, full compliance with the provisions of 310 CMR 15.000 is presumed by the Department to be protective of the public health, safety, welfare and the environment. **Specific site or design conditions, however, may require that additional criteria be met in order to achieve the purpose and/or intent of 310 CMR 15.000."** (Emphasis added) and "Local approving authorities may enact more stringent regulations to protect public health, safety, welfare and the environment only in accordance with M.G.L. c. 111 sec.31 and M.G.L. c. 21A sec. 13."

It is conceded that some local regulations fail to clearly demonstrate a public health benefit and may have been a central motive for enactment in issues other than the protection of the public health and the environment. On the other hand, a wide body of literature and published studies support many local regulations. To indiscriminately eliminate all local board of health regulation related to Title 5 could significantly reduce the public health protection afforded by valid regulations and undermine the boards of health ability to administer this vitally important environmental care. Great care and innovative approaches should be considered to excise superfluous local regulations while maintaining those regulations that are based on legitimate public health and/or environmental concerns.

6. Acknowledgments

The Department wishes to thank the following individuals for participating on the subcommittee and offering their time and knowledge.

Isabel Barbara-Castro, Neighborhood Assistance Corporation of America; Tom Cambareri, Cape Cod Commission; Jennifer Dalrymple, Duxbury Board of Health; Robert Daylor, Daylor Consulting Group, Inc.; Pam DiBona, Environmental League of Massachusetts; Paul Douglas, Franklin County Housing & Redevelopment Authority; Ed Eichner, Cape Cod Commission; Len Gengel, C&S Builders, Inc.; George Heufelder, Barnstable County Health Department; Peter Kolodziei, Tr-Town Health District; Elisabeth Miley, MA Department of Housing and Community Development; Lee Muniz, Representative Anthony Verga's Office; Richard Nylen, Lynch, Desimone & Nylen; Kevin Rabbitt, K. B. Rabbitt and Associates; Stephen Ryan, MA Association of Realtors; Mark Siegenthaler, MA Department of Housing and Community Development; Kevin Sweeney, Sweeney and Sons, Inc.; Lou Wagner, MA Audubon Society; Robert Zimmerman, Charles River Watershed Association.

Respectfully submitted
Lauren A. Liss, Commissioner
Department of Environmental Protection

DEC. -03' 01 (MON) 14:11 P. 002

OCT. -01' 01 (MON) 15:21 P. 002

Minority Report on
Barriers To Housing Commission: Report of Title 5 Subcommittee
August 21, 2001

The report presented to the Barriers to Housing Commission from the Title 5 Subcommittee does not represent the position of all Subcommittee members. In fact, the undersigned committee members and organizations are concerned that many of the recommendations are based on anecdotal information and seek to undermine home rule and environmental protections. We hold that neither should be sacrificed to provide housing for citizens of the Commonwealth.

While we reserve the right to comment in more detail on the specifics of the report, we are most concerned about the following issues with regard to its development and content:

Subcommittee membership did not include Boards of Health.
Neither the Massachusetts Association of Health Boards or the Massachusetts Health Officers Association was included in the discussion. Both of these organizations represent the group responsible for implementing Title 5, developing local bylaws, and enforcing those rules.

Individual cases are presented as wide-spread problems.
While the Subcommittee was provided with selected local bylaws for review, no one compiled their characteristics for comparison by the group, nor were tallies developed to determine the incidence of "unfounded" restrictions. We object to the anecdotal nature of the review presented in the body of the report. As the conclusion states, "many local regulations proceed with sound basis and are in agreement with the provisions of Title 5...". The Commission should not be misled into thinking that most Boards of Health are overstepping their authority in implementing the law.

The existing pilot program to evaluate a slower percolation rate is adequate (Section 3.3).
We object to the recommendations to allow 50 applicants per year for slower-than-30-minute percolation rates and eliminate the fee. If over the course of six years DEP received only 15 applications, why must the limit be raised to 50 in one year? We do not see the application procedure as particularly onerous, and oppose reducing the list of requirements. The logical reason for lack of applications is the increased cost associated with yearly monitoring, and the delay caused by review of the application and proposed plans. Since the program is testing a slower percolation rate, caution is justified, and these procedures are necessary. If developers are truly dedicated to both maximizing homebuilding as well as protecting natural resources as they often point out, they will participate in the program to build the body of evidence supporting such a change.

We urge the Commission to send the Subcommittee back to its task with <u>all</u> stakeholders at the table, and adequate time and information to draw fact-based conclusions and recommendations.

Submitted by:

Pamela DiBona, Title 5 Subcommittee member
Environmental League of Massachusetts

Robert L. Zimmerman, Jr. Title 5 Subcommittee member
Charles River Watershed Association

Marcia Renes
Massachusetts Association of Health Boards

CRWA

Charles River Watershed Association

July 25, 2001

Glenn Haas, Acting Assistant Commissioner
Bureau of Resource Protection
Department of Environmental Protection
One Winter Street
Boston MA 02108

Re: Comments of the Charles River Watershed Association on the Barriers Commission Subcommittee Title 5 Draft Report

Dear Mr. Haas:

CRWA is appalled at the assumptions surrounding the formation of a "Barriers Commission Title 5 Subcommittee," the need for the subcommittee, its composition, the lack of process that led to its findings, and the findings themselves. All are the result of a desire among developers and real estate brokers to remove what they perceive to be obstacles to their commerce, and might best be characterized as sprawl-enabling. The assumptions surrounding virtually the entire report are heavily anecdotal, and the report itself the work of unknown authors. The subcommittee does not include representation from either the Massachusetts Association of Health or the Massachusetts Health Officers Association Boards. These groups represent the local Boards of Health, those responsible for dealing with septic systems and their regulations on a day-to-day basis.

Further, the notion of "Limited-Science Burdensome Regulations" as described is simply without merit. There is no discussion of the pros and cons of the regulations in terms of the objectives they seek to address. For example, limits to mounded systems may have much to do with stormwater runoff and its impacts, certainly real, science-based issues. Since permits for wastewater disposal go to the property, and not to successive owners, issues of sizing and flow have merit based on potential future uses of such property. That there are additional environmental issues of clear-cutting and bio-mat problems with oversized systems suggests that there are issues in the methods for calculating flows worthy of careful analysis, as opposed to anecdotal declarations.

Limits to innovative and alternative technologies, and prohibitions to shared or community systems may have much to do with the infrastructure within a community to oversee and maintain such facilities. Should such facilities fail, there is ample science to suggest that they could pose real hazards to public health, long after developers and real estate brokers have reaped their benefits and left such properties to municipal oversight.

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Website: www.crwa.org Email: crwa@crwa.org.

Such a one-sided, ill-advised and poorly written report serves no one, particularly the health and well-being of the citizens of the Commonwealth. It should be summarily dismissed. Should the administration feel the need to evaluate Title 5 and Massachusetts Boards of Health powers to further restrict on-site wastewater disposal, the administration should appoint a new commission with equal representation from the development, real estate, environmental, health, regulatory and public policy communities, scope a real review, and allow ample time for a thorough evaluation of chapter and verse with both majority and minority reports.

Thank you for the opportunity to comment on this document. Please do not hesitate to contact me if you have any questions.

Sincerely,

Robert L. Zimmerman, Jr.
Executive Director

Environmental
League of
Massachusetts
Advocates For Responsible Environmental Policy Since 1898

July 19, 2001

Glenn Haas, Acting Assistant Commissioner
Bureau of Resource Protection
Department of Environmental Protection
One Winter Street
Boston MA 02108

Dear Glenn,

Thank you for coordinating the Subcommittee on Title 5 to the Governor's Commission on Barriers to Housing. The Environmental League has several comments on the report which we hope will be incorporated before it is submitted to the Commissioner.

Introduction
I have attached suggested reorganization and edits to the introduction.

Limited-Science Burdensome Regulations
We object to the heading of this section, which passes judgement on bylaws that may have some justification, but for which DEP has never required or sought out explanation.

Under the first recommendation, all three options require the local Board to "state the public health problem/threat and state the science/literature to demonstrate that the regulatory change will protect public health." What is the standard of care here? The report introduction states that reasonable people can argue as to the implications of a specific study, or the regulations that should result from a body of literature. Boards of Health do not have the resources to conduct site-specific investigations, nor will developers want to carry out scientific investigations to examine conditions at each lot. DEP must be willing and able to assist Boards of Health in implementing the regulations in a manner that ensures resource protection. If stricter site-specific standards are in fact justified, the Board should not be restricted from putting them in place for lack of staff to research and prepare extensive justifications. Further, DEP should establish an electronic "library" for Boards of Health to make literature easily available.

Improved Science and Education
This section refers to the DeFeo, Wait & Associates report as "very comprehensive." Others have argued that the report "was not a comprehensive review of the information regarding pathogen transport in groundwater. Further, the DeFeo, Wait & Associates' Report omitted a broad field of literature and research, some of which supports the need for increased setbacks in certain soils, particularly with reference to viruses" (Heufelder, May 2001 memo). If the report is to be updated, these deficiencies

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must be addressed. DEP should also make provisions for revisiting the document every two years if Boards of Health are to rely on it for documentation.

We agree that the Stormwater Guidance Document has been a useful tool for Conservation Commissions and developers alike. Any guidance document for Title 5 implementation should make it clear, however, that more stringent local bylaws are allowed.

The reference to changes to the Board of Health enabling statute in the third recommendation cannot stand as is. I do not recall discussion of changes, beyond an effort to allow private contracts for wastewater systems management. Please amend this section to reflect that discussion, and avoid alarming Boards of Health.

Title 5 Regulations and Policies

We do not agree with the proposal to allow 50 applicants per year for slower-than-30-minute percolation rates. If the agency is concerned about lack of data to evaluate the merits of slower percolation rates, why increase the number allowed? If over the course of six years DEP received only 15 applications, why must the limit be raised to 50 in one year? We do not see the application procedure as particularly onerous, and oppose reducing the list of requirements. The logical reason for lack of applications is the increased cost associated with yearly monitoring, and the delay caused by review of the application and proposed plans. Since the program is testing a slower percolation rate, caution is justified. If developers are truly dedicated to both maximizing homebuilding as well as protecting natural resources as they often point out, they will participate in the program to build the body of evidence supporting such a change.

The report correctly states that a higher level of oversight will be required for systems in slower-percolating soils. This point must be a central one in any proposed change to the Title 5 regulations.

I am also enclosing comments from the Massachusetts Association of Health Boards, a member of the Massachusetts Environmental Collaborative. Unfortunately, they learned of the Subcommittee's meetings and report from ELM rather than through DEP. We urge you to consider their concerns as you revise the report for submission to the Governor.

Please be sure to forward the next version of the report and any supporting materials when they become available.

Sincerely,

Pamela DiBona
Legislative Director

cc: Marcia Benes, Mass. Association of Health Boards

MEMORANDUM

To: Governor's Special Commission on Barriers to Housing Production

From: Home Builders Association of Massachusetts

Date: October 23, 2001

Re: Recommendations relative to Title 5

On January 25, then-Governor Argeo Paul Cellucci announced the formation of the Governor's Special Commission on Barriers to Housing Development. "The citizens of Massachusetts need affordable places to live," said Cellucci at the time. "If there are government regulations that can be improved or streamlined to make building and preserving housing in the commonwealth easier, then we should try to remove those barriers."

The Executive Order establishing the commission charged it with making "recommendations to the Governor as to specific legislative, regulatory, policy and operational changes that are required to remove, or to otherwise ease, such barriers to residential development so as to create housing that is affordable across a wide range of incomes and available throughout a broad spectrum of the Commonwealth's neighborhoods."

Finally, the commission was specifically required to "identify whether local municipalities have regulation or by-laws relating to Title 5...that vary from the state's requirements, and if so, whether such variations are justified by sound scientific principles and make such recommendations, if found necessary, to ensure that Title 5 is addressed and enforced on the local level in accord with sound scientific principles so that housing development is not unnecessarily impeded." (emphasis added)

In the report of the Subcommittee on Title 5, it is stated that there are several reasons why municipalities adopt standards stricter than Title 5, they are:

- Local environmental conditions may warrant it
- Continued debate about the science behind some parts of Title 5
- Perception that zoning regulations and other planning tools do not provide adequate means to manage growth
- Misapplication of the Title 5 or prohibition of things allowed by the state due to lack of local resources or training
- Gaps in policy and implementation at the state level leading communities to adopt their own regulations. (emphasis added)

The report notes that the Department of Environmental Protection has on file local regulations that exceed the requirements of Title 5 from 125 communities. It then sets out the types of local regulations adopted by some cities and towns that in the opinion of a majority of its members "add costs, restrict land and can be barriers to housing without having...a demonstrable public health or environmental protection benefit."

Disappointingly, then, the subcommittee offers a tepid response to its own findings, suggesting that G.L. c. 111, §31 be amended to merely require local boards of health identify to the Department of Environmental Protection the local conditions which exist or scientific, technological or administrative need for exceeding the provisions of Title 5, for such local regulations to be effective.

The Home Builders Association of Massachusetts recommends that G.L. c. 111, §31 be amended to establish Title 5 of the State Environmental Code (314 C.M.R. 15.00) as a statewide uniform code for the installation of on-site sewage disposal systems, provided however, that municipalities be permitted to adopt their own regulations

exceeding the provisions of Title 5 upon the submission of a written application to the Department of Environmental Protection for approval to do so.

Approval of said local septic regulations should be subject to a two-prong test.

First, did the community document, scientifically, the existence of some unusual or unique resource within their community that warrants the need for greater treatment than afforded by Title 5? This documentation could be based on scientific data or evidence demonstrating that application of the Title 5 standards is not sufficient to protect that particular resource.

Secondly, did the scientific data demonstrate that the superseding requirement will provide the needed increased environmental protection without being excessive? This is needed to prevent the application of arbitrary standards that go far beyond what may be needed to provide adequate protection.

The HBAM disagrees with those on the subcommittee when they said that it was not possible to have standard regulations that could be applied across the state because of variable conditions. To the contrary, Title 5 takes into account all kinds of variable conditions. For example, there are special provisions for designing systems within soils with rapid permeability rates, there are requirements for extended set backs to public water supply areas, there a special regulations regarding nitrogen sensitive areas, there are special provisions for conducting percolation testing in soils with slower rates, etc.

Rather, the Home Builders Association of Massachusetts agrees with DEP Commissioner Lauren Liss when she said, "[t]here was a tremendous amount of scientific research that went into the standards when the state's code was updated in 1995, and we think those rules go far enough." ("Title 5 brings unintended results," *The Boston Globe*, Saturday, October 28, 2000)

Massachusetts Association of Health Boards

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Governor Jane Swift
Rm 360
State House
Boston, MA 02133
August 10, 2001

Dear Governor Swift;

The Massachusetts Association of Health Boards recently reviewed the Barrier Commission Subcommittee on Title 5 draft report and found a number of flaws in this document. Attached to this letter is a response from two of our executive board members.

The shortfall of low income housing is not a result of local health regulations, but a result of decades of poor zoning, increased immigration, and the reliance on a law (Chapter 40B Comprehensive Permits) which pits local government against homebuilders. The present quotas of affordable housing represent an unattainable goal for most communities because the definition does not include older existing private housing stock or mobile home parks, and since low/moderate income units are continually converted to market rate, communities are browbeaten to approve projects which do not provide longterm solutions. Rather than continuing to scapegoat local health officials, we suggest the following more imaginative solutions.

1. Encourage changes in local zoning to allow the redesign of commercial plazas to include second floor apartments. This would reduce traffic, provide a natural linkage between employers and those seeking employment, and would not contribute to sprawl. Cities and small towns flourished under this model until suburban zoning isolated businesses from housing, creating the necessity for car ownership, and spawning our present failed development patterns.

2. Amend Ch. 40B to encourage more non-profit housing partnerships to keep units at low/moderate rates for perpetuity. Many private developers pay off their mortgages early and properties revert to market rate in a matter of years. This is unfair both to the communities and to the consumers of low/moderate income housing.

Although the home building industry would prefer that the state force communities to permit housing developments without regard to public, environmental or planning concerns, these two suggestions would go much farther towards creating a long term solution to the housing problem.

Sincerely,

Marcia Elizabeth Benes
MAHB Executive Director

c.c. Peter Forman, Chief of Staff
Bob Durand, Secretary of Environmental Affairs
Paul Jacobsen, Deputy Commissioner, MDPH
Edward Bertorelli, MAHB Community Liaison

Comments on the Barrier's Commission Subcommittee Title 5 Draft Report June 19, 2001

From: Ravi Nadkarni, P.E., Ph. D. and William R. Domey, P.E., Massachusetts Association of Health Boards (MAHB)

Introduction

The MAHB protests the validity of conclusions of the Barrier's Commission Subcommittee on Title 5 report. First of all, the essence of the report insults the many devoted, voluntary Board of Health members throughout the state. These people are the real experts on septic systems, dealing with them every day, as workers on the "front lines". Such a report should be rejected without meaningful input from local boards of health. Similarly, public health representation is minimized while the representation from developers and builders is maximized. Many of the conclusions and recommendations appear to reflect the same bias represented by the composition of the subcommittee.

Contrary to what is suggested by the report, the vast majority of Board of Health members adopt regulations intended for the protection of the public health, groundwater, and the environment in their communities. They are rarely intended for the purpose of limiting or controlling growth, or to strengthen land use regulations. This is a myth that is perpetuated by homebuilders and realtors in an effort to lower development costs to increase their profits. The cost of housing in any community is a function of what the traffic will bear, and is almost never related to actual builder's costs. An identical house and property for sale in different communities can have a wide range of selling prices.

The report never addresses the actual extent of any problems with so-called problem regulations, but uses a broad brush to intimate that this is a widespread problem throughout the state. There is no information regarding:

1. How many Boards of Health actually have regulations that the committee believes are intended to restrict housing?
2. Who are these Boards of Health?
3. How were these barrier regulations evaluated? Who on the committee had the expertise for the evaluation as to whether or not they had any merit or lacked "science"? Were any of the Boards of Health that adopted these regulations asked for the reasons why they adopted these regulations in the first place? Could it be that many of these regulations actually have merit?
4. In determining "cost" of a regulation, it appears that only the initial construction cost is considered, and not the actual value over a period of many years, which is the only true way of cost comparison. The cost over the lifetime of a septic system is the proper way in evaluate these costs, not just the initial costs which are a concern only to the developer.
5. Is the evidence of widespread abuse by Boards of Health actually based upon real data, or is it merely anecdotal in nature, with no specific basis in fact.
6. Has an analysis been made of the extent to which low cost housing construction

would actually be improved in the Commonwealth if all Board of Health regulations were negated or restricted?

The deficiencies in the draft report are first discussed in general terms below before discussing each recommendation:

$ The report tries to emphasize that a regulation has merit only if it is "science-based". In fact, there are many other practical reasons to justify the existence of a regulation. These include corrections of any deficiencies in the original regulation, changes to facilitate administration and so on. For example, for pumped systems, engineering common sense dictates that the pump be on a separate electrical circuit by itself so that other devices don't overload the circuit and that the audible high level alarm be on a circuit separate from that which supplies power to the pump. Title 5 is silent on these issues. A local regulation that requires these changes in not necessarily "science-based" but is compensating for deficiencies in Title 5, and injecting some common sense in the issue to prevent overflows from such a system which would leave a home owner with an overflowing septic tank or pump chamber and cause a public health problem.

$ Since the purpose of the report is to deal with barriers to home construction, a proper analysis of such barriers and their effect on home construction should have been a major portion of the report. Instead, we are treated to purely anecdotal information about local regulations that are more stringent than Title 5. Having lived for many years with realtor comments about how "cesspools fail automatically under Title 5" it would have been important for the report to provide specific references to the town or towns that passed these regulations, the exact wording of these regulations and, most important, their specific impact on housing stock. Without the names of the towns, it is impossible for a reader to even verify the claims that these regulations are correctly referenced or that they have indeed affected housing stock.

$ The report lists what are called "**Limited-Science Burdensome Regulations**". It unequivocally suggests that these regulations have no benefit, and only add cost, restrict land and are barriers to housing. Some of these examples merit some discussion.

  $ "**Science**" - The report contains contradictions on this issue. For example, in the Introduction, the subcommittee's report states that they decided not to debate science-based regulations regarding setbacks. The same section also admits that more stringent regulations also produce better functioning systems, promote sanitation and protect important ecologic resources. If they admit this is the case, the entire debate about not wanting local regulations more stringent than Title 5 is moot. Further, the Recommendations are largely based on the assumption that Title 5 incorporates the best available science in each and every case and is complete and up-to-date in this respect. Unfortunately this is not the case. Title 5 was based on a combination of science and political compromise. Any claim to the contrary is to forget the process that was employed to develop these regulations. A simple counter example will suffice: The separation to ground water in Title 5 is not adequate to destroy viruses. This was known when Title 5 was written.

$ **Process Limitations** - While Title 5 allows the determination of high groundwater throughout the year, there are situations when it is impossible to make that determination in all cases. For example, it is common in many sandy soils, that the soil morphology does not provide the redoximorphic features for the high groundwater determination, because they are too faint. In other words, the lack of the observed presence of mottles in the test hole does not necessarily mean there is no high groundwater. In these cases, a reliable determination can only be made during the wetter times of the year. Thus the need to restrict the testing period. However, if it were to be restricted only for those who have projects in sandy soil, this would be inequitable. Therefore, it is practical and good sense to keep everyone on a level playing field and restrict all. Generally this should not be applicable to upgrades of failed systems, since it is often necessary to take a calculated risk in the interests of the public health. For new construction, however, the risk of defining an incorrect high groundwater is not acceptable.

As for the stated reasons of limiting testing periods because of "agent-availability", exactly how many communities are documented as having this problem?

$ **Oversizing Requirements** – It is stated that oversizing a system may reduce treatment efficiency. There is no scientific merit or proof for this statement. As to an oversizing of 50%, this is often done by some communities because of the potential of the installation of garbage grinders for systems that are not sized to accommodate them. It is common knowledge, that most new houses today have are equipped with garbage grinders, very often after the Board of Health has issued a Certificate of Compliance. Some builders even brag about this "off-the record". Some towns have this problem. Some do not. Isn't the local Board of Health the best authority to make that judgement for their own community?

As for excessive bedroom counting, exactly how many communities pose this problem?

$ **Overbuilding requirements** – If one looks at the long term, not just the initial cost, expanding the spacing between trenches for the future placement of the reserve area makes good sense for more than one reason. Sadly, the committee report incorrectly infers that the reserve area may never be needed. This is the kind of thinking that has led us to the present situation of having to install upgrade for failed systems in inopportune and expensive locations. First of all, it guarantees that the reserve area will be dedicated and protected for that purpose for a long time in the future. The reserve area will not be the site of the swimming pool, the tennis court, the garage, large trees, etc. Further, a reserve area that is between existing trenches will ensure that if a future upgrade is necessary, it can be implemented at minimum cost.

$ **Percolation Rate Limits** – The report states that "many" communities limit maximum percolation rates at 20 minutes per inch. How many communities? How much land area is actually affected? How much of an increase in affordable housing will be achieved by changing this. Actually, it can be agreed that there is probably no real merit in restricting the percolation rate to 20 minutes per inch. Further, there is evidence that it could be increased to 60 minutes per inch. However, although it was agreed between the Mass DEP and the Title 5 advisory committee in 1995 that this would occur in 3 years, it is the DEP that has dragged its feet on this issue. The so-called problems of constructing a system in such soils are vastly exaggerated. The fact that one community in the whole state does not allow a system where the percolation rate is less than 2 minutes per inch is hardly an argument for claiming widespread abuse by Boards of Health. That position does, in fact, have some technical merit. Actually, the Title 5 measures have less merit.

$ **Limiting or Prohibiting Mounded Systems** – The committee should indicate how many communities actually do his. All over the state we hear complaints of mounded systems being built. In reality, this is probably not an issue in most communities.

$ **Limiting Innovative or Alternative Technologies for New Systems** – This argument in the report contradicts itself. The headline is "new" systems, but the discussion focuses on remedial systems. Again, how many Boards of Health actually will not allow I/A systems for upgrades of failed systems when applicable? The real reason that they are not used more is because they are often more expensive compared to conventional systems.

$ **Prohibiting Shared or Community Systems** – Although it has been 6 years since shared systems have been authorized by Title 5, the Massachusetts legislature has done nothing to provide legislation equivalent to that in effect about condominiums to assure that such systems will be operated and maintained properly, with proper financial safeguards in place. While there is no scientific or engineering reason that they won't function, there remains a real problem of real financial responsibility for operation and maintenance and replacement.

The report's 14 recommendations are not numbered but are grouped under several headings. Therefore, in these comments, they are numbered and repeated prior to discussion:

1. <u>Limited Science - Burdensome Regulations - Recommendation</u>

a. **OPTION 1: Regulations that are more stringent than Title 5 must state the public health threat and state the science to demonstrate that the regulatory**

change will protect public health. In addition to filing the regulations with DEP, the regulations must be approved in writing by DEP in order to become valid. This is akin to the Attorney General's approval of zoning bylaws and will be addressed in another paper. There should be no constructive approval for the DEP's failure to act upon a request to approve a regulation.

b. OPTION 2: DEP should issue guidance to boards of health indicating that in its opinion the above types of regulations do not, on their face, appear to be based in science and are subject to legal challenges pursuant to M.G.L. 111 by aggrieved parties. Boards would be advised to exam their regulations and if they contain these types of condition they should obtain the necessary scientific documentation, if they haven't already done so, or eliminate them. Under this option, there is no required statutory change and DEP remains a mandatory depository for the regulations in order to be adopted but it does not have the authority to approve regulations. Regulations proposed at the local level must state the public health problem and how the science and literature supports the regulations that are more stringent than Title 5 to protect public health.

c. OPTION 3: The third option is intended to address legal, technical, political and resource questions. Under this option, the statute would not grant DEP absolute authority over the approval of a regulation but would set a two prong test. First, the local board of health would be required to identify the threat to public health posed by adherence to the Title 5 code and must specify the science to support the change in the regulations. Second, the board of health would have to file the regulation with the DEP within thirty (30) days in order for the regulation to become effective.

All of these options involve the DEP usurping the authority of local Boards of Health in some fashion. Again, the operating assumption is that Title 5 is based on the best available science when it is not. Each option also ignores court rulings which have consistently supported the authority of local Boards of Health in these matters. Specifically the options ignore Arthur D. Little Inc. v. Commissioner of Health, 395 Mass. 535 (1985), which ruled that the Board could act against potential threats to public health and the Boards of Health are not subject to the state administrative procedure act. The courts will only strike a Board of Health regulation when the challenger proves, on the record, "the absence of any conceivable ground upon which [the rule] may be upheld." All three options here contradict these court rulings.

2. Limited Science - Burdensome Regulations - Recommendation

DEP and DCHD should build on past collaborative efforts to identify other ways in which

the two agencies can collaborate on the implementation of Title 5 regulations.

The consequences of this recommendation are not clear.

3. Improved Science and Education - Recommendation

The Commission should consider funding an update to the DeFeo-Waitt Report and collection of literature from the other states and relevant sources. An advisory group should be created by DEP to assist in compiling existing science and as a forum for technical discussions on updated scientific discussions.

A good idea.

4. Improved Science and Education - Recommendation

A guidance document similar to the DEP Stormwater Guidance document should be published that addresses the technical questions associated with Title 5 and provides the science and literature that address these issues. The Advisory Committee would oversee the update and assist in the presentation of the science and literature.

Combine this recommendation with item 3. The plan should be to issue periodic updates, perhaps every 5 to 7 years.

5. Improved Science and Education - Recommendation

Publication of a guidance document, as well as any amendment to the Board of Health enabling statute, must also be accompanied by a process for the education of local boards of health.

MAHB is successfully training and educating Boards of Health in many areas, as are other organizations. DEP and other state agencies are involved in conducting specific sessions in the areas of their expertise.

6. Improved Science and Education -Recommendation

The Commission should consider the use of circuit riders for assisting local boards of health and their agents in implementing Title 5.

Circuit riders can become a crutch. Furthermore, we have a concern that many people available for such jobs are young and without experience on the broad spectrum of local issues. Our preference is for training and education of the Boards of Health and their professional staff. Also, given the contradictory advice we often receive from regional DEP offices versus the advice

from DEP Headquarters, the use of circuit riders could increase the inconsistencies.

7. Improved Science and Education - Recommendation

In addition to technical education for boards of health, programs should be developed for cross-board training on general Title 5 for boards of health, planning and zoning boards, and boards of selectmen. This should include cross-board training for all boards on growth management, including the role of Title 5 in siting and designing development.

This is a good idea. However, all such boards in rural areas where on-site disposal is the only option are volunteer boards and time availability is an issue.

8. Improved Science and Education - Recommendation

The Comprehensive Water Resources Management Guidance currently being developed by DEP for use by communities should include guidance on the role of typical on-site systems, shared and alternative systems and septage management districts as part of integrated solutions to wastewater management. The guidance should include examples of successes that have occurred and samples of acceptable legal instruments that are often required.

No comment.

9. Title 5 Regulations and Policies - Recommendation

DEP should develop a policy to allow for the use of B horizons, that are sufficiently permeable, in new soil absorption systems.

DEP has already done this for system upgrades.

10. Title 5 Regulations and Policies - Recommendation

DEP should develop a guidance document on the nature and extent of the scientific evaluations necessary to designate an area to be nitrogen sensitive as well as the procedures necessary to adopt such a designation.

Good idea. This guidance is probably already available on the techniques to use to designate Zone II for any municipal drinking water supplies.

11. Title 5 Regulations and Policies - Recommendation

DEP should alter the application procedure for applicants wishing construct septic systems

Comments on the Barrier's Commission Subcommittee Title 5 Draft Report of September 20, 2001

From: Ravi Nadkarni, P.E., Ph. D. and Marcia Benes, Massachusetts Association of Health Boards

The comments below are supplemental to the comments on the Draft of June 19, 2001. We understand that both sets of comments will be published with the report as a Minority Report from the MAHB. Given the seriously flawed nature of the revised document, we can not provide cosmetic word changes to render the document acceptable.

Summary: The report states in the first paragraph, "In summary, one could say all of these regulations in some way restrict land from being used for housing or, at least, add some cost to housing." This is an interesting statement since it is true of many laws and regulations passed since Massachusetts was part of the Bay Colony. Are the authors advocating repeal of all such laws protecting public health and the environment?

Report Methodology: The revisions to the June 19 Draft do not address the issues raised in our previous comments but, at best, pay lip service to those comments. Our previous comment on the methodology was that "we are treated to purely anecdotal information about local regulations that are more stringent than Title 5.....it would have been important for the report to provide specific references to the town or towns that passed these regulations, the exact wording of these regulations and, most important, their specific impact on housing stock. Without the names of the towns, it is impossible for a reader to even verify the claims that these regulations are correctly referenced or that they have indeed affected housing stock." These comments still stand. On page 2, the report states that the subcommittee, relied extensively on their collective experiences, in order to come up with categories of conditions that create barriers without a readily apparent public health or environmental benefit. In other words, the lop-sided views are a result of the lop-sided composition of the subcommittee. We are now told that out of 351 municipalities in the Commonwealth, the regulations from 12 Boards of Health were randomly selected for review. This is a 3% sample. The text also refers to an attached Table 1, which contains check marks against various categories such as process limits, oversizing regs, overbuilding regs, perc rate limits, prohibit mounded systems, limit I/A technology and prohibit shared systems. Another problem with the table is that many process or other limitations have strong scientific basis; e.g. a Town may restrict perc tests to months with high groundwater because soil conditions do not reveal mottles. It is irrational to condemn local regulations which might scientifically accommodate local conditions purely because they go beyond Title 5.

How were the 12 towns "randomly"selected? Was it truly a random selection or was it designed to support conclusions already reached? Is a 3% sample statistically sound to support the conclusions previously derived purely from anecdotal information? Finally, the effect of these "more stringent" regulations on housing stock creation, or more specifically, the creation of low cost housing is not analyzed. The presumption is that any deviation from Title 5 is automatically a constraint.

What is science-based and what is not?:
The revised report continues to debate this issue incorrectly. Available data on many issues is scientifically inconclusive or selected data can support either side of an argument; regulations can incorporate factors of safety for protection, regulations can consider ease of enforceability and so on. Therefore, to insist that regulations be purely driven by science is not consistent with the way Title 5 was developed.

MAHB role misrepresented: the report states, "Both associations (MAHB and MHOA) have since been contacted, provided an opportunity to comment and participate in future meetings. MAHB sent a representative to the subcommittee's last meeting where minority reports were discussed." This statement does not properly represent the dynamics of what happened. MAHB commented on the June 19 draft and sent these comments in several directions, including to Gov. Swift's office. Our invitation to participate came only after that. While we did send a representative to the subcommittee's last meeting, the report was, by then, cast in concrete. We did not participate meaningfully in deriving any of the conclusions in the report and the report still does not address the questions we raised in our initial comments.

Who actually wrote the report? The report is a MSWord document. It reveals that the author of the report is Robert F. Daylor. He is the author of the June 19, August 20, and the September 17 versions. The September 20 version, on which we are supposed to comment by September 24, has editorial changes (redline and strikeouts) by Glenn Haas of the DEP. Why is Mr. Daylor authoring a report for the DEP Commissioner's signature? Is Mr. Daylor a DEP subcontractor? If MAHB was a member of the Subcommittee, we would doubtless know the answer to this last question, but our confusion underscores some of the problems with this entire process.

Comments on specific recommendations:

Our previous comments on the various recommendations still stand.

a) Amending M.G.L. c.111 section 31: The first recommendation in the report is that a Board of Health "be required to identify the threat to public health posed by adherence to the Title 5 code and must specify the science, technology or administrative need to support the change in the regulations". Obviously, this recommendation is not followed by the authors of this report since they have not provided any real data to support this drastic preemption of BOH authority.

b) MAHB involvement: The recommendation involving MAHB in some of the associated training and data-gathering efforts as a subcontractor sounds disingenuous in the context of this report.

September 24, 2001

To: Glenn Haas
From: William R. Domey, P.E.
Member of MAHB Executive Board
RE: Barrier's Commission Subcommittee on Title 5.

Dear Glenn:

Thank you for the opportunity to "sit in" last Wednesday with your committee regarding the finalizing of the T5 subcommittee report and the minority reports. I appreciate that you have emailed the latest redraft to me and I am presuming that there will be future communication with me regarding meetings and reports.

I was especially glad to see that there has now been some recognition that septic system regulations as adopted by Boards of Health can have different basis than only the "science" criteria. As we agreed, Title 5 itself is in fact not based solely on science, but also on other factors, including political agendas. This welcome change is reflected in the recommendation on page 4 that M.G.L. c.111, section 31 be amended to require the local board of health to specify the **science, technology, or administrative** (should be scientific, technological, or administrative) need to support the change in regulations.

However, I can only consider this a very small beginning of any change in attitude. You are also recommending that the local board of health be required to identify the threat posed by adherence to Title 5 code. This is a ridiculous requirement. How can a local board of health do that? Certainly there is little in Title 5 that threatens the public health or the environment. The main problem with Title 5 is that in certain areas it is incomplete, ambiguous, or silent. Therefore, local regulations are required, not to conflict with Title 5, but to complement it and to provide additional guidance. I will take this opportunity to advise you that by 8-page letter to Marsha Sherman of DEP, dated May 12, 1999, I described many of these issues.

Although the recommendation on page 4 opens the door for other regulation reasons, this is not reflected otherwise throughout the report. Only "science" is mentioned in critical paragraphs on pages 1 and 2. This situation should be remedied in the report.

On another issue, I am very disappointed that the strong paragraph on page 3 regarding "Reserve Area Requirements". I believe that I have pointed out to the committee that there are significant reasons where expanding spacing for trenches for reserve areas serves the public health and is actually more cost effective when one considers the long term costs of subsurface disposal.

As to Section 4, Minority Reports, as I stated at the meeting, I do not agree that all of your responses are adequate.

4.1 I am happy to see that you have concluded that most Boards of Health do not use intentionally use septic regulations for land control.

4.2 I can not agree that my attendance for 1-½ hours at the last meeting you have had before preparing this version of your report has provided any really meaningful participation in the findings of your committee. MAHB represents many boards of health, which lost their voice in this process. I still believe that the MAHB and the many boards of Health that it represents deserve more input to the report. The representatives of health boards and health agents that you cite do not provide the same broad perspective that MAHB can contribute.

4.3 I can not agree that you have proved your point that unreasonable or superfluous local limitations are more than isolated instances. The table of regulations from 12 towns that DEP has prepared is not statistically significant for evaluation of 351 cities and towns. Also, the table gives no information as to the extent of the effect of the unreasonable local regulations on barriers to housing.

In summary, I must still object to many of the statements in the report as cited in the MAHB comment letter of June 19, 2001.

I hope that you will seriously consider these comments before finalizing the report. Please share this comment letter with all of the members of your committee. I would appreciate it if you would forward to me all of the comments of others regarding this latest redraft of the committee report.

COMMENTS OF THE MASSACHUSETTS ASSOCIATION OF REALTORS ON TITLE 5 SUBCOMMITTEE REPORT

The Massachusetts Association of REALTORS(MAR) genuinely appreciates the opportunity afforded to us by the Swift Administration to participate in the Barriers to Housing Commission. MAR, NAIOP, the Greater Boston Real Estate Board and the Mass Association of Home Builders have long believed that a thoughtful examination of the issues regarding the shortage of housing and the impact that local septic regulations and their enforcement play in that shortage is essential to effectively addressing this problem.

The findings in paragraphs a-g of the "Local Limitations" portion of our subcommittee's report are, in MAR's opinion, an important collective acknowledgement of the problems facing home owners and property developers under our current two-tiered Title 5 system of state and local regulation. There is a clear belief amongst subcommittee members representing property owners and builders that many local communities are, in fact, attempting to use Title 5 and local septic ordinances as de facto zoning and growth management tools. This usage is not only unfair to property owners, it is inconsistent with both the letter and spirit of the sanitary code and the authority vested in these local health officials.

It is with this understanding of the current situation in mind that MAR respectfully suggests that the proposed recommendation of the subcommittee to deal with this problem falls short of what many in the real estate community believe to be substantive changes to this problem.

MAR has consistently supported a uniform code for Title 5. While recognizing the attendant need for additional funding for DEP and the political difficulties that may be encountered in any perceived encroachment on the concept of "home rule" as it relates to septic systems, we remain convinced that the best way to create a level playing field for homeowners and builders throughout the Commonwealth is to establish a uniform code for septic systems. While we acknowledge that the recommendation in the subcommittee's report to amend M.G.L. c. 111, section 31 as not being inconsistent with that goal and a clear improvement of the current situation, we do not believe it will solve all of the problems related to this issue at the local level. In short, though we would view this recommendation as a potential step in the right direction, we would still suggest that a framework under which stricter local septic controls must be reviewed and approved by the Commonwealth is the most effective solution to this problem.

There is currently no mechanism by which DEP may effectively address the misuse of Title 5 by communities seeking to stop housing production or improvement. As a result, we believe many property owners spend millions of dollars every year complying with local septic ordinances that may have no sound basis in science or foundation in environmental protection and that many units of much-needed new housing go unbuilt. This situation must change. Should the full committee accept the subcommittee's recommendation on this matter, we would hope for a commitment by DEP that they would be ready to revisit, and support, our position on a uniform code should the subcommittee's recommendation fail to produce a substantive improvement in this situation.

Thank you again for the opportunity to participate in this important project.

Sincerely,

Stephen J. Ryan
MAR General Counsel

OCT. -01' 01(MON) 15:21 P. 003

CC: Commissioner

Massachusetts Audubon Society
208 South Great Road
Lincoln, Massachusetts 01773
(781) 259-9500

July 16, 2001

Mr. Glenn Haas
Acting Assistant Commissioner
Department of Environmental Protection
One Winter Street
Boston, MA 02108

RE: Draft Report of Title 5 Subcommittee to Barriers to Housing Commission

Dear Mr. Haas,

I am writing to comment on the Barriers to Housing Commission Title 5 Subcommittee draft report. The Massachusetts Audubon Society appreciates the opportunity to participate on the subcommittee.

In general, we believe that the draft report accurately captures the suggestions made by members of the Title 5 Subcommittee. We do not, however, agree with a number of the conclusions and statements included in the draft report.

While we do agree that a number of communities have enacted local regulations governing the use of septic systems that are more stringent than Title 5, we do not agree with the assumption that this has typically been done to restrict growth and development. In general, the subcommittee, which placed great emphasis on the need for science as the basis for septic system regulation, took a very unscientific approach in casually accepting the assumption that growth control is the basis for many local regulations. That hypothesis remains untested and unproved. Clearly, some local onsite sewage disposal regulations may have the effect of increasing the cost of construction and limiting where septic systems can be used. Further, some local regulations may not substantially enhance the protection of public health and the environment. However, we believe that most local health boards have enacted local regulations in response to local conditions and with the intent of better protecting the health and welfare of the residents of their community.

We believe that most communities are attempting to do their best to implement Title 5 to protect public health and the environment and that most local septic system regulations are developed and adopted to further this end. A detailed review of the literature on septic system performance, including the literature reviewed for the preparation of the 1991 DeFeo Wait Report, demonstrates that precise information on septic system performance and design requirements is

hard to find, and that Title 5 requirements may, in some cases, be insufficient. It is clear that septic system performance varies with site conditions and use and that a one size fits all approach, such as a uniform code, is not a realistic solution. In order for a uniform code to provide adequate public health and environmental protection in all of the varied conditions and uses encountered across the commonwealth it would have to be more stringent than the current regulations.

While developing precise information on design requirements for septic systems is difficult, the commonwealth could greatly assist communities in enacting sound local regulations that respond to real local needs by providing increased education and technical support. The ability of communities to protect local resources and public health could be greatly enhanced by guidance from the state on the types of measures that are likely to be effective to achieve specific goals. For example, if communities are concerned about nitrogen discharges, the use of alternative technologies with nitrogen removal capabilities could be encouraged whereas increasing separation to groundwater could be identified as a measure that would generally not be effective. Specific guidance regarding the types of requirements that are appropriate to achieve local goals would help to avoid the problem of local regulations that make new housing more expensive without actually enhancing public health and environmental protection.

The subcommittee focused on issues relating to onsite sewage disposal and new construction. If the goal is to improve the affordability of housing, the state should consider providing increased education and outreach to local health boards regarding the inspection and upgrading of existing onsite sewage disposal systems. Since existing housing stock is typically the least expensive and the most readily affordable by those with low and moderate incomes, affordability of housing could be improved by ensuring that inspection and repair requirements do not exceed Title 5 standards, except where necessary to address genuine public health and environmental quality threats. Increased efforts by the state to educate local boards on appropriate inspection and repair measures would enhance the affordability of housing.

We heartily endorse the recommendations of the subcommittee regarding increased education for local health boards. We also endorse the recommendation that the state fund an update of the DeFeo Wait report. Before such an update is undertaken, however, it will be important to thoughtfully consider and identify the key issues and questions that such a report should address.

The Massachusetts Audubon Society opposes proposals to limit the home rule authority of the commonwealth's cities and towns on public health issues. We believe that in general, local health boards have acted in response to local concerns and conditions to protect public health and the environment. Lack of sufficient funding and technical expertise may sometimes have resulted in counterproductive local regulations, but this does not justify limiting local powers. Instead, the state should focus its efforts on providing increased education and technical assistance to local health boards.

Sincerely,

Lou Wagner
Regional Conservation Scientist

BARRIERS TO HOUSING COMMISSION
REPORT OF THE ZONING SUB-COMMITTEE

Introduction

The Zoning Sub-Committee of the Barriers to Housing Commission met 11 times from May 2 to August 1 to examine land use regulatory issues affecting housing production. The sub-committee represented many diverse interests including both for-profit and non-profit developers, banks, municipalities, and local and regional planners.

Several themes emerged from the sub-committee's discussions:

(1) localities are concerned that more housing will add to municipal service burdens and costs;
(2) the Commonwealth must take a more proactive role in providing financial incentives for housing development;
(3) there is a need to encourage municipalities not to enact unnecessary regulations that increase housing costs;
(4) there is a need to make legislative changes to deal with procedural problems that unnecessarily delay housing development and increase housing costs;
(5) there are available tools for responsible planning and zoning such as cluster development, transfer of development rights and density bonus provisions which could increase housing supply;
(6) there are newer avenues for growth and development, such as brownfields redevelopment and mixed use developments, which may make better use of land in developed areas; and,
(7) the Commonwealth must encourage both local and regional planning for housing.

Given the diverse composition of the sub-committee, not all members supported all recommendations. However, the committee believes that the report represents the combined best efforts of its membership to bring the immediate need to increase housing production to the forefront. The report makes findings and recommendations in the following areas for the Commission's consideration:

a. Municipal Cost Burden
b. Density Regulations
c. Growth Control Bylaws
d. Municipal Fees
e. Subdivision Control Regulations
f. Local Wetland Protection Bylaws
g. Appeals Process
h. Density Bonus Regulations

i. Mixed Use Development Projects
j. Brownfields Grant, Loan and Tax Programs
k. Urban Development Corporations
l. Regional Housing Supply Planning

Proposed Recommendations to Reduce Barriers to Housing Production

MUNICIPAL COST BURDEN

There is a common perception, sometimes justified, that new housing units create a fiscal burden on the local community. The actual burden is dependent upon the assessed values of new homes and the incremental cost for additional students and other services. In some communities, it is likely that high sales prices and assessed values of new homes may actually generate net revenue. However, some communities may have a negative impact based on school capacity, extent of infrastructure, and available services (e.g., public safety, public works and recreation programs).

To determine the validity and extent of the claimed fiscal burden, a uniform methodology for determining the "cost of services" must be established and accepted by all parties to the housing production equation, which can then be used to establish the "true" cost of new housing units. With this "cost of services" in hand, a program or combination of programs can be developed, whether subsidy or fee-based, to defray the impact.

Recommendation

The state should establish a comprehensive model for local aid which, on a community by community basis, assesses the impact of new housing. Such a model may reallocate some portion of existing aid and establish a state local aid impact fund to defray the true impact of new housing construction on cities and towns.

DENSITY REGULATIONS

Density regulations, such as minimum lot area requirements, minimum frontage requirements and low density per acre requirements, are the most significant barriers to the production of housing in the Commonwealth. Density regulations in many communities have increased the competition for available smaller lots, dispersed development, wasted valuable land resources, and have increased the costs of public and private services. Moderate income home purchasers are being excluded from

communities because of land costs and the selling cost of existing homes, and are finding the available small lots selling at prices beyond their means.

Although the issue of density regulations must be addressed, the Commission does not believe that a viable solution to the problem lies in a blanket statutory prohibition on municipalities enacting density regulations such as minimum lot size requirements. Establishing mandatory density regulations is not an acceptable technique for increasing housing production. Not only is such a solution unfair to areas already fully developed, but in some cases the requirement of certain density regulations may be justified by topographic or soil conditions and should be continued if such land is to be developed at all. The Commission also recognizes that home rule means that a municipality has the right, through legislated authority, to determine the location, manner and type of development it will permit within its boundaries. The State Legislature has repeatedly upheld this concept in legislation relating to zoning and subdivision control.

The Commission concludes that the Commonwealth needs a more energized and focused effort for increasing housing production.

Recommendations

1. **The Commonwealth should encourage communities to use the 40B process as a way of increasing production of market housing as well as affordable housing. The Commonwealth should design programs that reward communities that use this process in a friendly manner by defraying the municipal costs incurred by increased housing production.**

2. **The Commonwealth should examine all existing housing programs to determine if there are ways they can be revised to further increase housing production. For example, DHCD should review the LIP Program to see if the current guidelines make it economically feasible for a developer to construct housing under that program. Proposed program changes should be widely disseminated to the municipal and development interests affected by such changes.**

3. **The Commonwealth should encourage local adoption of zoning regulations that support higher density housing near commercial and transit uses. Such actions could discourage sprawl and spread of development to "green" areas.**

4. **A committee should be established by the Legislature that includes local officials, developers, planners and housing advocates for the purpose of recommending programs, legislation and planning tools that will increase housing production in the Commonwealth. Such programs, legislation and planning tools should be available at local option so as to maintain local autonomy. In order to accomplish this aim, revenue sources and grant**

programs should be directed to those communities that use such programs, legislation and planning tools and work cooperatively with the Commonwealth in increasing housing supply.

GROWTH CONTROL BYLAWS

The enactment of local bylaws which impose limitations on the number of building permits which can be issued in any one year, or which permit only a certain percentage of units in any one development to be constructed in one year, or which prohibit development for one or more years is resulting in significant barriers to housing creation at all income levels. Most municipalities impose these growth controls in order to study infrastructure needs or to review zoning. Some municipalities, however, impose growth controls simply to severely curtail new development or redevelopment projects without a clear action plan to resolve or correct the particular growth issue. See Sturges v. Town of Chilmark, 380 Mass. 246 (1980); Collura v. Town of Arlington, 367 Mass. 881 (1975). Moreover, Executive Order 215 provides that the imposition of a moratorium may result in the loss of discretionary funding but it is unclear whether E.O. 215 has ever been enforced against a municipality. In exchange for financial assistance to communities exhibiting a greater municipal cost burden as a result of housing development, local building cap regulations should have limited duration and purpose. Our population is going to grow regardless of growth control by-laws. If, for example, 60 towns enact them, the remaining communities must then shoulder a disproportionate burden.

There are, at times, real issues confronting a municipality, in terms of water supplies, sewer capacities, or school enrollments, which need to be addressed. However, these issues are identifiable and resolvable within a predictable horizon. Therefore, growth or permit controls should be substantially limited in their enactment, scope, and duration, with specific thresholds for implementation and municipal action to resolve the concern leading to the imposition of controls. Case history in our state has shown that municipalities that enact these permit restrictions rarely, if ever, remove them from their bylaws, but rather continually renew them and frequently further restrict the number of units to be allowed annually, even after correcting water or sewer issues, or building new schools to address the student enrollment issues.

Recommendations

1. **Any municipal growth control by-law must: a) identify a specific problem(s) and include a reasonable stated duration; and b) contain a strategic plan to address the problem(s). The plan, which must be approved by DHCD, shall address the specific problem(s) and propose a timetable for solving the problem(s). Should the community seek to extend the bylaw for another**

duration, the community must revise its plan to explain the rationale for additional time and submit the revised plan to DHCD for approval.

2. **Dwelling units of two bedrooms or less should be exempt from growth control measures enacted based on municipal finance concerns as there are likely to be few children living in these types of units, but they are vitally needed for young adults and seniors.**

MUNICIPAL FEES

Section 53G of GL c. 44 provides that any city or town provide rules for the imposition of "reasonable fees" for the employment of outside consultants. Many times, the amount of review fees accrued by the outside consultant in its review of a project design may exceed what is reasonably necessary to review a project. Moreover, some municipalities provide an applicant only one choice of review agent when at least four choices would be reasonable. Further, some municipalities charge permit fees that are well in excess of the reasonable cost in administering the permit program.

Recommendation

1. **Section 53G of Chapter 44 should provide clear standards for the retention of outside review consultants by allowing the developer a choice of not fewer than four review consultants. To avoid the appearance of a conflict and using the Conflict of Interest Law, MGL, Chapter 268A, as a guide, it is recommended that the list cannot include an individual who has worked for the developer in the past year and that the selected consultant must agree not to work for the developer for at least one year after the conclusion of the review. In addition, Section 53G of Chapter 44 should provide an administrative appeal to the city council or board of selectmen on the reasonableness of the scope of work to be performed by the consultant, and the reasonableness of the consultant costs to be expended on the review of a project.**

2. **If the recommendation above is enacted by the Legislature, then Section 53G of Chapter 44 should also authorize conservation commissions to impose reasonable fees for the employment of outside consultants.**

3. **DHCD should develop a model outside consultant review bylaw that can be readily adapted by a municipality.**

A tax has been defined as "an enforced contribution to provide the support of government." United States v. Tax Comm'n of Miss., 421 U.S. 599 (1975). In

Massachusetts, a community may not levy, assess or collect taxes without the permission of the General Court. The distinction between a fee and a tax was discussed by the court in Emerson College v. Boston, 391 Mass. 415 (1984). The court concluded that the imposed charge by the city, which produced revenue for allocation to the general police and fire services, constituted a tax to defray the cost of a public benefit rather than a fee payable for a benefit limited to the owners of a buildings. In deciding Emerson, the court noted that fees share three common traits that distinguish them from taxes. First, they are charged in exchange for a particular government service that benefits the party paying the fee in a manner not shared by other members of society. Second, they are paid by choice in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge; and third, they are collected not to raise revenues but to compensate the governmental entity providing the service for its expenses.

There have been instances where imposed charges have been upheld as valid fees. For example, in Southview Co-operative Housing Corp. v. Rent Control Board of Cambridge, 396 Mass. 395 (1985), the court concluded that charges assessed against landlords by the Rent Control Board of Cambridge in connection with petitions for individual rent adjustments were valid fees. In Commonwealth v. Caldwell, 25 Mass. App. Ct. 91 (1987), the court found that a mooring and slip fee assessed to boat owners by a city's harbormaster pursuant to a municipal ordinance was a valid fee and not a tax. In both cases the court determined that the revenues raised directly compensated the government for the cost of providing the service.

Municipalities may be imposing fees that exceed the cost of the service being provided.

Recommendations

1. **Local permit and approval fees must be based upon the reasonable costs of permit program administration, and cannot be used as a mechanism to generate revenue in excess of the costs of administration for a particular board, commission or department. Communities should be required to provide a rationale for the fees charged, demonstrating the relationship between such fees and the cost of providing the particular service through the particular board, commission or department. Any application or permit request should be governed by the fee schedule in effect at the time of the submission of the application or permit request.**

2. **When review consultants are to be employed by the community, a developer should have a choice of not fewer than four review consultants. To avoid the appearance of a conflict and using the Conflict of Interest Law, MGL, Chapter 268A, as a guide, it is recommended that the list not include an individual who has worked for the developer in the past year and the selected consultant must agree not to work for the developer for at least one year after the conclusion of the review. In addition, there should be a**

process for administrative appeal to the city council or board of selectmen by a developer to permit the developer to contest the reasonableness of the scope of work to be performed by the consultant, and the reasonableness of the review consultants cost to be expended on the review of the project.

SUBDIVISION CONTROL REGULATIONS

Excessive road and infrastructure design and construction standards add substantial cost and create a significant barrier to creation of housing. Reasonable engineering standards can be established for infrastructure needs that can generally reflect public safety, health and environmental priorities.

Recommendations

1. **A working group of stake holders, including developers, municipal officials and engineering consultants should be formed for the purpose of recommending suggested construction standards that incorporate various conditions that would affect design and use of the roadways. This committee should also prepare a guidebook containing the suggested standards for distribution to cities and towns.**

2. **The Department of Housing and Community Development shall include adoption of the suggested construction standards as an action that can be used by a community to qualify toward obtaining housing certification pursuant to Executive Order 418.**

LOCAL WETLAND PROTECTION BYLAWS

A significant barrier to the development of housing is how wetlands are regulated in the Commonwealth. A municipality's power to regulate wetlands is shared jointly with the Commonwealth. Specifically, wetlands are regulated both under the State Wetlands Act and local wetlands bylaws enacted pursuant to the State Wetlands Act. There are two major reasons why this dual regulatory authority needs to be addressed.

First, municipalities have enacted wetland bylaws covering issues that are beyond the DEP's regulatory authority established under the Wetlands Protection Act. Some local wetlands bylaws have also introduced certain "no-build" and "non-disturbance" areas located either within a wetlands resource area buffer zone or beyond the buffer zone and in upland resource areas in excess of what may be necessary for environmental

protection. In addition, some local wetlands bylaws include stormwater management guidelines in excess of the DEP Stormwater Management Guidelines.

Second, dual authority to regulate wetlands creates a bifurcated wetlands appeal process. Appeals under the State Wetlands Act are governed by Chapter 30A, the State Administrative Procedures Act, and administered through the Adjudicatory Rules and Wetlands Regulations. These appeals are made initially to the DEP regional office, then through the Office of Administrative Appeals, and finally to Superior Court. However, appeals of orders issued under a local wetlands bylaw is by complaint to Superior Court in the nature of *certiorari* filed within 60 days after the issuance of a decision.

Similar to the Building Code, a standard and permitting/enforcement method for environmental, conservation, and health concerns needs to be established. Environmental, conservation, and health standards are necessary but they need to be uniform, predictable, based on scientific or engineering fact, and have some compelling public benefit to their enactment.

Recommendations

1. **The State Wetlands Act should be the primary authority for the regulation of Wetlands in the Commonwealth. A municipality should have the ability to enact more stringent regulations if based on science and approved by the DEP.**

2. **In communities where local wetlands bylaws have been enacted, the current dual appeal process should be combined by creating a consolidated appeal process to be administered by DEP.**

It is also recommended that the DEP review their policies relative to appeals and consider the following suggestions.

1. Revise the DEP's Expedited Review Policy to permit expedited review of significant housing development opportunities such as large multifamily projects and/or affordable housing projects.

2. Eliminate several of the appeal routes/procedures provided under the Adjudicatory Rules that are not specifically based upon the Wetlands Act. For example, a person wishing to prolong an adjudicatory appeal may file a "motion for reconsideration" of the adjudicatory appeals decision issued by the administrative law judge ("ALJ") even though such request has no merit. See 310 CMR 1.01(14)(d). Such a request may significantly add to the delay in

obtaining a "final" approval and has rarely, if ever, been successful in reversing a decision issued by the ALJ.

3. Mandate that appellants strictly comply with the specific regulatory part of the request filed.

4. Require appellants to post a bond when appealing to reduce the number of frivolous appeals.

5. Limit issues raised in an appeal to those expressly identified in the appeal, and preclude new issues for appeal which are gathered from those not a party to an appeal at DEP site visits or through ex parte contact with the DEP.

6. Mandate that strict timeframes be adhered to by both applicants and appellants under penalty of dismissal with prejudice, and without the ability to submit new information beyond regulatory timeframes.

APPEALS PROCESS

It is very inexpensive for communities and abutters to appeal subdivision approvals and tie up housing projects for years, yet costly for developers to litigate arbitrary decisions by boards. Currently appeals of zoning by-laws and subdivision decisions can be appealed to Superior Court. Under current law such appeals are not given precedence and can take up to one to three years for a final decision. Only the largest building companies have the cash flow to support the costs for these suits.

In addition, the State Zoning Act includes an obscure provision relating to the posting of bonds and the awarding of court costs resulting from appeals of approved subdivision plans. Specifically, Section 17 of the Sate Zoning Act (MGL c.40A, s. 17) provides that "the court shall require non-municipal plaintiffs to post a surety or cash bond in a sum of not less than two thousand nor more than fifteen thousand dollars to secure the payment of such [court] costs in appeals of decisions approving subdivision plans" ... and that all appeals under Section 17 ... "shall have precedence over all other civil actions and proceedings." Further, all the provisions of Section 17 relating to the posting of bonds and the awarding of court costs should be more broadly applied to the appeals of special permits in addition to appeals of approved subdivision plans.

Moreover, the appeals process gives an unreasonably powerful tool to anti-housing interests, since arbitrary and frivolous appeals can be lodged with little or no basis, cost or risk. The appeals process needs to be corrected and clarified so that it is a balanced and efficient resolution to genuine issues.

Recommendation

1. **Section 81BB of the State Subdivision Control Law should include language identical to Section 17 of the Zoning Act with respect to requirements for the posting of bonds and the awarding of court costs when a party appealing a decision approving a subdivision plan acts in bad faith or with malice in making the appeal to the court.**

2. **Section 17 of Chapter 40A should mandate the court to impose on non-municipal plaintiffs the requirement to post a surety or cash bond in a sum between $2,000 and $15,000 to secure the payment and award of court costs to the applicant in appeals of decisions approving special permits when the court determines the appellant acted in bad faith or with malice in making the appeal to the court.**

3. **In addition, or as an alternative, to requiring appellants to post a surety or cash bond, Chapter 40A, Section 17 and Chapter 41, Section 81BB should provide the applicant with the right to file an immediate, special motion to dismiss an appeal of an approval of a special permit and /or definitive subdivision plan approval if the applicant feels it can demonstrate that the appellant acted in bad faith or with malice in making the appeal to the court. In such circumstances when the court grants such special motion to dismiss based upon its findings of bad faith or malice, the court shall award the applicant both costs and reasonable attorneys fees including those costs and fees incurred for the special motion and any related discovery matters.**

4. **Senate Bill No. 810 of 2001 would amend MGL, Chapter 183 by giving precedence to any civil action or proceeding involving real estate permits. A real estate permit is defined as any authorization, certificate, building permit, license, variance or other approval issued by an agency, department, board, commission, authority or other governmental body or official of the Commonwealth or any city, town, or other political subdivision thereof to any person, firm, corporation, or other entity for the erection, alteration, repair or removal of a building or structure upon land. The Legislature should enact and the Governor should support this legislation or similar legislation that would expedite litigation involving residential construction.**

DENSITY BONUS REGULATIONS

Many cities and towns have enacted bylaws or ordinances that are designed to reward the developer with a density bonus in exchange for the set-aside of a certain number of

affordable units. Unfortunately, the vast majority of these bylaws have gone unused because most of them are unworkable. Even if they were workable, developers are frequently confused about how to implement affordable housing restrictions.

Recommendation

1. **In order to encourage the use of the density bonus incentive to create additional units of affordable housing without having to go through the Chapter 40B process, DHCD should develop a model affordable housing density bonus bylaw package which includes: a model inclusionary housing bylaw, a model affordable housing restriction, recommended marketing and sales practices, recommended process for managing the affordable units, and a step-by-step guide for the developer and municipality which describes the process for establishing and maintaining affordable units.**

2. **The Zoning Act should specifically allow municipalities to enact zoning provisions permitting housing density bonuses as a matter of right.**

Mixed Use Development Projects

Some cities and towns view residential housing development and commercial/industrial development in isolation, and do not consider the creation of mixed use zoning districts. With the recent phenomenon of the corporate campus and other large office-type developments, it appears that the developments would be ideally suited for the creation of the New England village style of development whereby commercial development can be surrounded by (or interspersed with) residential housing at all income levels. Given that the lack of affordable housing is a factor in out-of-state companies declining to move to the Commonwealth, several actions could encourage these companies to relocate to Massachusetts.

Recommendation

1. **The Commonwealth should provide incentives to companies looking to relocate to the Commonwealth and/or looking to develop corporate campuses to create housing to complement the commercial development. Such incentives could include enhanced tax increment financing which could be expanded to include housing creation as part of a mixed use development package. Other financing incentives which link commercial development incentives with housing creation could expand housing opportunities, and result in the creation of a revenue neutral project. Such incentives could be targeted for developments which locate in existing commercial/industrial areas as well as areas located adjacent to mass transit corridors.**

2. **Allow the abandoned building tax credit to be used to encourage the redevelopment of urbanized blighted areas into new neighborhoods.**

BROWNFIELDS GRANT, LOAN, AND TAX PROGRAMS

Over the past several years, particularly since the enactment of the hazardous waste brownfields amendments to Chapter 21E, the Commonwealth has created a whole menu of financing, grant and tax incentive programs designed to encourage the redevelopment of urbanized brownfields contaminated by oil and/or hazardous materials. The key focus of these Brownfields programs, as administered through the Governor's Office of Brownfields Revitalization, has been commercial/industrial development and related job creation.

Recommendation

Where brownfields are suitable for residential development, authorize such housing projects as eligible for state brownfields programs and related incentives to redevelop urbanized areas into housing for all income levels. For example, subsidized environmental insurance can provide incentives for redevelopment of housing and the cleanup of hazardous materials. The Brownfields Tax Credit and Municipal Tax Abatement programs would also provide incentives to both remediate contamination and create additional housing opportunities.

URBAN REDEVELOPMENT CORPORATION

Urban redevelopment corporations are private, limited dividend entities which are created under Chapter 121A and 760 CMR 25.00 to develop residential, commercial, recreational, historic or industrial projects in areas which are considered to be blighted or substandard. The urban redevelopment corporation may not undertake more than one project nor engage in any other type of development activity. The corporation bears the responsibility for planning and initiating the project and owns the project throughout its existence. Chapter 121A authorizes the exemption of a project from real and personal property taxes, betterments and special assessments, and allows the project developer to exercise the power of eminent domain to assemble a development site in specified circumstances. By allowing the tax exemptions, urban redevelopment corporations act as catalysts for development in areas with high property tax rates. The reason Chapter 121A corporations have not recently been used for the creation of affordable housing is that by law, the 121A entity may earn no more than an 8% return on investment, and any excess profits (after all eligible deductions) must be returned to

the municipality up to the level of tax that would have been assessed if the property were to include a non-121A entity.

Recommendation

Amend Chapter 121A to increase the return on investment to that permitted under certain programs under Chapter 40B (i.e., 20% of development costs for non-rentals, and 10% of equity for rental housing).

REGIONAL HOUSING SUPPLY PLANNING

Increasing and facilitating housing production should be examined from a regional perspective. Planning for housing in regions or sub-regions should be supported by the Commonwealth. Regional housing development decisions that are guided by the housing market, demographic conditions, the area's economy, and available or planned infrastructure target the areas where housing development should occur, prevents sprawl and encourages more efficient development. Regional planning agencies can serve as catalysts and conveners of regional planning for housing.

Recommendation

In addition to supporting the planning efforts supported by Executive Order 418, the Commonwealth should examine the applicability of regulatory tools, such as those of the Cape Cod Commission, as a way to direct housing production to areas of greatest need, while protecting natural resources and assuring an adequate public transportation network and infrastructure for the housing to be built.

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"MINORITY REPORT" TO THE BARRIERS TO HOUSING COMMISSION
REPORT OF THE ZONING SUB-COMMITTEE

Introduction

This "Minority Report" to the Barriers to Housing Commission Report of the Zoning Sub-Committee *is submitted on behalf of those members of the Zoning Sub-Committee who did not fully support all recommendations found in the final report, yet believe that many of the recommendations are worthwhile. With that spirit in mind this report indicates those recommendations we found acceptable and those we did not, with reasons cited on those we did not. We were pleased to be a part of the Sub-Committee and look forward to working on the recommendations we believe are of merit. The text in "bold italics" is our addition while the* "standard text" *is the majority view and remains unchanged.*

While we still believe the Report *reflects the majority point of view, i.e. that of the members of the development community actively involved in the housing industry, we acknowledge that our participation resulted in many of our comments being incorporated. We also believe that much anecdotal evidence was discussed which impacted the majority viewpoint. Based on our knowledge of planning and development in Massachusetts we note that much of the anecdotal evidence simply is not true throughout the Commonwealth. The need for affordable housing does indeed exist, but we question the whole premise for the need for addressing market rate housing in the Commonwealth.*

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The Zoning Sub-Committee of the Barriers to Housing Commission met 11 times from May 2 to August 1 to examine land use regulatory issues affecting housing production. The Sub-Committee represented many diverse interests including both for-profit and non-profit developers, banks, municipalities, and local and regional planners.

Several themes emerged from the Sub-Committee's discussions:

(8) localities are concerned that more housing will add to municipal service burdens and costs;
(9) the Commonwealth must take a more proactive role in providing financial incentives for housing development;
(10) there is a need to encourage municipalities not to enact unnecessary regulations that increase housing costs;
(11) there is a need to make legislative changes to deal with procedural problems that unnecessarily delay housing development and increase housing costs;
(12) there are available tools for responsible planning and zoning such as cluster development, transfer of development rights and density bonus provisions which could increase housing supply;
(13) there are newer avenues for growth and development, such as brownfields redevelopment and mixed use developments, which may make better use of land in developed areas; and,
(14) the Commonwealth must encourage both local and regional planning for housing.

Given the diverse composition of the Sub-Committee, not all members supported all recommendations. However, the Sub-Committee believes that the report represents the combined best efforts of its membership to bring the immediate need to increase housing production to the forefront. The report makes findings and recommendations in the following areas for the Commission's consideration:

a. Municipal Cost Burden
b. Density Regulations
c. Growth Control Bylaws
d. Municipal Fees
e. Subdivision Control Regulations
f. Local Wetland Protection Bylaws
g. Appeals Process
h. Density Bonus Regulations
i. Mixed Use Development Projects
j. Brownfields Grant, Loan and Tax Programs
k. Urban Development Corporations
l. Regional Housing Supply Planning

Proposed Recommendations to Reduce Barriers to Housing Production

MUNICIPAL COST BURDEN

There is a common perception, sometimes justified, that new housing units create a fiscal burden on the local community. The actual burden is dependent upon the assessed values of new homes and the incremental cost for additional students and other services. In some communities, it is likely that high sales prices and assessed values of new homes may actually generate net revenue. However, some communities may have a negative impact based on school capacity, extent of infrastructure, and available services (e.g., public safety, public works and recreation programs).

To determine the validity and extent of the claimed fiscal burden, a uniform methodology for determining the "cost of services" must be established and accepted by all parties to the housing production equation, which can then be used to establish the "true" cost of new housing units. With this "cost of services" in hand, a program or combination of programs can be developed, whether subsidy or fee-based, to defray the impact.

Recommendation

The Commonwealth should establish a comprehensive model for local aid which, on a community by community basis, assesses the impact of new housing. Such a model may reallocate some portion of existing aid and establish a state local aid impact fund to defray the true impact of new housing construction on cities and towns.

We do not support this recommendation. However, we would support an incentive program for communities that are addressing their housing needs. We cannot support re-allocation of local aid, but we could support the establishment of a local aid impact fund to defray the true impact of new housing construction on cities and towns.

DENSITY REGULATIONS

Density regulations, such as minimum lot area requirements, minimum frontage requirements and low density per acre requirements, are the most significant barriers to the production of housing in the Commonwealth. Density regulations in many

communities have increased the competition for available smaller lots, dispersed development, wasted valuable land resources, and have increased the costs of public and private services. Moderate income home purchasers are being excluded from communities because of land costs and the selling cost of existing homes, and are finding the available small lots selling at prices beyond their means.

Although the issue of density regulations must be addressed, the Sub-Committee does not believe that a viable solution to the problem lies in a blanket statutory prohibition on municipalities enacting density regulations such as minimum lot size requirements. Establishing mandatory density regulations is not an acceptable technique for increasing housing production. Not only is such a solution unfair to areas already fully developed, but in some cases the requirement of certain density regulations may be justified by topographic or soil conditions and should be continued if such land is to be developed at all. The Sub-Committee also recognizes that home rule means that a municipality has the right, through legislated authority, to determine the location, manner and type of development it will permit within its boundaries. The State Legislature has repeatedly upheld this concept in legislation relating to zoning and subdivision control.

The Sub-Committee concludes that the Commonwealth needs a more energized and focused effort for increasing housing production.

<u>Recommendations</u>

3. **The Commonwealth should encourage communities to use the 40B process as a way of increasing production of market housing as well as affordable housing. The Commonwealth should design programs that reward communities that use this process in a friendly manner by defraying the municipal costs incurred by increased housing production.**

We support this recommendation.

4. **The Commonwealth should examine all existing housing programs to determine if there are ways they can be revised to further increase housing production. For example, DHCD should review the LIP Program to see if the current guidelines make it economically feasible for a developer to construct housing under that program. Proposed program changes should be widely disseminated to the municipal and development interests affected by such changes.**

We support this recommendation.

3. **The Commonwealth should encourage local adoption of zoning regulations that support higher density housing near commercial and transit uses. Such actions could discourage sprawl and spread of development to "green" areas.**

We support this recommendation.

5. **A committee should be established by the Legislature that includes local officials, developers, planners and housing advocates for the purpose of recommending programs, legislation and planning tools that will increase housing production in the Commonwealth. Such programs, legislation and planning tools should be available at local option so as to maintain local autonomy. In order to accomplish this aim, revenue sources and grant programs should be directed to those communities that use such programs, legislation and planning tools and work cooperatively with the Commonwealth in increasing housing supply.**

We support this recommendation.

GROWTH CONTROL BYLAWS

The enactment of local bylaws which impose limitations on the number of building permits which can be issued in any one year, or which permit only a certain percentage of units in any one development to be constructed in one year, or which prohibit development for one or more years is resulting in significant barriers to housing creation at all income levels. Most municipalities impose these growth controls in order to study infrastructure needs or to review zoning. Some municipalities, however, impose growth controls simply to severely curtail new development or redevelopment projects without a clear action plan to resolve or correct the particular growth issue. See Sturges v. Town of Chilmark, 380 Mass. 246 (1980); Collura v. Town of Arlington, 367 Mass. 881 (1975). Moreover, Executive Order 215 provides that the imposition of a moratorium may result in the loss of discretionary funding but it is unclear whether E.O. 215 has ever been enforced against a municipality. In exchange for financial assistance to communities exhibiting a greater municipal cost burden as a result of housing development, local building cap regulations should have limited duration and purpose. The Commonwealth's population is going to grow regardless of growth control by-laws. If, for example, 60 towns enact them, the remaining communities must then shoulder a disproportionate burden.

There are, at times, real issues confronting a municipality, in terms of water supplies, sewer capacities, or school enrollments, which need to be addressed. However, these issues are identifiable and resolvable within a predictable horizon. Therefore, growth or permit controls should be substantially limited in their enactment, scope, and duration, with specific thresholds for implementation and municipal action to resolve the concern leading to the imposition of controls. Case history in the Commonwealth has shown that municipalities that enact these permit restrictions rarely, if ever, remove them from their bylaws, but rather continually renew them and frequently further

restrict the number of units to be allowed annually, even after correcting water or sewer issues, or building new schools to address the student enrollment issues.

Recommendations

3. **Any municipal growth control by-law must: a) identify a specific problem(s) and include a reasonable stated duration; and b) contain a strategic plan to address the problem(s). The plan, which must be approved by DHCD, shall address the specific problem(s) and propose a timetable for solving the problem(s). Should the community seek to extend the bylaw for another duration, the community must revise its plan to explain the rationale for additional time and submit the revised plan to DHCD for approval.**

While this recommendation is a good idea and we support programs that require ALL growth control by-laws to identify problems and contain strategic plans for solutions, we note that it erodes local community control when a state agency must approve of it. How about DHCD "review" rather than approval? There is also the presumption that some issues may be resolvable by a local community when only a regional solution will solve them. Also, community character is not something that is resolvable by adhering to a specific timetable, it is a continuing process and would require continuous revisions to a plan. We do not support this recommendation.

4. **Dwelling units of two bedrooms or less should be exempt from growth control measures enacted based on municipal finance concerns as there are likely to be few children living in these types of units, but they are vitally needed for young adults and seniors.**

We do not support this recommendation. Many families of more than 3 members are unfortunately forced to occupy two bedroom units. There are in fact likely to be numerous children in these types of units. Let's focus on providing adequate family housing rather than exempting one and two bedroom units and thus creating housing for young adults and senior at the expense of family housing.

MUNICIPAL FEES

Section 53G of GL c. 44 provides that any city or town provide rules for the imposition of "reasonable fees" for the employment of outside consultants. Many times, the amount of review fees accrued by the outside consultant in its review of a project design may exceed what is reasonably necessary to review a project. Moreover, some municipalities provide an applicant only one choice of review agent when at least four choices would be reasonable. Further, some municipalities charge permit fees that are well in excess of the reasonable cost in administering the permit program.

Recommendation

4. **Section 53G of Chapter 44 should provide clear standards for the retention of outside review consultants by allowing the developer a choice of not fewer than four review consultants. To avoid the appearance of a conflict and using the Conflict of Interest Law, MGL, Chapter 268A, as a guide, it is recommended that the list cannot include an individual who has worked for the developer in the past year and that the selected consultant must agree not to work for the developer for at least one year after the conclusion of the review. In addition, Section 53G of Chapter 44 should provide an administrative appeal to the city council or board of selectmen on the reasonableness of the scope of work to be performed by the consultant, and the reasonableness of the consultant costs to be expended on the review of a project.**

We do not support this recommendation. Again local control is threatened. The local community should choose who will review applications before its boards, not the developer. Are we to allow the developers a voice in hiring a Town Engineer that many communities are fortunate enough to employ to review not only public projects but also development applications?

5. **If the recommendation above is enacted by the Legislature, then Section 53G of Chapter 44 should also authorize conservation commissions to impose reasonable fees for the employment of outside consultants.**

We do not support this recommendation unless local choice is retained.

6. **DHCD should develop a model outside consultant review bylaw that can be readily adapted by a municipality.**

We support this recommendation since models are always of value to a community in determining for itself the various means of accomplishing its goals.

A tax has been defined as "an enforced contribution to provide the support of government." United States v. Tax Comm'n of Miss., 421 U.S. 599 (1975). In Massachusetts, a community may not levy, assess or collect taxes without the permission of the General Court. The distinction between a fee and a tax was discussed by the court in Emerson College v. Boston, 391 Mass. 415 (1984). The court concluded that the imposed charge by the city, which produced revenue for allocation to the general police and fire services, constituted a tax to defray the cost of a public benefit rather than a fee payable for a benefit limited to the owners of a buildings. In deciding Emerson, the court noted that fees share three common traits that distinguish them from taxes. First, they are charged in exchange for a particular government

service that benefits the party paying the fee in a manner not shared by other members of society. Second, they are paid by choice in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge; and third, they are collected not to raise revenues but to compensate the governmental entity providing the service for its expenses.

There have been instances where imposed charges have been upheld as valid fees. For example, in Southview Co-operative Housing Corp. v. Rent Control Board of Cambridge, 396 Mass. 395 (1985), the court concluded that charges assessed against landlords by the Rent Control Board of Cambridge in connection with petitions for individual rent adjustments were valid fees. In Commonwealth v. Caldwell, 25 Mass. App. Ct. 91 (1987), the court found that a mooring and slip fee assessed to boat owners by a city's harbormaster pursuant to a municipal ordinance was a valid fee and not a tax. In both cases the court determined that the revenues raised directly compensated the government for the cost of providing the service.

Municipalities may be imposing fees that exceed the cost of the service being provided.

Recommendations

3. **Local permit and approval fees must be based upon the reasonable costs of permit program administration, and cannot be used as a mechanism to generate revenue in excess of the costs of administration for a particular board, commission or department. Communities should be required to provide a rationale for the fees charged, demonstrating the relationship between such fees and the cost of providing the particular service through the particular board, commission or department. Any application or permit request should be governed by the fee schedule in effect at the time of the submission of the application or permit request.**

We support this recommendation since all communities' fees should be based on reasonable costs of permit program administration. We caution that the result of such a program may result in a realization of increased fees to developers.

4. **When review consultants are to be employed by the community, a developer should have a choice of not fewer than four review consultants. To avoid the appearance of a conflict and using the Conflict of Interest Law, MGL, Chapter 268A, as a guide, it is recommended that the list not include an individual who has worked for the developer in the past year and the selected consultant must agree not to work for the developer for at least one year after the conclusion of the review. In addition, there should be a process for administrative appeal to the city council or board of selectmen by a developer to permit the developer to contest the reasonableness of the**

scope of work to be performed by the consultant, and the reasonableness of the review consultants cost to be expended on the review of the project.

We do not support this recommendation. Again local control is threatened and it is not proper for the developer to choose who will review his/her plans.

SUBDIVISION CONTROL REGULATIONS

Excessive road and infrastructure design and construction standards add substantial cost and create a significant barrier to creation of housing. Reasonable engineering standards can be established for infrastructure needs that can generally reflect public safety, health and environmental priorities. ***We note that MGL c. 41 is outside the review of this Sub-Committee on Zoning, however we understand that subdivision control and zoning are intertwined and will ultimately affect overall housing costs. Further study is needed.***

Recommendations

3. **A working group of stake holders, including developers, municipal officials and engineering consultants should be formed for the purpose of recommending suggested construction standards that incorporate various conditions that would affect design and use of the roadways. This committee should also prepare a guidebook containing the suggested standards for distribution to cities and towns.**

We support this recommendation if only a handbook for local communities is the result. Again, the more resources a community has to make an informed decision on local development, the better off the Commonwealth will be. The list of stakeholders should be expanded to include environmental planners.

4. **The Department of Housing and Community Development shall include adoption of the suggested construction standards as an action that can be used by a community to qualify toward obtaining housing certification pursuant to Executive Order 418.**

We support this recommendation but note that there would need to be a provision to allow for alternatives. "One size fits all" does not work. Local character will be lost if a community is forced to a standard in order to qualify for funding.

LOCAL WETLAND PROTECTION BYLAWS

While this report states that wetland regulation is a significant barrier to housing, it should be recognized that wetlands SHOULD be a "limiting factor" to any development project. PROTECTION OF THE ENVIRONMENT MUST GO HAND IN HAND WITH PROVIDING HOUSING. In fact, this discussion is outside of the purview of this Sub-Committee: Wetlands bylaws are not rules for zoning, but for environmental protection.

A significant barrier to the development of housing is how wetlands are regulated in the Commonwealth. A municipality's power to regulate wetlands is shared jointly with the Commonwealth. Specifically, wetlands are regulated both under the State Wetlands Act and local wetlands bylaws enacted pursuant to the State Wetlands Act. There are two major reasons why this dual regulatory authority needs to be addressed.

First, municipalities have enacted wetland bylaws covering issues that are beyond the DEP's regulatory authority established under the Wetlands Protection Act. Some local wetlands bylaws have also introduced certain "no-build" and "non-disturbance" areas located either within a wetlands resource area buffer zone or beyond the buffer zone and in upland resource areas in excess of what may be necessary for environmental protection. In addition, some local wetlands bylaws include stormwater management guidelines in excess of the DEP Stormwater Management Guidelines.

Second, dual authority to regulate wetlands creates a bifurcated wetlands appeal process. Appeals under the State Wetlands Act are governed by Chapter 30A, the State Administrative Procedures Act, and administered through the Adjudicatory Rules and Wetlands Regulations. These appeals are made initially to the DEP regional office, then through the Office of Administrative Appeals, and finally to Superior Court. However, appeals of orders issued under a local wetlands bylaw is by complaint to Superior Court in the nature of *certiorari* filed within 60 days after the issuance of a decision.

Similar to the Building Code, a standard and permitting/enforcement method for environmental, conservation, and health concerns needs to be established. Environmental, conservation, and health standards are necessary but they need to be uniform, predictable, based on scientific or engineering fact, and have some compelling public benefit to their enactment.

Recommendations

1. **The State Wetlands Act should be the primary authority for the regulation of Wetlands in the Commonwealth. A municipality should have the ability to enact more stringent regulations if based on science and approved by the DEP.**

Our view of this recommendation is that communities ALREADY do this. If there are no local regulations, then DEP regulations are automatically in place. Local regulations ARE based on science. Local authority to set standards more strict than state regulations has been upheld in the courts. We do not agree that DEP should hold final say over local bylaws. We see no need for this recommendation.

2. In communities where local wetland bylaws have been enacted, the current dual appeal process should be combined by creating a consolidated appeal process to be administered by DEP.

We do not support the eroding of the appeal process as it stands today. We see no value in making it less rigorous with respect to environmental protection.

It is also recommended that the DEP review their policies relative to appeals and consider the following suggestions.

While the majority view was to forward these comments to DEP, we see no value in making these recommendations which dilute the appellants ability to appeal.

1. Revise the DEP's Expedited Review Policy to permit expedited review of significant housing development opportunities such as large multifamily projects and/or affordable housing projects.

2. Eliminate several of the appeal routes/procedures provided under the Adjudicatory Rules that are not specifically based upon the Wetlands Act. For example, a person wishing to prolong an adjudicatory appeal may file a "motion for reconsideration" of the adjudicatory appeals decision issued by the administrative law judge ("ALJ") even though such request has no merit. See 310 CMR 1.01(14)(d). Such a request may significantly add to the delay in obtaining a "final" approval and has rarely, if ever, been successful in reversing a decision issued by the ALJ.

5. Mandate that appellants strictly comply with the specific regulatory part of the request filed.

6. Require appellants to post a bond when appealing to reduce the number of frivolous appeals.

7. Limit issues raised in an appeal to those expressly identified in the appeal, and preclude new issues for appeal which are gathered from those not a party to an appeal at DEP site visits or through ex parte contact with the DEP.

8. Mandate that strict timeframes be adhered to by both applicants and appellants under penalty of dismissal with prejudice, and without the ability to submit new information beyond regulatory timeframes.

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It is very inexpensive for communities and abutters to appeal subdivision approvals and tie up housing projects for years, yet costly for developers to litigate arbitrary decisions by boards. Currently appeals of zoning by-laws and subdivision decisions can be appealed to Superior Court. Under current law such appeals are not given precedence and can take up to one to three years for a final decision. Only the largest building companies have the cash flow to support the costs for these suits.

In addition, the State Zoning Act includes an obscure provision relating to the posting of bonds and the awarding of court costs resulting from appeals of approved subdivision plans. Specifically, Section 17 of the Sate Zoning Act (MGL c.40A, s. 17) provides that "the court shall require non-municipal plaintiffs to post a surety or cash bond in a sum of not less than two thousand nor more than fifteen thousand dollars to secure the payment of such [court] costs in appeals of decisions approving subdivision plans" ... and that all appeals under Section 17 ... "shall have precedence over all other civil actions and proceedings." Further, all the provisions of Section 17 relating to the posting of bonds and the awarding of court costs should be more broadly applied to the appeals of special permits in addition to appeals of approved subdivision plans.

Moreover, the appeals process gives an unreasonably powerful tool to anti-housing interests, since arbitrary and frivolous appeals can be lodged with little or no basis, cost or risk. The appeals process needs to be corrected and clarified so that it is a balanced and efficient resolution to genuine issues.

Recommendation

5. **Section 81BB of the State Subdivision Control Law should include language identical to Section 17 of the Zoning Act with respect to requirements for the posting of bonds and the awarding of court costs when a party appealing a decision approving a subdivision plan acts in bad faith or with malice in making the appeal to the court.**

We do not support this recommendation since it erodes the public process.

6. **Section 17 of Chapter 40A should mandate the court to impose on non-municipal plaintiffs the requirement to post a surety or cash bond in a sum between $2,000 and $15,000 to secure the payment and award of court costs to the applicant in appeals of decisions approving special permits when the court determines the appellant acted in bad faith or with malice in making the appeal to the court.**

We do not support this recommendation since it too erodes the public process.

7. **In addition, or as an alternative, to requiring appellants to post a surety or cash bond, Chapter 40A, Section 17 and Chapter 41, Section 81BB should provide the applicant with the right to file an immediate, special motion to dismiss an appeal of an approval of a special permit and /or definitive subdivision plan approval if the applicant feels it can demonstrate that the appellant acted in bad faith or with malice in making the appeal to the court. In such circumstances when the court grants such special motion to dismiss based upon its findings of bad faith or malice, the court shall award the applicant both costs and reasonable attorneys fees including those costs and fees incurred for the special motion and any related discovery matters.**

We do not support this recommendation since it too erodes the public process.

8. **Senate Bill No. 810 of 2001 would amend MGL, Chapter 183 by giving precedence to any civil action or proceeding involving real estate permits. A real estate permit is defined as any authorization, certificate, building permit, license, variance or other approval issued by an agency, department, board, commission, authority or other governmental body or official of the Commonwealth or any city, town, or other political subdivision thereof to any person, firm, corporation, or other entity for the erection, alteration, repair or removal of a building or structure upon land. The Legislature should enact and the Governor should support this legislation or similar legislation that would expedite litigation involving residential construction.**

We do not support this recommendation since it too erodes the public process.

DENSITY BONUS REGULATIONS

Many cities and towns have enacted bylaws or ordinances that are designed to reward the developer with a density bonus in exchange for the set-aside of a certain number of affordable units. Unfortunately, the vast majority of these bylaws have gone unused because most of them are unworkable. Even if they were workable, developers are frequently confused about how to implement affordable housing restrictions.

Recommendation

3. **In order to encourage the use of the density bonus incentive to create additional units of affordable housing without having to go through the Chapter 40B process, DHCD should develop a model affordable housing density bonus bylaw package which includes: a model inclusionary housing bylaw, a model affordable housing restriction, recommended marketing and sales practices, recommended process for managing the affordable units, and**

a step-by-step guide for the developer and municipality which describes the process for establishing and maintaining affordable units.

We support this recommendation. Again, model bylaws that assist local communities in addressing local land use decisions enable the community to make reasonable choices. The ultimate authority for adoption of such a process should rest with the local community.

4. **The Zoning Act should specifically allow municipalities to enact zoning provisions permitting housing density bonuses as a matter of right.**

We support this recommendation when the decision is made by the local community.

MIXED USE DEVELOPMENT PROJECTS

Some cities and towns view residential housing development and commercial/industrial development in isolation, and do not consider the creation of mixed use zoning districts. With the recent phenomenon of the corporate campus and other large office-type developments, it appears that the developments would be ideally suited for the creation of the New England village style of development whereby commercial development can be surrounded by (or interspersed with) residential housing at all income levels. Given that the lack of affordable housing is a factor in out-of-state companies declining to move to the Commonwealth, several actions could encourage these companies to relocate to Massachusetts.

Recommendation

2. **The Commonwealth should provide incentives to companies looking to relocate to the Commonwealth and/or looking to develop corporate campuses to create housing to complement the commercial development. Such incentives could include enhanced tax increment financing which could be expanded to include housing creation as part of a mixed-use development package. Other financing incentives which link commercial development incentives with housing creation could expand housing opportunities, and result in the creation of a revenue neutral project. Such incentives could be targeted for developments which locate in existing commercial/industrial areas as well as areas located adjacent to mass transit corridors.**

We support this recommendation, and in fact encourage this type of planning.

2. **Allow the abandoned building tax credit to be used to encourage the redevelopment of urbanized blighted areas into new neighborhoods.**

We support this recommendation and again encourage this type of planning so long as the "new neighborhoods" include housing for all income levels, not only our lowest-income citizens.

BROWNFIELDS GRANT, LOAN, AND TAX PROGRAMS

Over the past several years, particularly since the enactment of the hazardous waste brownfields amendments to Chapter 21E, the Commonwealth has created a whole menu of financing, grant and tax incentive programs designed to encourage the redevelopment of urbanized brownfields contaminated by oil and/or hazardous materials. The key focus of these Brownfields programs, as administered through the Governor's Office of Brownfields Revitalization, has been commercial/industrial development and related job creation.

Recommendation

Where brownfields are suitable for residential development, authorize such housing projects as eligible for state brownfields programs and related incentives to redevelop urbanized areas into housing for all income levels. For example, subsidized environmental insurance can provide incentives for redevelopment of housing and the cleanup of hazardous materials. The Brownfields Tax Credit and Municipal Tax Abatement programs would also provide incentives to both remediate contamination and create additional housing opportunities.

We support this recommendation and encourage this type of planning, so long as the housing is truly developed to serve "all income levels".

URBAN REDEVELOPMENT CORPORATION

Urban redevelopment corporations are private, limited dividend entities which are created under Chapter 121A and 760 CMR 25.00 to develop residential, commercial, recreational, historic or industrial projects in areas which are considered to be blighted or substandard. The urban redevelopment corporation may not undertake more than one project nor engage in any other type of development activity. The corporation bears the responsibility for planning and initiating the project and owns the project throughout its existence. Chapter 121A authorizes the exemption of a project from real and personal property taxes, betterments and special assessments, and allows the project developer to exercise the power of eminent domain to assemble a development site in specified circumstances. By allowing the tax exemptions, urban redevelopment

corporations act as catalysts for development in areas with high property tax rates. The reason Chapter 121A corporations have not recently been used for the creation of affordable housing is that by law, the 121A entity may earn no more than an 8% return on investment, and any excess profits (after all eligible deductions) must be returned to the municipality up to the level of tax that would have been assessed if the property were to include a non-121A entity.

Recommendation

Amend Chapter 121A to increase the return on investment to that permitted under certain programs under Chapter 40B (i.e., 20% of development costs for non-rentals, and 10% of equity for rental housing).

We support this recommendation and encourage this type of planning.

Regional Housing Supply Planning

Increasing and facilitating housing production should be examined from a regional perspective. Planning for housing in regions or sub-regions should be supported by the Commonwealth. Regional housing development decisions that are guided by the housing market, demographic conditions, the area's economy, and available or planned infrastructure target the areas where housing development should occur, prevents sprawl and encourages more efficient development. Regional planning agencies can serve as catalysts and conveners of regional planning for housing.

Recommendation

In addition to supporting the planning efforts supported by Executive Order 418, the Commonwealth should examine the applicability of regulatory tools, such as those of the Cape Cod Commission, as a way to direct housing production to areas of greatest need, while protecting natural resources and assuring an adequate public transportation network and infrastructure for the housing to be built.

We support this recommendation and encourage this type of planning.

"MINORITY REPORT" TO THE BARRIERS TO HOUSING COMMISSION REPORT OF THE ZONING SUB-COMMITTEE

Introduction

This "Minority Report" to the Barriers to Housing Commission Report of the Zoning Sub-Committee is submitted on behalf of those members of the Zoning Sub-Committee who did support the vast majority of recommendations found in the final report. However, we feel that some of the Sub-Committee's recommendations did not go far enough in identifying and proposing recommendations for the removal of unnecessary barriers to housing, or needed further clarification as to purpose which was not readily apparent in the final Sub-Committee Report. This Minority Report also provides commentary on the Minority Report submitted by Thomas Broderick, et als. (the "Broderick Minority Report") in order to address policy issues raised therein, and to clarify certain matters which did not appear to be clearly understood by the authors of the Broderick Minority Report. We apologize for the timing of the filing of this Minority Report, but we felt it was necessary to respond to both the Broderick Minority Report, and to the Department of Environmental Protection's October 1, 2001 comments on the Zoning Sub-Committee Report (a copy of which we received from the DEP on October 12, 2001), which prompted the following commentary and response in order to clarify the position of several members of the Zoning Sub-Committee.

It is important for the Special Commission to understand that the recommendations of the Zoning Sub-Committee, including the Sub-Committee members noted below, are recommendations which are largely procedural and which are proposed in a manner so as not to impact environmental protection, rights of public participation, or municipal home rule authority. While we understand that municipal officials are very frequently concerned with the erosion of local decision-making authority, the Subcommittee had extensive, constructive discussion over the need for balancing home rule authority with the Administration's policy objective of removing certain barriers to housing creation at all income levels.

For purposes of clarity, we have revised the format of the Sub-Committee Report to enable the reader to identify and compare the recommendations of the Sub-Committee, the authors of the Broderick Minority Report, and this Minority Report. **The text which is underlined and in bold print identifies our recommendations or commentary,** the "standard text" and text in **bold print** is the Majority view**, and the *"bold italics" print identifies the view in the Broderick Minority Report.***

We also stress that the recommendations in the Sub-Committee Report were based upon the collective experience of developers, lenders, community leaders, municipal officials and others actively involved in the development community

throughout the Commonwealth, and we therefore strongly disagree with the statement in the Broderick Minority Report that the Sub-Committee Report included "much anecdotal evidence [which is] simply not true throughout the Commonwealth." While we believe the goal of the Subcommittee (including the authors of this Minority Report), and the Governor is the elimination of barriers to housing creation to the point where only isolated, anecdotal circumstances arise, we believe that the drastic undersupply of housing in the Commonwealth speaks for itself. Moreover, several members of the Sub-Committee suggested that the Sub-Committee was overstepping the Barriers Commission's directive, or had considered matters which the Sub-Committee was not authorized to review. While we disagree with those members of the Sub-Committee who feel that way, we feel the Administration is more interested in identifying the barriers and resolving them rather than limiting or confining the discussion to matters strictly within the confines of the Zoning Sub-Committee since both zoning and subdivision control, as well as local wetlands bylaws and state wetlands regulations and policies, are very much interrelated.

Moreover, we understand that some of the recommendations in the Sub-Committee Report and this Minority Report may be subject to significant political opposition. The authors of this Minority Report fully understand these potential challenges to proposals for significant policy changes. We are also of the view, however, that unless the major zoning and wetlands regulatory barriers are identified and are at least "put on the table," we would be doing a disservice to the full Barriers Commission and current Administration by failing to identify these barriers or treating such barriers as if they did not exist because they do not have an easy political and/or legal solution. As you will discover below, solutions to removing some barriers are much easier than others. Clearly, some existing barriers to housing creation will need much more extensive evaluation. For example, one of the more significant barriers to housing creation is the procedural mechanism by which wetlands decisions on the state and local level are appealed and handled through the appeals process. There is no doubt that the resolution of this procedural barrier is quite complex but merits further examination, given the view of many members of the Sub-Committee that the current dual appeals process is unnecessarily complex and results in a very substantial barrier to housing creation.

Lastly, we disagree with the contention that the housing problem is strictly one of the need to create low or moderate income housing. When applied to the basic economic concept of supply and demand, an increase in housing supply will, in general, reduce housing costs. The housing crisis has extended far beyond those who can benefit from affordable housing programs, and now impacts the middle class wage earner who earns in excess of the median household income level.

We hope that the full Barriers Commission will find our comments both thoughtful and helpful in addressing the many of the issued raised by the many talented and energetic participants on the Zoning Sub-Committee.

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The Zoning Sub-Committee of the Barriers to Housing Commission met 11 times from May 2 to August 1 to examine land use regulatory issues affecting housing production. The Sub-Committee represented many diverse interests including both for-profit and non-profit developers, banks, municipalities, and local and regional planners.

Several themes emerged from the Sub-Committee's discussions:

(15) localities are concerned that more housing will add to municipal service burdens and costs;
(16) the Commonwealth must take a more proactive role in providing financial incentives for housing development;
(17) there is a need to encourage municipalities not to enact unnecessary regulations that increase housing costs;
(18) there is a need to make legislative changes to deal with procedural problems that unnecessarily delay housing development and increase housing costs;
(19) there are available tools for responsible planning and zoning such as cluster development, transfer of development rights and density bonus provisions which could increase housing supply;
(20) there are newer avenues for growth and development, such as brownfields redevelopment and mixed use developments, which may make better use of land in developed areas; and,
(21) the Commonwealth must encourage both local and regional planning for housing.

Given the diverse composition of the Sub-Committee, not all members supported all recommendations. However, the Sub-Committee believes that the report represents the combined best efforts of its membership to bring the immediate need to increase housing production to the forefront. The report makes findings and recommendations in the following areas for the Commission's consideration:

a. Municipal Cost Burden
b. Density Regulations
c. Growth Control Bylaws
d. Municipal Fees
e. Subdivision Control Regulations
f. Local Wetland Protection Bylaws
g. Appeals Process
h. Density Bonus Regulations
i. Mixed Use Development Projects
j. Brownfields Grant, Loan and Tax Programs
k. Urban Development Corporations
l. Regional Housing Supply Planning

Proposed Recommendations to Reduce Barriers to Housing Production

MUNICIPAL COST BURDEN

There is a common perception, sometimes justified, that new housing units create a fiscal burden on the local community. The actual burden is dependent upon the assessed values of new homes and the incremental cost for additional students and other services. In some communities, it is likely that high sales prices and assessed values of new homes may actually generate net revenue. However, some communities may have a negative impact based on school capacity, extent of infrastructure, and available services (e.g., public safety, public works and recreation programs).

To determine the validity and extent of the claimed fiscal burden, a uniform methodology for determining the "cost of services" must be established and accepted by all parties to the housing production equation, which can then be used to establish the "true" cost of new housing units. With this "cost of services" in hand, a program or combination of programs can be developed, whether subsidy or fee-based, to defray the impact.

Recommendation

The Commonwealth should establish a comprehensive model for local aid which, on a community by community basis, assesses the impact of new housing. Such a model may reallocate some portion of existing aid and establish a state local aid impact fund to defray the true impact of new housing construction on cities and towns.

Broderick Minority Report

We do not support this recommendation. However, we would support an incentive program for communities that are addressing their housing needs. We cannot support re-allocation of local aid, but we could support the establishment of a local aid impact fund to defray the true impact of new housing construction on cities and towns.

Minority Report

We agree with the Sub-committee recommendation.

DENSITY REGULATIONS

Density regulations, such as minimum lot area requirements, minimum frontage requirements and low density per acre requirements, are the most significant barriers to the production of housing in the Commonwealth. Density regulations in many communities have increased the competition for available smaller lots, dispersed development, wasted valuable land resources, and have increased the costs of public and

private services. Moderate income home purchasers are being excluded from communities because of land costs and the selling cost of existing homes, and are finding the available small lots selling at prices beyond their means.

Although the issue of density regulations must be addressed, the Sub-Committee does not believe that a viable solution to the problem lies in a blanket statutory prohibition on municipalities enacting density regulations such as minimum lot size requirements. Establishing mandatory density regulations is not an acceptable technique for increasing housing production. Not only is such a solution unfair to areas already fully developed, but in some cases the requirement of certain density regulations may be justified by topographic or soil conditions and should be continued if such land is to be developed at all. The Sub-Committee also recognizes that home rule means that a municipality has the right, through legislated authority, to determine the location, manner and type of development it will permit within its boundaries. The State Legislature has repeatedly upheld this concept in legislation relating to zoning and subdivision control.

The Sub-Committee concludes that the Commonwealth needs a more energized and focused effort for increasing housing production.

Recommendations

5. **The Commonwealth should encourage communities to use the 40B process as a way of increasing production of market housing as well as affordable housing. The Commonwealth should design programs that reward communities that use this process in a friendly manner by defraying the municipal costs incurred by increased housing production.**

Broderick Minority Report

We support this recommendation.

Minority Report

We support this recommendation.

6. **The Commonwealth should examine all existing housing programs to determine if there are ways they can be revised to further increase housing production. For example, DHCD should review the LIP Program to see if the current guidelines make it economically feasible for a developer to construct housing under that program. Proposed program changes should be widely disseminated to the municipal and development interests affected by such changes.**

Broderick Minority Report

We support this recommendation.

Minority Report

We support this recommendation.

7. **The Commonwealth should encourage local adoption of zoning regulations that support higher density housing near commercial and transit uses. Such actions could discourage sprawl and spread of development to "green" areas.**

Broderick Minority Report

We support this recommendation.

Minority Report

We support this recommendation.

6. **A committee should be established by the Legislature that includes local officials, developers, planners and housing advocates for the purpose of recommending programs, legislation and planning tools that will increase housing production in the Commonwealth. Such programs, legislation and planning tools should be available at local option so as to maintain local autonomy. In order to accomplish this aim, revenue sources and grant programs should be directed to those communities that use such programs, legislation and planning tools and work cooperatively with the Commonwealth in increasing housing supply.**

Broderick Minority Report

We support this recommendation.

Minority Report

We support this recommendation.

GROWTH CONTROL BYLAWS

The enactment of local bylaws which impose limitations on the number of building permits which can be issued in any one year, or which permit only a certain percentage of units in any one development to be constructed in one year, or which prohibit development for one or more years is resulting in significant barriers to housing creation

at all income levels. Most municipalities impose these growth controls in order to study infrastructure needs or to review zoning. Some municipalities, however, impose growth controls simply to severely curtail new development or redevelopment projects without a clear action plan to resolve or correct the particular growth issue. See Sturges v. Town of Chilmark, 380 Mass. 246 (1980); Collura v. Town of Arlington, 367 Mass. 881 (1975). Moreover, Executive Order 215 provides that the imposition of a moratorium may result in the loss of discretionary funding but it is unclear whether E.O. 215 has ever been enforced against a municipality. In exchange for financial assistance to communities exhibiting a greater municipal cost burden as a result of housing development, local building cap regulations should have limited duration and purpose. The Commonwealth's population is going to grow regardless of growth control by-laws. If, for example, 60 towns enact them, the remaining communities must then shoulder a disproportionate burden.

There are, at times, real issues confronting a municipality, in terms of water supplies, sewer capacities, or school enrollments, which need to be addressed. However, these issues are identifiable and resolvable within a predictable horizon. Therefore, growth or permit controls should be substantially limited in their enactment, scope, and duration, with specific thresholds for implementation and municipal action to resolve the concern leading to the imposition of controls. Case history in the Commonwealth has shown that municipalities that enact these permit restrictions rarely, if ever, remove them from their bylaws, but rather continually renew them and frequently further restrict the number of units to be allowed annually, even after correcting water or sewer issues, or building new schools to address the student enrollment issues.

Recommendations

5. **Any municipal growth control by-law must: a) identify a specific problem(s) and include a reasonable stated duration; and b) contain a strategic plan to address the problem(s). The plan, which must be approved by DHCD, shall address the specific problem(s) and propose a timetable for solving the problem(s). Should the community seek to extend the bylaw for another duration, the community must revise its plan to explain the rationale for additional time and submit the revised plan to DHCD for approval.**

Broderick Minority Report

While this recommendation is a good idea and we support programs that require ALL growth control by-laws to identify problems and contain strategic plans for solutions, we note that it erodes local community control when a state agency must approve of it. How about DHCD "review" rather than approval? There is also the presumption that some issues may be resolvable by a local community when only a regional solution will solve them. Also, community character is not something that is resolvable by adhering to a specific timetable, it is a continuing process and would require continuous revisions to a plan. We do not support this recommendation.

Minority Report

While we support this recommendation, we feel that there must be some mechanism to ensure that a municipality proposing growth controls does so in a reasonable manner and undertakes measures to resolve the problem within a reasonable amount of time. For example, some municipalities limit the number of building permits for new dwellings units to 20 to 30 permits per year which the authors feel is entirely unreasonable since the particular municipality must have known of the infrastructure limitations for an extensive period of time (without properly reacting) to impose such a drastic growth control measure. We feel that an initial period of two years is a reasonable amount of time in most cases to both study the problem leading to the need for the growth control and to propose mechanisms through Town Meeting or the City Council to deal with such issues. There is no question that some issues (either local or regional) need more than two years to plan and implement such as wastewater facilities planning. However, we also believe that poor municipal planning should not be rewarded by allowing a municipality to impose growth controls which (but for poor planning and some foresight) could have resulted in the avoidance of the need for the growth control in the first place. We feel that a balanced approach to growth control would include DHCD approval to ensure that a municipality will proactively deal with the particular growth control issue. We acknowledge that the two-year growth control time limit would not work in every situation, and for that reason, the municipality would be able to extend the growth control period as long as the DHCD determines that the extension is reasonably required to substantially resolve the particular problem which led to the imposition of the growth control measure. Lastly, community character is clearly important to municipal residents, and community character can and should be a priority and can be handled proactively with careful planning which could result in the avoidance of certain reactive growth control measures.

6. **Dwelling units of two bedrooms or less should be exempt from growth control measures enacted based on municipal finance concerns as there are likely to be few children living in these types of units, but they are vitally needed for young adults and seniors.**

Broderick Minority Report

We do not support this recommendation. Many families of more than 3 members are unfortunately forced to occupy two bedroom units. There are in fact likely to be numerous children in these types of units. Let's focus on providing adequate family housing rather than exempting one and two bedroom units and thus creating housing for young adults and senior at the expense of family housing.

Minority Report

We concur with this recommendation. There is a significant lack of housing for both younger professionals and seniors for maintenance-free, apartment living. Many of these individuals cannot afford to purchase a home, or cannot find appropriate housing opportunities. Rental rates have grown dramatically to the point where such rates form a barrier similar to barriers for those seeking to purchase a home. Families with children are not the primary residents for these types of units, and to deny housing opportunities because children may live in such units is a sad commentary.

MUNICIPAL FEES

Section 53G of GL c. 44 provides that any city or town provide rules for the imposition of "reasonable fees" for the employment of outside consultants. Many times, the amount of review fees accrued by the outside consultant in its review of a project design may exceed what is reasonably necessary to review a project. Moreover, some municipalities provide an applicant only one choice of review agent when at least four choices would be reasonable. Further, some municipalities charge permit fees that are well in excess of the reasonable cost in administering the permit program.

Recommendation

7. **Section 53G of Chapter 44 should provide clear standards for the retention of outside review consultants by allowing the developer a choice of not fewer than four review consultants. To avoid the appearance of a conflict and using the Conflict of Interest Law, MGL, Chapter 268A, as a guide, it is recommended that the list cannot include an individual who has worked for the developer in the past year and that the selected consultant must agree not to work for the developer for at least one year after the conclusion of the review. In addition, Section 53G of Chapter 44 should provide an administrative appeal to the city council or board of selectmen on the reasonableness of the scope of work to be performed by the consultant, and the reasonableness of the consultant costs to be expended on the review of a project.**

Broderick Minority Report

We do not support this recommendation. Again local control is threatened. The local community should choose who will review applications before its boards, not the developer. Are we to allow the developers a voice in hiring a Town Engineer that many communities are fortunate enough to employ to review not only public projects but also development applications?

Minority Report

We strongly support this recommendation for a number of reasons. First, we interpret this recommendation to permit a municipality to have complete autonomy in selecting each of the review consultants which would be included on a list of the municipalities' recommended consultants, so local control is entirely preserved. The only choice the project proponent would have is the selection of one of those four consultants. Second, a simple administrative review mechanism as that proposed by the Sub-Committee would serve to ensure that the scope of work and related costs as proposed are reasonable and commensurate with the size of the proposed project. It is the opinion of the authors of this Minority Report that the administrative review process would be rarely used except in extreme circumstances since the proponent is unlikely to want to suffer delays in project review to challenge a patrticular scope of review fee unless the scope or related costs for such review were considered significantly out of line for the type of project. Nevertheless, the authors of this Minority Report feel the existence of this administrative process is an essential tool to ensure the reasonableness of outside consultant review.

8. **If the recommendation above is enacted by the Legislature, then Section 53G of Chapter 44 should also authorize conservation commissions to impose reasonable fees for the employment of outside consultants.**

Broderick Minority Report

We do not support this recommendation unless local choice is retained.

Minority Report

See Minority Report comments on Recommendation # 1 above.

9. **DHCD should develop a model outside consultant review bylaw that can be readily adapted by a municipality.**

Broderick Minority Report

We support this recommendation since models are always of value to a community in determining for itself the various means of accomplishing its goals.

Minority Report

We support this recommendation since we believe reasonable municipal boards or commissions will desire to adopt a bylaw that provides a balanced approach to the retention of outside review consultants for project review.

A tax has been defined as "an enforced contribution to provide the support of government." United States v. Tax Comm'n of Miss., 421 U.S. 599 (1975). In Massachusetts, a community may not levy, assess or collect taxes without the permission of the General Court. The distinction between a fee and a tax was discussed by the court in Emerson College v. Boston, 391 Mass. 415 (1984). The court concluded that the imposed charge by the city, which produced revenue for allocation to the general police and fire services, constituted a tax to defray the cost of a public benefit rather than a fee payable for a benefit limited to the owners of a buildings. In deciding Emerson, the court noted that fees share three common traits that distinguish them from taxes. First, they are charged in exchange for a particular government service that benefits the party paying the fee in a manner not shared by other members of society. Second, they are paid by choice in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge; and third, they are collected not to raise revenues but to compensate the governmental entity providing the service for its expenses.

There have been instances where imposed charges have been upheld as valid fees. For example, in Southview Co-operative Housing Corp. v. Rent Control Board of Cambridge, 396 Mass. 395 (1985), the court concluded that charges assessed against landlords by the Rent Control Board of Cambridge in connection with petitions for individual rent adjustments were valid fees. In Commonwealth v. Caldwell, 25 Mass. App. Ct. 91 (1987), the court found that a mooring and slip fee assessed to boat owners by a city's harbormaster pursuant to a municipal ordinance was a valid fee and not a tax. In both cases the court determined that the revenues raised directly compensated the government for the cost of providing the service.

Municipalities may be imposing fees that exceed the cost of the service being provided.

Recommendations

5. **Local permit and approval fees must be based upon the reasonable costs of permit program administration, and cannot be used as a mechanism to generate revenue in excess of the costs of administration for a particular board, commission or department. Communities should be required to provide a rationale for the fees charged, demonstrating the relationship between such fees and the cost of providing the particular service through the particular board, commission or department. Any application or permit request should be governed by the fee schedule in effect at the time of the submission of the application or permit request.**

Broderick Minority Report

We support this recommendation since all communities' fees should be based on reasonable costs of permit program administration. We caution that the result of such a program may result in a realization of increased fees to developers.

Minority Report

Several members of the Sub-Committee initially considered this issue to be an example of an anecdotal, isolated incident which rarely occurs in Massachusetts. However, the disclosure of the common nature of this practice in a July 26, 2001 Boston Globe article indicates the practice is a common occurrence in Massachusetts. For example, the above-referenced Boston Globe article stated that "many municipalities rake in hundreds of thousands of dollars each year in permit fees collected by local building departments ... [and] ... most permit revenue is fed into a city or town's general operating fund." For example, the Boston Globe article states that in FY2001, a certain town building department incurred $74,974 in program administration expenses but generated $1,128,136 in permit fees. To continue such a practice creates a housing affordability barrier by unnecessarily increasing a developer's housing costs which, in turn, are passed on to the homebuyer in the form of higher housing prices.

6. **When review consultants are to be employed by the community, a developer should have a choice of not fewer than four review consultants. To avoid the appearance of a conflict and using the Conflict of Interest Law, MGL, Chapter 268A, as a guide, it is recommended that the list not include an individual who has worked for the developer in the past year and the selected consultant must agree not to work for the developer for at least one year after the conclusion of the review. In addition, there should be a process for administrative appeal to the city council or board of selectmen by a developer to permit the developer to contest the reasonableness of the scope of work to be performed by the consultant, and the reasonableness of the review consultants cost to be expended on the review of the project.**

Broderick Minority Report

We do not support this recommendation. Again local control is threatened and it is not proper for the developer to choose who will review his/her plans.

Minority Report

See Minority Report comments on Municipal Fees Recommendation # 1 above.

SUBDIVISION CONTROL REGULATIONS

Excessive road and infrastructure design and construction standards add substantial cost and create a significant barrier to creation of housing. Reasonable engineering standards can be established for infrastructure needs that can generally reflect public safety, health and environmental priorities.

Broderick Minority Report

We note that MGL c. 41 is outside the review of this Sub-Committee on Zoning, however we understand that subdivision control and zoning are intertwined and will ultimately affect overall housing costs. Further study is needed.

Minority Report

The promulgation of local regulations under the State Subdivision Control Law is certainly necessary to ensure health and safety measures are achieved, and help to ensure that a community's character is preserved. Subdivision control is intertwined with zoning regulation. At times, however, local subdivision control regulations can create a significant barrier to housing creation by imposing unreasonable design standards and/or resulting costs for road layout and other design specifications which, in turn, can significantly and unnecessarily increase housing costs.

Recommendations

9. **A working group of stake holders, including developers, municipal officials and engineering consultants should be formed for the purpose of recommending suggested construction standards that incorporate various conditions that would affect design and use of the roadways. This committee should also prepare a guidebook containing the suggested standards for distribution to cities and towns.**

Broderick Minority Report

We support this recommendation if only a handbook for local communities is the result. Again, the more resources a community has to make an informed decision on local

development, the better off the Commonwealth will be. The list of stakeholders should be expanded to include environmental planners.

Minority Report

We agree with the Sub-Committee recommendation and the Broderick Minority Report.

10. **The Department of Housing and Community Development shall include adoption of the suggested construction standards as an action that can be used by a community to qualify toward obtaining housing certification pursuant to Executive Order 418.**

Broderick Minority Report

We support this recommendation but note that there would need to be a provision to allow for alternatives. "One size fits all" does not work. Local character will be lost if a community is forced to a standard in order to qualify for funding.

Minority Report

We agree with this recommendation, and agree with the Broderick Minority Report that alternative construction standards should be explored so that minimum standards are achieved to ensure that the purposes of the subdivision control law are satisfied.

LOCAL WETLAND PROTECTION BYLAWS

Broderick Minority Report

While this report states that wetland regulation is a significant barrier to housing, it should be recognized that wetlands SHOULD be a "limiting factor" to any development project. PROTECTION OF THE ENVIRONMENT MUST GO HAND IN HAND WITH PROVIDING HOUSING. In fact, this discussion is outside of the purview of this Sub-Committee: Wetlands bylaws are not rules for zoning, but for environmental protection.

Minority Report

There is no question that wetlands protection should be a limiting factor to any development project, and that there is no question that reasonable local regulation of wetlands is important to preserve unique wetlands resources. Local wetlands

regulation, however, has very frequently been used as a "zoning-type" control through the imposition of no-build or non-disturbance setbacks, or through the imposition of minimum contiguous buildable upland requirements in many zoning bylaws. While we agree that such restrictions are appropriate in many circumstances for the protection of sensitive receptors for purposes such as public water supply watershed protection or wellfield recharge, a "one-size fits all" approach does not always serve to protect wetland interests. In fact, the imposition or arbitrary setbacks may have the opposite effect by resulting in the need for the development of more land to satisfy wetlands regulatory and/or zoning requirements. As a result of these measures and other measures which result in the need for large lot zoning, developed land now has less than one half of the population density of developed land in 1950. Further, as noted in the "Bringing Down the Barriers Report," the amount of developed land increased at a rate greater than six times population growth between 1950 and 1990. See Policy Report—Bringing Down the Barriers: Changing Housing Supply Dynamics in Massachusetts," Administration and Finance (p.22). While admittedly the creation of more restrictive local wetlands protection bylaws is only one reason for the increased consumption of land, it is a measure which has contributed to the need for larger lot zoning which, in turn, has promoted suburban sprawl.

A significant barrier to the development of housing is how wetlands are regulated in the Commonwealth. A municipality's power to regulate wetlands is shared jointly with the Commonwealth. Specifically, wetlands are regulated both under the State Wetlands Act and local wetlands bylaws enacted pursuant to the State Wetlands Act. There are two major reasons why this dual regulatory authority needs to be addressed.

First, municipalities have enacted wetland bylaws covering issues that are beyond the DEP's regulatory authority established under the Wetlands Protection Act. Some local wetlands bylaws have also introduced certain "no-build" and "non-disturbance" areas located either within a wetlands resource area buffer zone or beyond the buffer zone and in upland resource areas in excess of what may be necessary for environmental protection. In addition, some local wetlands bylaws include stormwater management guidelines in excess of the DEP Stormwater Management Guidelines.

Second, dual authority to regulate wetlands creates a bifurcated wetlands appeal process. Appeals under the State Wetlands Act are governed by Chapter 30A, the State Administrative Procedures Act, and administered through the Adjudicatory Rules and Wetlands Regulations. These appeals are made initially to the DEP regional office, then through the Office of Administrative Appeals, and finally to Superior Court. However, appeals of orders issued under a local wetlands bylaw is by complaint to Superior Court in the nature of *certiorari* filed within 60 days after the issuance of a decision.

Similar to the Building Code, a standard and permitting/enforcement method for environmental, conservation, and health concerns needs to be established.

Environmental, conservation, and health standards are necessary but they need to be uniform, predictable, based on scientific or engineering fact, and have some compelling public benefit to their enactment.

Recommendations

1. **The State Wetlands Act should be the primary authority for the regulation of Wetlands in the Commonwealth. A municipality should have the ability to enact more stringent regulations if based on science and approved by the DEP.**

Broderick Minority Report

Our view of this recommendation is that communities ALREADY do this. If there are no local regulations, then DEP regulations are automatically in place. Local regulations ARE based on science. Local authority to set standards more strict than state regulations has been upheld in the courts. We do not agree that DEP should hold final say over local bylaws. We see no need for this recommendation.

Minority Report

The authors of this Minority Report agree that many municipalities do enact wetlands regulations based upon science. On the other hand, the authors believe the intent of this recommendation is the creation of a uniform code of wetlands standards at the state level, and permitting local municipalities to enact more stringent wetlands bylaws only for compelling reasons based upon unique local conditions.

As such, the authors propose the following recommendation:

> **Require that the State Wetlands Protection Act and Regulations serve as a uniform code. Proposed local wetlands bylaws, which are more stringent than standards described under the State Wetlands Act and Regulations, shall be based on generally-recognized scientific principles and include regulation of subject matter defined in the State Wetlands Act and Regulations. In order to enforce these requirements, establish a wetlands bylaw review process similar to that formerly proposed to be established under Title 5 of the State Environmental Code (310 CMR 15.000) which would require local conservation commissions (or municipalities), prior to bylaw enactment, to provide the DEP with copies of proposed local bylaws, including generally-recognized scientific justification for their enactment, and the unique local conditions meriting a deviation from the uniform code. The Department of Environmental Protection, in turn, should be charged with reviewing the proposed bylaw to ensure that such bylaws are consistent with the state regulatory requirements, are scientifically justified, and are based upon unique local circumstances. Such review procedure should be**

instituted regardless of whether the local wetlands bylaw is enacted under home rule authority or otherwise.

We acknowledge this proposal is a radical departure from the current wetlands protection regulatory scheme, and that the proposal would face significant political opposition. This recommendation will also result in the need for examination of certain legal issues regarding potential impacts to existing local wetlands bylaws enacted under home rule authority. On the other hand, the consolidation of the wetlands review process would lead to more streamlined and consistent review of potential project impacts to wetland resources, including unique wetland resources significant to local concerns.

2. In communities where local wetland bylaws have been enacted, the current dual appeal process should be combined by creating a consolidated appeal process to be administered by DEP.

Broderick Minority Report

We do not support the eroding of the appeal process as it stands today. We see no value in making it less rigorous with respect to environmental protection.

Minority Report

This second proposal is linked to the first Minority Report recommendation above. We also feel that the Broderick Minority Report misses the point since a more disjointed process does not result in more environmental protection but results in a more expensive process with no commensurate increase in environmental protection. It is well-recognized that the current dual appeals process for appeals of approvals issued under the State Act and local bylaws is a very disjointed process which results only in unnecessary project delay and does not result in any increased environmental protection unless one considers a 2-3 year project delay a method of environmental protection because a project is abandoned or not constructed because of the carrying expense to the project proponent. There is no question that this dual appeals process creates one of the most significant barriers to housing creation due to the lengthy bifurcated process involved when a wetlands appeal involves an appeal to the Department and to Superior Court. It is acknowledged that the separate legal authority for appeals under the State Wetlands Protection Act (pursuant to M.G.L. c.30A) and local bylaw (by certiorari to Superior Court) presents challenging legal and policy issues to the proposed combination of both appeals processes under the current dual wetlands review process. On the other hand, the authors feel a combined appeals process would certainly work well with a uniform wetlands protection act at the state level as recommended above. As noted in the introductory comments to this Minority Report, we believe this recommendation deserves more significant evaluation to determine whether a statutory mechanism can be created to combine the appeals process, to create a

uniform standard of review, and to create uniform appeal periods. We all recognize the problem and the barrier it creates to housing creation, but the recommended solution to this problem will require much more substantive analysis.

It is also recommended that the DEP review their policies relative to appeals and consider the following suggestions.

Broderick Minority Report

While the majority view was to forward these comments to DEP, we see no value in making these recommendations which dilute the appellants ability to appeal.

Minority Report

The Broderick Minority Report misses the point. The authors of this Minority Report simply desire to cut down on the number of frivolous appeals which routinely occur. It is well-known in the regulated community that the easiest and least costly method by which a project can be delayed is by appealing the issuance of a wetlands order of conditions pursuant to the state wetlands protection act. Because the Department does not strictly adhere to its own regulatory timeframes or strictly enforce standards which appellants must meet to satisfy minimum criteria for appeals due to resource limitations, the anti-development community has taken advantage of this well-known delay tactic which imposes significant barriers to both housing creation and housing costs.

1. **Revise the DEP's Expedited Review Policy to permit expedited review of significant housing development opportunities such as large multifamily projects and/or affordable housing projects.**

Minority Report

We support this recommendation. Since the administration's stated goal is to reduce barriers to housing development, the Department should expedite significant housing opportunities such as housing approved as part of the Chapter 40B and Chapter 121A processes. We agree with the Department's comments that the expedited review process could be self-defeating if expedited review applied to all housing projects, so we recommend that the policy apply to the types of housing most urgently needed, such as moderate income housing or other housing created under the Chapter 40B and Chapter 121A processes.

2. **Eliminate several of the appeal routes/procedures provided under the Adjudicatory Rules that are not specifically based upon the Wetlands Act. For example, a person wishing to prolong an adjudicatory appeal may file a "motion for reconsideration" of the adjudicatory appeals decision issued by the administrative law judge ("ALJ") even though such request has no merit. See 310 CMR 1.01(14)(d). Such a request may significantly add to the delay in obtaining a "final" approval and has rarely, if ever, been successful in reversing a decision issued by the ALJ.**

Minority Report

We support this recommendation because we feel that a more simplified appeals process should be implemented. While the Department is currently reviewing methods by which to streamline "trial-like" procedures, our concern really lies with the number of appeal routes (and related procedural techniques) provided under the State Wetlands Regulations and Adjudicatory Rules. For example, a wetlands order of conditions can be appealed to the Department's regional office through a request for superseding order of conditions which can take up to four or more months to be resolved. Subsequently, the superseding order can be appealed through a request for adjudicatory hearing which involves a lengthy review process. Thereafter, an appeal of a final determination in the adjudicatory appeals process can be made to Superior Court. Moreover, the authors are aware of circumstances where it has taken no less than five months for the Department to assign an adjudicatory appeal to an administrative law judge. Although the Department's time standards mandate that adjudicatory appeals must be resolved within one year, the appeals process is more complicated than it needs to be.

11. **Mandate that appellants strictly comply with the specific regulatory part of the request filed.**

12. **Require appellants to post a bond when appealing to reduce the number of frivolous appeals.**

13. **Limit issues raised in an appeal to those expressly identified in the appeal, and preclude new issues for appeal which are gathered from those not a party to an appeal at DEP site visits or through ex parte contact with the DEP.**

14. **Mandate that strict timeframes be adhered to by both applicants and appellants under penalty of dismissal with prejudice, and without the ability to submit new information beyond regulatory timeframes.**

Minority Report

We support these recommendations.

APPEALS PROCESS

It is very inexpensive for communities and abutters to appeal subdivision approvals and tie up housing projects for years, yet costly for developers to litigate arbitrary decisions by boards. Currently appeals of zoning by-laws and subdivision decisions can be appealed to Superior Court. Under current law such appeals are not given precedence and can take up to one to three years for a final decision. Only the largest building companies have the cash flow to support the costs for these suits.

In addition, the State Zoning Act includes an obscure provision relating to the posting of bonds and the awarding of court costs resulting from appeals of approved subdivision plans. Specifically, Section 17 of the Sate Zoning Act (MGL c.40A, s. 17) provides that "the court shall require non-municipal plaintiffs to post a surety or cash bond in a sum of not less than two thousand nor more than fifteen thousand dollars to secure the payment of such [court] costs in appeals of decisions approving subdivision plans" ... and that all appeals under Section 17 ... "shall have precedence over all other civil actions and proceedings." Further, all the provisions of Section 17 relating to the posting of bonds and the awarding of court costs should be more broadly applied to the appeals of special permits in addition to appeals of approved subdivision plans.

Moreover, the appeals process gives an unreasonably powerful tool to anti-housing interests, since arbitrary and frivolous appeals can be lodged with little or no basis, cost or risk. The appeals process needs to be corrected and clarified so that it is a balanced and efficient resolution to genuine issues.

Recommendation

9. Section 81BB of the State Subdivision Control Law should include language identical to Section 17 of the Zoning Act with respect to requirements for the posting of bonds and the awarding of court costs when a party appealing a decision approving a subdivision plan acts in bad faith or with malice in making the appeal to the court.

Broderick Minority Report

We do not support this recommendation since it erodes the public process.

Minority Report

The Broderick Minority Report misses the point. The public process would be significantly enhanced were those appealing decisions on frivolous grounds given a disincentive to do so by allowing a neutral arbiter (a judge) to award court costs when a party appealing a decision approving a subdivision plan acts in bad faith or with malice in making the appeal to the court.

10. **Section 17 of Chapter 40A should mandate the court to impose on non-municipal plaintiffs the requirement to post a surety or cash bond in a sum between $2,000 and $15,000 to secure the payment and award of court costs to the applicant in appeals of decisions approving special permits when the court determines the appellant acted in bad faith or with malice in making the appeal to the court.**

Broderick Minority Report

We do not support this recommendation since it too erodes the public process.

Minority Report

See the Minority Report comments on Recommendation # 1 above.

11. **In addition, or as an alternative, to requiring appellants to post a surety or cash bond, Chapter 40A, Section 17 and Chapter 41, Section 81BB should provide the applicant with the right to file an immediate, special motion to dismiss an appeal of an approval of a special permit and /or definitive subdivision plan approval if the applicant feels it can demonstrate that the appellant acted in bad faith or with malice in making the appeal to the court. In such circumstances when the court grants such special motion to dismiss based upon its findings of bad faith or malice, the court shall award the applicant both costs and reasonable attorneys fees including those costs and fees incurred for the special motion and any related discovery matters.**

Broderick Minority Report

We do not support this recommendation since it too erodes the public process.

Minority Report

We support this recommendation since it only provides a disincentive to those who appeal an approval of a special permit and/or definitive subdivision plan in bad

faith or with malice. A party filing an appeal in good faith would not be concerned with sanctions such as those proposed pursuant to this recommendation.

12. **Senate Bill No. 810 of 2001 would amend MGL, Chapter 183 by giving precedence to any civil action or proceeding involving real estate permits. A real estate permit is defined as any authorization, certificate, building permit, license, variance or other approval issued by an agency, department, board, commission, authority or other governmental body or official of the Commonwealth or any city, town, or other political subdivision thereof to any person, firm, corporation, or other entity for the erection, alteration, repair or removal of a building or structure upon land. The Legislature should enact and the Governor should support this legislation or similar legislation that would expedite litigation involving residential construction.**

Broderick Minority Report

We do not support this recommendation since it too erodes the public process.

Minority Report

We support this recommendation since it attempts to prioritize, as a matter of policy, the elimination of barriers to housing by expediting court review of housing projects.

DENSITY BONUS REGULATIONS

Many cities and towns have enacted bylaws or ordinances that are designed to reward the developer with a density bonus in exchange for the set-aside of a certain number of affordable units. Unfortunately, the vast majority of these bylaws have gone unused because most of them are unworkable. Even if they were workable, developers are frequently confused about how to implement affordable housing restrictions.

Recommendation

5. **In order to encourage the use of the density bonus incentive to create additional units of affordable housing without having to go through the Chapter 40B process, DHCD should develop a model affordable housing density bonus bylaw package which includes: a model inclusionary housing**

bylaw, a model affordable housing restriction, recommended marketing and sales practices, recommended process for managing the affordable units, and a step-by-step guide for the developer and municipality which describes the process for establishing and maintaining affordable units.

Broderick Minority Report

We support this recommendation. Again, model bylaws that assist local communities in addressing local land use decisions enable the community to make reasonable choices. The ultimate authority for adoption of such a process should rest with the local community.

Minority Report

We support this recommendation but suggest that Chapter 40A be amended to expressly provide that if municipalities enact affordable housing mandates for conventional (non-Chapter 40B) residential projects, the municipality must provide density bonuses. The concern raised relates to recent legislative proposals to mandate the provision of affordable housing in housing developments of a certain size but without any density bonus to offset the monetary loss to the project proponent resulting from the mandate to create affordable units.

6. **The Zoning Act should specifically allow municipalities to enact zoning provisions permitting housing density bonuses as a matter of right.**

Broderick Minority Report

We support this recommendation when the decision is made by the local community.

Minority Report

We support this recommendation.

MIXED USE DEVELOPMENT PROJECTS

Some cities and towns view residential housing development and commercial/industrial development in isolation, and do not consider the creation of mixed use zoning districts. With the recent phenomenon of the corporate campus and other large office-type developments, it appears that the developments would be ideally suited for the creation of the New England village style of development whereby commercial development can be surrounded by (or interspersed with) residential housing at all income levels. Given that

the lack of affordable housing is a factor in out-of-state companies declining to move to the Commonwealth, several actions could encourage these companies to relocate to Massachusetts.

Recommendation

3. **The Commonwealth should provide incentives to companies looking to relocate to the Commonwealth and/or looking to develop corporate campuses to create housing to complement the commercial development. Such incentives could include enhanced tax increment financing which could be expanded to include housing creation as part of a mixed-use development package. Other financing incentives which link commercial development incentives with housing creation could expand housing opportunities, and result in the creation of a revenue neutral project. Such incentives could be targeted for developments which locate in existing commercial/industrial areas as well as areas located adjacent to mass transit corridors.**

Broderick Minority Report

We support this recommendation, and in fact encourage this type of planning.

Minority Report

We support this recommendation.

2. **Allow the abandoned building tax credit to be used to encourage the redevelopment of urbanized blighted areas into new neighborhoods.**

Broderick Minority Report

We support this recommendation and again encourage this type of planning so long as the "new neighborhoods" include housing for all income levels, not only our lowest-income citizens.

Minority Report

We support this recommendation, but as a matter of policy, we suggest that this tax credit be targeted for the type of housing which is of greatest need.

BROWNFIELDS GRANT, LOAN, AND TAX PROGRAMS

Over the past several years, particularly since the enactment of the hazardous waste brownfields amendments to Chapter 21E, the Commonwealth has created a whole menu of financing, grant and tax incentive programs designed to encourage the redevelopment of urbanized brownfields contaminated by oil and/or hazardous materials. The key focus of these Brownfields programs, as administered through the Governor's Office of Brownfields Revitalization, has been commercial/industrial development and related job creation.

Recommendation

Where brownfields are suitable for residential development, authorize such housing projects as eligible for state brownfields programs and related incentives to redevelop urbanized areas into housing for all income levels. For example, subsidized environmental insurance can provide incentives for redevelopment of housing and the cleanup of hazardous materials. The Brownfields Tax Credit and Municipal Tax Abatement programs would also provide incentives to both remediate contamination and create additional housing opportunities.

Broderick Minority Report

We support this recommendation and encourage this type of planning, so long as the housing is truly developed to serve "all income levels".

Minority Report

We support this recommendation, and encourage more expansive use of Brownfields program incentives. We note that many of the incentives are tied to job creation for the stated purpose of economic development. However, those same incentives should be expanded to encourage housing creation.

URBAN REDEVELOPMENT CORPORATION

Urban redevelopment corporations are private, limited dividend entities which are created under Chapter 121A and 760 CMR 25.00 to develop residential, commercial, recreational, historic or industrial projects in areas which are considered to be blighted or substandard. The urban redevelopment corporation may not undertake more than one project nor engage in any other type of development activity. The corporation bears the responsibility for planning and initiating the project and owns the project throughout its existence. Chapter 121A authorizes the exemption of a project from real and personal property taxes, betterments and special assessments, and allows the project developer to exercise the power of eminent domain to assemble a development site in specified circumstances. By allowing the tax exemptions, urban redevelopment corporations act as catalysts for development in areas with high property tax rates. The reason Chapter 121A corporations have not recently been used for the creation of affordable housing is that by

law, the 121A entity may earn no more than an 8% return on investment, and any excess profits (after all eligible deductions) must be returned to the municipality up to the level of tax that would have been assessed if the property were to include a non-121A entity.

Recommendation

Amend Chapter 121A to increase the return on investment to that permitted under certain programs under Chapter 40B (i.e., 20% of development costs for non-rentals, and 10% of equity for rental housing).

Broderick Minority Report

We support this recommendation and encourage this type of planning.

Minority Report

We support this recommendation and also encourage this type of planning which is designed to redevelop housing in urbanized areas.

REGIONAL HOUSING SUPPLY PLANNING

Increasing and facilitating housing production should be examined from a regional perspective. Planning for housing in regions or sub-regions should be supported by the Commonwealth. Regional housing development decisions that are guided by the housing market, demographic conditions, the area's economy, and available or planned infrastructure target the areas where housing development should occur, prevents sprawl and encourages more efficient development. Regional planning agencies can serve as catalysts and conveners of regional planning for housing.

Recommendation

In addition to supporting the planning efforts supported by Executive Order 418, the Commonwealth should examine the applicability of regulatory tools, such as those of the Cape Cod Commission, as a way to direct housing production to areas of greatest need, while protecting natural resources and assuring an adequate public transportation network and infrastructure for the housing to be built.

Broderick Minority Report

We support this recommendation and encourage this type of planning.

Minority Report

We support this recommendation and encourage the use of regional planning agencies as facilitators, so long as such use does not create an additional layer of permitting which could serve as a barrier to housing creation.

ADDENDUM TO MINORITY REPORT TO THE BARRIERS TO HOUSING COMMISSION REPORT OF THE ZONING SUB-COMMITTEE

Introduction

The following is an addendum to the "Minority Report" to the Barriers to Housing Commission Report of the Zoning Sub-Committee previously submitted by John T. Smolak and Thomas D. Zahoruiko in order to clarify an issue raised previously by the undersigned as part of the Zoning Subcommittee deliberations.

LOCAL WETLAND PROTECTION BYLAWS

A significant barrier to the development of housing is how wetlands are regulated in the Commonwealth. A municipality's power to regulate wetlands is shared jointly with the Commonwealth. Specifically, wetlands are regulated both under the State Wetlands Act, and under local wetlands bylaws enacted pursuant to municipal home rule authority. Most frequently, a municipality having a local wetlands bylaw will issue a single wetlands order of conditions for a proposed residential project pursuant to the State Wetlands Act and local wetlands bylaw.

Dual authority to regulate wetlands creates a bifurcated wetlands appeal process. Appeals of an order of conditions issued under the State Wetlands Act are governed by Chapter 30A, the State Administrative Procedures Act, and are administered through the Adjudicatory Rules and Wetlands Regulations. These appeals are made initially to the DEP regional office, then through the Office of Administrative Appeals, and finally to Superior Court.

Appeals of wetlands orders of conditions or permits issued under a local wetlands bylaw are by complaint to Superior Court in the nature of *certiorari* filed within 60 days after the issuance of a decision pursuant to M.G.L. c.249, §4, and review is limited to the record compiled during the local conservation commission hearing process.

Accordingly, information not previously introduced during the conservation commission hearing process may not be included as part of the record on appeal of a local wetland bylaw decision. As a result, any decision on an order of conditions issued by the Department of Environmental Protection on the same project cannot be introduced as evidence in the local bylaw appeal proceeding because that decision was not a part of the local conservation commission record. This mechanism effectively precludes the introduction of new evidence from a competent source, such as a DEP decision on the project, from being introduced as evidence in the Superior Court wetlands appeal proceeding.

Minority Report Recommendation

1. Section 4 of Chapter 249 should be amended to provide that appeals of decisions made pursuant to local wetlands bylaws shall be subject to de novo review.

Respectfully, submitted,

John T. Smolak, Esq., Partner, Peabody & Arnold LLP
Immediate Past Vice-Chairman, Merrimack Valley Planning Commission
Former Chairman, Wetlands, Waterways and Water Quality Committee, Boston Bar Association

Thomas D. Zahoruiko
Tara Leigh Development Company, LLC
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JANE SWIFT
Governor

BOB DURAND
Secretary

LAUREN A. LISS
Commissioner

October 1, 2001

Mr. Donald Schmidt
Department of Housing and Community Development
One Congress Street, 10th Floor
Boston, MA 02114-2010

Dear Mr. Schmidt:

I am writing to you in your capacity as the Chairman of the Barriers to Housing Commission, Zoning Sub-committee and offer the following comments to the Proposed Recommendations to Reduce Barriers to Housing Production. The Department of Environmental Protection (the "Department") would like to extend our thanks to you for your ongoing effort in attempting to identify zoning barriers to housing construction in Massachusetts. While the Report of the Zoning Sub-Committee (the"Report") primarily addresses local obstacles to housing, some of the recommendations acknowledge the close relationship that exists between local wetland protection by-laws and the Commonwealth's Wetland Protection Act. As you know, the Department relies on local conservation commissions to implement the wetland regulations. As such, the Department has had extensive interaction and experience with conservation commissions in efforts to promote wetland protection. This experience serves as the basis for many of the attached comments.

Under the Local Wetland Protection Bylaws section of the recommendations, several recommendations are proposed which do not reflect earlier comments offered by the Department. The Department's positions on these issues are reiterated in the attached comments, which attempt to balance the charge of your committee with our efforts to protect the environment.

Recommendations

1. The State Wetlands Act should be the primary authority for the regulation of Wetlands in the Commonwealth. A municipality should have the ability to enact more stringent regulations if based on science and approved by the DEP.

Wetland bylaws are enacted under a separate legal authority, stemming from Home Rule powers under the Massachusetts' Constitution. A fundamental legal issue that must be addressed before this item can be seriously debated is: Can the legislature enact a law that will alter the existing rights and requirements contained in more than 150 existing home rule wetland bylaws? In other words, can the Legislature retroactively impose additional restrictions, appeal routes or other modifications of existing bylaws? It is almost assured that environmental organizations, and many municipal law experts, will oppose this recommendation.

While the recommendation acknowledges the opportunity for more stringent bylaws, it also implies that most bylaws are not based on science. In fact, more stringent local wetland by-laws are quite often supported by science. For example, in light of the recent National Academy of Sciences Report which critiqued the success of wetland replication efforts, a scientific argument can be made that the requirement for 2:1 mitigation is reasonable. In addition, no-build/ non-disturbance zone provisions in local by-laws can be justified based upon scientific literature on wildlife habitat requirements and the toll which cumulative impacts (including the incremental wetland fill by individual homeowners) have been shown to have on wildlife habitat. In sum, science typically supports the enactment of local wetlands bylaw where the state regulations are not protective enough. Contrary to assertions made in support of this recommendation, the current science on comprehensive wetland protection does support the concept of "no-build" and "non-disturbance" protective zones; such zones do not represent excessive measures in attempting to provide environmental protection.

2. In communities where local wetland bylaws have been enacted, the current dual appeal process should be combined by creating a consolidated appeal process to be administered by DEP.

As noted in the text supporting this recommendation, a dual wetland appeal process exists because of the separate local and state wetland protection processes. If adopted, this recommendation will result in a greater backlog in the Department administrative appeal process due to increased number of appeals and increased complexity of issues that the Department will have to grapple. The assumption of appeals of local bylaws would place a heavy administrative, technical, and legal burden on the Department, which would require significantly more resources. The Department and its Office of Administrative appeals will be required to debate issues beyond the scope of the Department's authority. The function of the Department's Administrative Law Judge is to "take any action authorized by MGL c.30A to conduct a just, efficient and speedy adjudicatory appeal, and to write a fair and impartial

decision for consideration and adoption by the Commissioner." 310 CMR 1.01(5). Their power does not to reach to issues derived from and pertaining exclusively to local law or the Home Rule Act.

The Wetlands Protection Act designates local governments (i.e. conservation commissions) as the first step in the process of wetland permitting review. In addition, under the Home Rule Act, communities may also elect to "police" issues of local concern, including wetland protection, by the enactment of a wetland bylaw. Unlike appeals of the state Wetland Protection regulations that are made to the Department's Office of Administrative Appeals, appeals of local bylaws are required to go to Superior Court. Lacking legislative authorization, the Department's appeal process cannot be expanded to include bylaw challenges. Under the Home Rule Act, municipalities may choose to regulate land uses (e.g. aesthetics or to protection wildlife and not simply wildlife habitat) beyond the Department's regulatory authority established in the Wetlands Protection Act.

In addition to the above recommendations, the sub-committee provided additional suggestions regarding changes to this Department's administrative appeals process. These recommendations, and the Department's comments, are as follows:

1. **Revise the DEP's Expedited Review Policy to permit expedited review of significant housing development opportunities such as large multifamily projects and/or affordable housing projects.**

Affordable housing could be incorporated quite easily into the existing policy, simply by inserting appropriate language in the policy to acknowledge the "affordable housing" constitute a public interest of the Commonwealth. But affordable housing should be the limit – perhaps tied to the 40B process. Adding "large multifamily projects", however, could conceivably be construed to include everything from million dollar waterfront condos and major subdivisions to and mixed-use developments. Such broad-based exceptions would soon swallow the policy.

2. **Eliminate several of the appeal routes/procedures provided under the Adjudicatory Rules that are not specifically based upon the Wetlands Act. For example, a person wishing to prolong an adjudicatory appeal may file a "motion for reconsideration" of the adjudicatory appeals decision issued by the administrative law judge even though such request has no merit. See 310 CMR 1.01(14)(d). Such a request may significantly add to the delay in obtaining a "final" approval and has rarely, if ever, been successful in reversing a decision issued by the ALJ.**

While the adudicatory hearing rules are being reviewed to streamline trial-like procedures (e.g motions for reconsideration), adjudicatory regulations provide that ALJs conduct a hearing de novo. As such, the Administrative Appeal Office often find this process necessary for them to add issues to "develop an adequate and comprehensible record of the adjudicatory appeal." 310 CMR 1.01(5)13.

Growth controls enacted in response to municipal finance concerns (i.e. water/sewer moratoria) also involve environmental policy. For example, Executive Order, 181, regarding development on Barrier Beaches, prohibits state and federal funds from being used to encourage growth and development in hazard prone barrier beach areas. Aside for financial considerations, housing development for any segment of the population has the potential to cause substantial environmental impacts. As such, potential environmental impacts from housing should be given equal consideration, in addition to municipal finance, when developing growth control measures.

On behalf of the Department, thank you for the opportunity to comment on the recommendations of the Barriers Commission Zoning Sub-Committee.

Sincerely,

Glenn Haas
Director
Division of Watershed Management

Metropolitan Area Planning Council

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Serving 101 cities and towns in metropolitan Boston

October 3, 2001

Hon. Jane Gumble
Director
Department of Housing and Community Development
One Congress Street, 10th Floor
Boston, MA 02114

OCT 2 - 2001

Dear Jane:

I appreciate the opportunity to comment on the draft report of the Zoning Committee of the Barriers Commission. While we are fully committed to creating affordable housing opportunities in the metropolitan region and the Commonwealth, there are several concerns in the approach and tone of the committee's report that need comment.

- We recognize that local regulation may, in fact, lead to increased costs of development. However, the legal framework for local regulation is based in state law. Local governments create zoning and subdivision regulations based on specific provisions of the General Laws of the Commonwealth. Significant case law exists which further restricts the rights of municipalities to regulate the use of land. Communities which overly constrain the supply of housing, are subject to the Comprehensive Permit statute. Finally, the unintended consequence of the outlook presented in the subcommittee reports would be to promote shopping centers and mansionization as much as subsidized or moderate income housing.

- We agree with the seven general themes in the opening section of the subcommittee's report. However, the proposed methods for dealing with these themes would lead to a take over of local government's powers and duties by state government. We do not believe that is the intention of the Commission and it is certainly not in the best interest of the Commonwealth and its municipalities.

- Further, the quality of life and the community character of Massachusetts and its municipalities are critical components in determining the economic future of the state. Community character, by definition, comes from the deliberative processes of planning and zoning regulations. Limiting the ability of communities to define their character by state mandates rather than freeing them up for creative initiatives works against the fundamental fabric of our state's competitive advantage. It would be more effective to use the state legal and regulative framework to hold communities accountable for their fair

share of moderate and affordable housing. The state can and should provide incentives and resources to communities to produce such housing. Finally, the state can and should encourage innovations by local government through selective changes to 40-A rather than homogenization of regulations and a pre-emption of home rule.

- Specifically, we are concerned about the following recommendations:

Municipal Cost Burden

1. We agree with a comprehensive local aid package. However, the administration's proposal submitted to the legislature redistributes existing aid and penalizes cities to the benefit of suburbs. Any local aid impact should draw from a new financial base.

Density Regulations

1. We disagree with this recommendation. Developers regularly succeed in creating market rate housing using the comprehensive permit to circumvent local regulations.

   Recommendations 2,3,4 are generally acceptable as encouragement and incentives.

Growth Control By-Laws

1. This appears to be a state pre-emption (DHCD approval) of current case law.
2. Every dwelling unit has an impact on local costs. However, some workable strategy could be developed around this issue to meet the goal of the recommendation.

Municipal Fees

General concerns about fees are noted, however, this should be under local control and based on local costs.

Subdivision Control Regulations

General concerns about construction standards are noted, but differential standards, based on local needs and concerns are critical.

Local Wetland Protection Bylaws

We agree with the minority report on this issue.

Appeals Process

We agree with the minority report on this issue.

Density Bonus Regulations

Generally these recommendations are positive.

Mixed Use Development Projects

1. This recommendation is a pre-emption of local regulations. We need to support communities to allow incentives to the creation of housing with the assistance of state financial resources. A partnership between state and local government on this issue is what is needed.

2. This recommendation is positive.

Brownfields Grant, Loan, and tax Programs

We agree with the minority report on this issue.

Urban Redevelopment Corporation

Communities should have the option of an 8% return.

Regional Housing Supply Planning

The state should work with the Regional Planning Agencies to provide tools for the communities to plan for and create housing opportunities and supply. The recommendation has the feel of a "top down" approach.

I look forward to working with you on this important matter.

Sincerely,

David C. Soule
Executive Director

October 25, 2001

Dear Members of the Barriers to Housing Commission:

In regard to the Building Code, Title V, and Zoning Subcommittee reports to the Barriers to Housing Commission the Massachusetts Executive Office of Environmental Affairs (EOEA) offers the following comments.

The Building Code Subcommittee Report:

The single current recommendation of significant concern is the recommendation to review local zoning bylaws to identify communities that are using zoning bylaws to supersede State Building Code. EOEA supports the ability of communities to freely plan and zone for growth and development, pursuant to the home-rule amendment. Caution is urged to ensure that the already overly limited ability of municipalities to creatively manage land use is not undercut in a legitimate effort to ensure compliance with the State Building Code. EOEA also suggests that the Barriers Commission recommend a review of the current State Building Code to ensure that the reuse of existing buildings is encouraged.

The Title V Subcommittee Report:

As Commissioner Lauren Liss of the Department of Environmental Protection (DEP) chaired this subcommittee, EOEA will largely defer to DEP on the matter of Title V. However, in several places the report refers to the inadequacy of zoning regulations and other planning tools to properly manage growth, and the improper use of Title V to attempt to fill this gap in the ability of local governments to effectively plan for and administer development. EOEA encourages the Commission to consider as an additional recommendation amendments to current planning, zoning, and subdivision enabling legislation. Reforms could provide communities with better tools in the areas of planning, zoning, and subdivision regulation, thereby helping to remove the temptation for municipalities to stretch their Title V regulatory authority to address concerns that would be handled through planning and zoning authority in other states.

The Zoning Subcommittee Report:

Current density regulations are referred to as the most significant barriers to housing production in the Commonwealth. They also promote land consumption and environmental degradation. EOEA offers comments to the Commission on the following recommendations:

Municipal Cost Burden:

Substantial data exists regarding the fiscal burden that new housing places upon communities. While a worthwhile project, the development of a uniform cost of

community services model that can be applied in all communities is fraught with difficulties, such as the widely varying levels of service provided by each of the municipalities. Producing reliable results that can receive uniform acceptance and thus serve as the basis for programs to defray local costs will be a challenge, one in which EOEA is willing to assist. Note that Proposition 2 ½ also has substantial impact upon municipal finance, growth management, and the provision of housing, a topic, which is not addressed in the recommendations.

Density Regulations:

EOEA supports efforts to encourage local adoption of higher density zoning regulations, preferably with a mix of uses, and would be willing to serve on a Committee that examines tools for providing additional housing production in concert with improvements in environmental protection, transportation planning, and other areas of growth and development.

The zoning and subdivision regulations currently in place in the vast majority of Massachusetts cities and towns are detrimental not just to providing an adequate and affordable housing supply, but to the environment and quality of life in Massachusetts as well. Over the course of the past several years EOEA has been using buildout analyses illustrating the shortcomings of current zoning to encourage communities to consider alternatives to the status quo. In short, EOEA stands ready to assist in efforts to persuade municipalities, developers, and other parties to alter current density regulations in order to produce more sustainable, affordable development that will provide a better quality of life for current and future residents.

In regard to a specific recommendation offered by the Subcommittee communities may not be very receptive to a 40B-based approach, given widespread dissatisfaction with the Comprehensive Permit process and products.

Growth Control Bylaws:

For almost three years EOEA's Community Preservation Initiative has focused on providing tools and information to communities so that they are better prepared to make local land use decisions. EOEA took this empowerment of local decision-makers approach instead of seeking regulatory reforms that would provide it or other state agencies broader authority to directly review or manage local growth decisions. Based on this philosophy EOEA does not believe that Department of Housing and Community Development review is in the best interest of the Commonwealth. Currently local bylaws require approval by the Attorney General. In addition, past court cases have provided a framework within which communities can utilize this tool. EOEA believes that these mechanisms are sufficient to ensure that growth control bylaws are used for legitimate purposes.

Many legitimate uses of growth control bylaws may temporarily, or even permanently, limit construction of new housing or other types of development. For

example, in addition to the scenarios included in the Subcommittee's report it is reasonable for communities to restrict permits to an annual level that allows for a moderate level of long term growth in order to adequately provide infrastructure and local facilities while maintaining a stable local tax rate. In addition, natural resources are finite, and the time is coming when limits may be reached. Already, some watersheds, the Ipswich most notably, are near or over their capacity to provide further water supplies. A growth control bylaw that restricts further growth to that which can be supplied by reducing water use by existing homes or businesses, or by eliminating leaks in the local water supply system, would be a legitimate use of a growth control bylaw. Finally, granting dwelling units of two bedrooms or less a broad exemption to growth control bylaws enacted for financial reasons (presumably because they have little or no education costs associated with them) does not account for the admittedly less significant financial burden of providing police, fire, and other general government services.

Subdivision Control Regulations:

Excessive subdivision control regulations can also be a barrier to the supply of housing and are certainly a factor in the cost of new housing units. A guidebook drafted by an appropriately representative body may help communities to select more appropriate subdivision standards. A conservation subdivision design guidebook funded by EOEA and completed by the Metropolitan Area Planning Council may be useful to those drafting the recommended subdivision guidebook.

Local Wetland Protection Bylaws:

While amendments to local wetlands protection regulations are cause for concern, EOEA defers to DEP for specific comment on these recommendations. In general, however, EOEA believes that communities should have the ability to implement local bylaws or ordinances that address the unique environmental resources of the community.

Density Bonus Regulations:

EOEA is supportive of a provision that would allow communities to permit housing bonuses as of right. However, while this small amendment to the Zoning Act would be helpful a larger effort to address the shortcomings of the Zoning Act is likely to have many benefits to those interested in improving the patterns of growth and development in the Commonwealth, including the provision of more affordable housing.

In addition, EOEA is interested in assisting DHCD in the development of the density bonus bylaw package, as it relates to Conservation Subdivision Design Bylaws and other development techniques that EOEA has developed and will broadly distribute in a forthcoming Community Preservation Toolkit.

Mixed Use Development Projects:

EOEA is very supportive of any effort to promote mixed-use development. While this is certainly appropriate for corporate campuses and other large-scale developments (South Weymouth, Makepeace, etc.), most development in Massachusetts is of a smaller scale. By developing smaller projects, or even individual homes or businesses in a manner consistent with the mixed use developments of our past we can incrementally add to our hamlets, villages, and cities instead of continuing to build the anywhere U.S.A. subdivisions, office and industrial parks, and malls of the present. Traditional neighborhood design or New Urbanism has gained widespread support across the country as an alternative to the status quo. EOEA looks forward to working with all interested parties to bring the ideas of these movements to the attention of land use decision makers in Massachusetts.

Regional Housing Supply Planning:

EOEA supports regional housing supply planning, although a tools and information and/or incentives based approach may be preferable to the utilization of regulatory tools to achieve housing objectives.

In conclusion, caution is urged in regard to changes to local authority to manage growth and development. In many ways additional discretion on the part of local governments to creatively exercise their land use authority is needed, while at the same time certain very limited applications of regional or state preemption of local authority may be warranted. Certainly, EOEA is also concerned that implementation of any recommendations resulting from the work of the Commission result in improved stewardship of our natural resources, and not a weakening of necessary environmental protections. I thank you for the opportunity to provide comments to the Barriers to Housing Commission and look forward to working with DHCD and other parties to move forward in the interest of the citizens of Massachusetts.

Sincerely,

Kurt Gaertner
Director of Growth Planning