

BERKSHIRE REGIONAL PLANNING COMMISSION  
1 FENN STREET, SUITE 201, PITTSFIELD, MASSACHUSETTS 01201  
TELEPHONE (413) 442-1521 · FAX (413) 442-1523  
Massachusetts Relay Service: TTY: 771 or 1-800-439-2370  
[www.berkshireplanning.org](http://www.berkshireplanning.org)

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Executive Director

December 1, 2017

The Honorable Michael Moore  
Senate Co-Chair  
Joint Committee on Municipalities and Regional Government  
State House, Room 109-B  
Boston, MA 02133

The Honorable James O'Day  
House Co-Chair  
Joint Committee on Municipalities and Regional Government  
State House, Room 540  
Boston, MA 02133

RE: H.2420 – An Act Building for the Future of the Commonwealth

Dear Senator Moore and Representative O'Day:

The Berkshire Regional Planning Commission, which serves the thirty-two cities and towns in Berkshire County, wishes to indicate its overall support for the passage of H.2420., sponsored by Representatives Kulik and Peake. We hope that the Joint Committee on Municipalities and Regional Government will report the bill out favorably, with some modifications. That being said, we believe that the requirements of this bill, if enacted, constitute an unfunded mandate on towns and cities and thus there must be state funding provided to assist communities in complying with the required elements.

The Commonwealth's land use laws are some of the oldest and outdated land use laws in the U.S. They discourage smart growth and deprive cities and towns of modern zoning and planning tools to address twenty-first century challenges. The proposed bill will finally modernize the zoning, planning and subdivision laws of the Commonwealth. Comprehensive land use reform legislation has been introduced and discussed by the legislature for over a decade, without action. Our comments on major sections of the bill are:

### Accessory Dwelling Unit Requirement

We support the requirement that accessory dwelling units must be permitted within single family dwellings, with appropriate regulations, without requiring a special permit. We believe that allowing a community to require that at least one of the units in the dwelling be owner-occupied, set an overall limit on the percentage of such units, be exempted if there already are at least 5% multi-family units in the community, or if housing sale prices have declined in the community are important safeguards.

### Multi-Family and Open Space Residential Development Requirement

While generally we support the requirement that multi-family residential use by right should be required in some portion of most communities, we believe some modifications to this section are warranted. The language should explicitly allow “by-right, subject to site plan review.” This will allow communities to set reasonable site requirements while not allowing them to prohibit multi-family development. We believe that requiring every rural town to apply to DHCD for a waiver when they neither currently have nor will have water and sewer in a reasonable future nor any areas even remotely suitable for 40R status is an unwarranted burden on very small towns with no staff. It would be more productive to simply set an exclusion for towns with year-round populations of 250 people per square mile or less and with no existing or planned water and sewer.

While we support the concept that Open Space Residential Development must be allowed by right if a proposed subdivision has 5 or more lots for any zoning district with a minimum lot size of 40,000 square feet or greater (almost one acre), it is very questionable how this will be implemented in most Berkshire communities due to their lack of planning resources. We also feel that this makes it more critical to modernize the Subdivision Control Law which creates a set of barriers to more flexible development practices.

### Majority and Supermajority Voting on Zoning Matters

The issue of allowing each community to make its own decisions regarding whether zoning adoption and amendments, special permits, and variances are by super-majority or simple majority votes comes up in various sections of the bill. We support allowing the community to decide. We believe changing the current super-majority to simple majority by supermajority vote of the legislative body is appropriate. We believe that changing the existing supermajority vote on special permits to simple majority should require a legislative body vote rather than require a vote in order to retain the supermajority requirement. We think that the requirement that any zoning change subject to a landowner protest must be by supermajority, regardless of the standard requirement set by the community, such as simple majority voting, is fraught with pitfalls and should be dropped.

### Provision for Different Voting Majority if Accessory Dwelling, Multi-Family, or OSRD Bylaw Proposals Fail

The bill indicates that if a legislative vote to approve any of the required Accessory Dwelling, Multi-Family or OSRD Bylaw proposals fails to gain the required super-majority, they may be subsequently approved by a simple majority. This will be very confusing to communities, especially those that use town meetings. For instance, who has the authority to require that the subsequent simple majority vote rule applies? It would be more straightforward to either remove this language in its entirety or, failing that, to simply state that the initial votes to adopt these provisions are by simple majority.

### Vesting and Grandfathering Provisions

We support almost all the provisions which clarify and clean-up the language on when proposed projects are vested and the grandfathering provisions. We especially support the changes which clarify that only the actual project proposed through an ANR plan is protected, and that the simple filing of an

ANR plan does not freeze all aspects of the existing zoning. We believe that clarity needs to be added regarding the status of applications which are submitted and processed after publication of notice of a potential zoning change but before a vote of the legislative body has occurred. We do not believe they should be protected from the possible zoning change since this could lead to filing of applications quickly to avoid new requirements, but what happens if they attempt to meet new requirements which then do not get adopted? Especially given the length of time that a zoning amendment takes to be approved from public notice to final legislative vote, this could be a considerable delay for the project proponent. We suggest that a reasonable approach may be to provide a reasonably limited amount of time for the zoning amendment to receive legislative consideration or otherwise the proposed project proceeds under the zoning in existence when the permit was applied for.

#### Form-Based Zoning

While we support the explicit permission to use form-based zoning, we believe that this tool is already available under Home Rule provisions.

#### Site Plan Review Authority

While we support the explicit provision for site plan review, this tool has received legal blessing from the Massachusetts' courts. We believe some of the language is problematic, such as conditions placed on a site plan are limited to impacts on properties within 300 feet. While 300 feet is an adequate distance for many issues dealt with in site plan review, lighting and noise, specifically, can create impacts much greater than 300 feet and can be very site specific due to topography, vegetation and other screening, height and types of lights, and atmospheric conditions for noise. No fixed distance limitation can adequately accommodate these variations.

#### Development Impact Fees and Inclusionary Zoning

We support the authorization for Impact Fees and Inclusionary Zoning.

#### Land Use Dispute Avoidance Process

The bill prohibits a bylaw or ordinance from not allowing a developer of a 40B permit to request use of a land use dispute avoidance process. This may be an unnecessary carry-over from previous versions of this legislation since there is no land use dispute avoidance process in the current bill.

#### Art Use and Habitation by Artists

We oppose this requirement. It is unnecessary and contrary to local home rule decision-making. The related definition does not account for the many variations on what might be considered an "art use" and is actually more restrictive than that found in some of our communities' existing bylaws and ordinances when they have dealt with this use explicitly.

#### Standards for Granting Variances

We support loosening the standards for permitting variances. We have a preference to the language used in S.81 (sponsored by Senator Chandler) over that used in H.2420.

#### Surety or Cash Bond Requirements for Appeals

We are concerned that this possible requirement for surety or cash bonds if a judicial appeal is filed will put Environmental Justice communities, which are more heavily comprised of lower or fixed income people, at a disadvantage. A \$15,000 cash bond may be well beyond the means of neighbors in a low-income community but will not be a deterrent at all in a wealthy neighborhood.

### Smart Growth Zoning or Starter Home Zoning Districts

We support the provision that smart growth or starter home zoning districts can be adopted by simple majority vote.

### Master Plans (Chapter 41, s.81D)

We believe the wholesale changes in the language for master plans will lead to fewer communities even trying to develop these important documents. The requirements laid out both for the mandatory and voluntary elements are intimidating and overly proscriptive. We believe that the first 3 sections add good guidance and intent statements. There should be a general statement that planning boards should consult with other appropriate local officials, boards and commissions in developing master plans, rather than scattered limited references (agricultural commissions and boards of health).

### Natural Resources & Energy Element

While both of these are important for master plans to cover and the addition of consideration of energy in master plans is a useful addition to the enabling legislation, we believe they should be dealt with separately. Natural Resources, Open Space and Recreation should be one element with allowance that an Open Space and Recreation Plan should be considered as equivalent. Energy and Climate Change should be a totally separate element as it should encompass a wide variety of issues, well beyond land use and natural resources and should encompass mitigation, adaptation and vulnerability assessment.

### Mandatory versus Voluntary Elements

We believe the transportation element should be mandatory. We do not believe that there should be a separate possible Open Space and Recreation element but this should be covered under the Natural Resources element discussed above.

### Other Comments on Specific Master Plan Elements

The Cultural Resources Element should be "Cultural Resources & Historic Preservation Element." While the two might be synonymous, they are not necessarily so but typically have a strong inter-relationship. The Infrastructure and Capital Facilities Element should be "Infrastructure and Community Facilities Element" and it is premature to require costs and revenues in a master plan element. These are typically dealt with in a community's Capital Improvements Program which typically includes items such as major equipment or systems which are not facilities but are major capital expenses with extended service lives. The Water Facilities element is much more specific than the other elements and seems to be more on the order of regulations rather than setting legislative policy. The Public Health Element needs to be carefully redrafted to make it something that a planning board can relate to its intent and its relationship to their traditional land use responsibilities.

### Master Plan Implementation Element and Self-Assessment Against Regional Plan

We support retaining the Implementation Element and adding a requirement for a self-assessment of local plan elements against similar subjects covered by a regional plan.

### Subdivision Control Law (C.41, s.81) Changes

We support most of the changes proposed to the Subdivision Control Law and, in fact, believe this law deserves an extensive complete modernization but outside the current changes. Various provisions and the processes laid out in the current law probably lead to some of the issues with housing affordability across the State. We do suggest that the 21 day requirement for action on adjustments to lot lines be extended to 45 days as with most of our planning boards only meeting once a month, having to act

within 21 days creates an undue burden on these volunteer boards and 45 days is not excessive if input is requested from other local officials and boards.

#### Approval Not Required Subdivisions (C.41, s.81HH (g))

BRPC opposes the concept of continuing the ANR provisions in any form (both in H.2420 and S.81) if communities adopt a minor subdivision provision. The House language is problematic in that it further encourages strip lots along arterial highways (State-Numbered Routes) which then increases accidents and reduces the traffic flow capacity of those highways. We are not going to be seeing new roadway capacity created to compensate for that loss and this provision will lead to increased air pollution, traffic accidents, and vehicular delay. Generally the State—numbered routes should be the last place one would want to encourage more lots and therefore driveways. Encouraging further strip development could actually negatively impact our tourist based economy in the Berkshires.

#### Discriminatory Land Use Practices

While BRPC definitely does not support discriminatory land use practices, adding this to the Massachusetts Commission Against Discrimination's direct responsibilities will lead to very expensive litigation and considerable delays in decisions. The Courts are better equipped at this time to deal with local land use decisions which may have either a discriminatory intent or result.

#### Study of Educational Uses Under Sec. 3 of C.40A

S.81 contains a provision not in H.2420 establishing a special commission to study the use and effectiveness of the zoning approval process for educational uses. We support such a study and would like it added to H.2420, with an additional stipulation that municipalities should be represented on such a commission.

#### Effective Dates

In order to manage the implementation of the wholesale changes which will be needed in probably every zoning ordinance and bylaw in the Commonwealth to comply with this law, we suggest that the effective dates for most provisions be more reasonable than one year and be a uniform three years after signing of the legislation. The exception would be for development impact fees which will require some time to perform the necessary studies and adoption of regulations to implement this provision but may not take three years to properly execute (many communities will not take this on at all; others may have more pressing needs).

#### Resources to Meet Requirements

Many of the new zoning and master plan requirements will take considerable resources to accomplish the needed changes to local zoning bylaws and ordinances and to bring master plans into compliance with the much more rigorous stipulations contained in this bill. Even communities with a planner (which is only five of 32 Berkshire municipalities) the major changes required will overwhelm their existing resources. Many of our communities are at or close to their levy ceilings and do not have the funding necessary to accomplish this, without taking away from other very pressing needs. Significant state funding will be needed to actually meet the new requirements.

The Berkshire Regional Planning Commission respectfully requests that the Joint Committee on Municipalities and Regional Government consider the modifications we request and then expeditiously favorably report out the legislation, as modified.

Sincerely,



Nathaniel W. Karns, AICP  
Executive Director

Attachment: July 19, 2017 Bill Comparison Table

Cc: The Honorable Stanley Rosenberg, President of the Senate  
The Honorable Robert DeLeo, Speaker of the House  
The Honorable Adam Hinds, Senator, Berkshire, Franklin and Hampshire District  
The Honorable John Barrett, III, Representative, 1<sup>st</sup> Berkshire District  
The Honorable Paul Mark, Representative, 2<sup>nd</sup> Berkshire District  
The Honorable Tricia Farley-Bouvier, Representative, 3<sup>rd</sup> Berkshire District  
The Honorable Smitty Pignatelli, Representative, 4<sup>th</sup> Berkshire District  
The Honorable Stephen Kulik, 1<sup>st</sup> Franklin District  
The Honorable Sarah Peake, 4<sup>th</sup> Barnstable District  
Geoffrey Beckwith, Massachusetts Municipal Association  
Massachusetts Association of Regional Planning Agencies  
Massachusetts Chapter, American Planning Association