Massachusetts Municipal Lawyers Association

"Dedicated to Effective Local Government Through the Advancement of Municipal Law"

March 8, 2024

To: Joint Committee on Housing
Joint Committee on Bonding, Capital Expenditures and State Assets
Joint Committee on Ways and Means

Re: H.4138-An Act known as the Affordable Homes Act

Dear Committee Members:

I am writing to you in my capacity as the President of the Massachusetts Municipal Lawyers Association ("MMLA"), the Commonwealth's municipal bar association to communicate our comments and recommended revisions on H.4138, An Act known as the Affordable Homes Act.

The proposed Affordable Homes Act is a sweeping Bill pursuant to which Governor Healey proposes a comprehensive funding strategy to increase the supply of, rehabilitate, and support affordable housing opportunities, and create new initiative to address a myriad of housing concerns. Overall, the MMLA applauds and supports the Governor's focus and initiative on addressing the housing needs of the state which, by the nature of housing, are met at the local level on a municipality by municipality basis. In particular, the funding programs proposed in the Bill will go a long way to assist residents of the Commonwealth with meeting their housing needs and to fund critical infrastructure needs.

At the same time, the MMLA wishes to flag a serious concern with the increasing number of legislative initiatives that are beginning to erode the long-standing role of Home Rule as codified in the Commonwealth with the adoption of Amendment Article 89 of the Massachusetts Constitution and Chapter 43B of the General Laws. While Home Rule comes with some limitations, Article II, Section 1 of Amendment Article 89 clearly states: "It is the intention of this article to reaffirm the customary and traditional liberties of the people with respect to the conduct of their local government, and to grant and confirm to the people of every city and town the right of self-government in local matters".

In recent years the MMLA has undertaken an initiative to increase and improve communications between our organization and the legislature and state agencies so that we, as the legal representatives of the Commonwealth's cities and towns, can contribute, often in collaboration with the Massachusetts Municipal Association, to a positive dialogue on matters affecting cities

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and towns. This increase in communication and collaboration between the state and local representatives has made a substantive difference in a number of areas, such as supporting remote meetings and permanent changes to the Open Meeting Law, and handling the opioid litigation settlements. More recently, the number and substance of communications between the MMLA and the Executive Office of Housing and Livable Communities (EOHLC, formerly DHCD) is fostering a growing working relationship between state and local representatives related to the recently enacted Section 3A of Chapter 40A, and Chapter 40Y. We look forward to growing these relationships at all levels and departments of the Commonwealth, including the newly created Housing Affordability Unit of the Attorney General's office and the Office of Fair Housing proposed in the Affordable Homes Act within the EOHLC.

The immediate concern, however, is that the Affordable Homes Act contains a number of provisions which would erode local Home Rule control of zoning. The right of cities and towns to adopt zoning ordinances and bylaws is critical to self-governance. As noted above, the MMLA recognizes the housing needs of the Commonwealth and the role of municipalities in addressing those needs through zoning policies. Yet, we are gravely concerned with the top-down manner in which the proposed Act seeks to mandate local zoning, particularly given the lack of meaningful dialogue between state officials and municipal officials and their representatives in finding a collaborative path forward. In many instances, the zoning proposals that are put forward are crafted by special interests in the developer and construction industries, bills are late-filed, committee hearings are rushed, and public comment periods are short. The proposals also push detailed authority over local zoning to EOHLC, which results in micro-management of matters rightfully and constitutionally delegated to cities and towns and their residents.

As a result of this top down approach, what is really lost is critical perspective. Much focus is given to the history of exclusionary zoning in the Commonwealth and the United States as a whole. Such practices cannot be denied or dismissed as they have clearly contributed to existing housing patterns. And while those attitudes may unfortunately still exist in some segments of our Commonwealth, there is clear evidence that it is not the widespread motivation for local development concerns. The failure of a ballot initiative to repeal Chapter 40B is one significant example.

What is missing is the recognition that cities and towns need and are entitled to tailor these housing and related strategies to their own particular situations and, in some cases, constraints. In our experience, cities and towns are more than willing to meet the needs of the Commonwealth, yet the current dominant public discourse is to assume that, and accuse local communities of restricting housing for exclusionary reasons. Meaningful invitations for municipal representation at the table for housing policy discussions at the state level are rare, and while we acknowledge that the two Commissions recently formed by Governor Healey include a few senior municipal officials, the Commissions lack experienced municipal zoning and housing professionals in contrast to the number of private sector appointees who are experts in this field.

Further, significant local, non-exclusionary-motivated, issues posed by development are typically ignored, or given lip service. These include state environmental restrictions and regulations on water supplies, limited sewer infrastructure and other environmental concerns with wastewater systems such as nitrogen loading, the growing impacts of climate change and sea level rise, and outdated and undersized roadway infrastructure. Many local communities are facing the need for

overrides due to the requirements of Proposition 2½, which are not always favored by taxpayers. Many local school systems and other municipal unions are functioning without contracts because of municipal finance pressures.

We are further concerned that there may be insufficient awareness or communication between state officials who oversee housing and development policy and those who oversee the state's environmental policies. In the last 5+ years, municipalities have been subject to significant mandates, including the so-called MS4 requirements which task municipalities with regulating public and private stormwater discharges for compliance with federal and state law, and mandated zoning changes from Massachusetts DEP to comply with federal and state floodplain requirements and to comply with state groundwater protection (Zone II) requirements. As discussed below, some of the Zoning Act amendments set forth in the proposed Affordable Homes Act Bill do not acknowledge these increasing mandates and pressures on local development.

We feel that it is important for the General Court and the Governor to understand the context with which we provide the following comments to certain sections of the proposed Affordable Homes Act. We welcome the opportunity to meet with you, other legislators, and state officials to discuss these comments and we strongly urge the General Court to amend these sections as recommended below or to delay advancing these sections of the Bill until meaningful dialogue between state and local officials can take place.

With the foregoing introduction for context, we offer the following specific section by section comments to the H4634, An Act known as the Affordable Homes Act:

SECTION 10 would amend MGL c. 23B (governing statute of the EOHLC) to insert new Sections 31 through 34 to create a new office of fair housing.

SECTION 11 would create a Fair Housing Trust Fund to forward fair housing goals and initiatives. The MMLA supports the creation of the office, particularly the purpose set forth under proposed Section 31(c)(ii) to facilitate communication and partnership among state agencies and municipalities on fair housing matters. We offer the following comments to these sections:

1. SECTION 10 - New Section 32 (at Lines 740-741). Note an apparent error in the definition of "SCCC". The correct section reference should be *"section 33(a)"* rather than *"section (b)"*.

2. SECTION 10 - New Section 33(a) [Line 742] creates a "seasonal community coordinating council" (SCCC). A council focusing on the specific needs of seasonal communities is welcomed, however, the make-up of the council should be either amended, or expanded, to insure meaningful representation. This recommendation is consistent with our introductory comments regarding the proposed Act in that it is critical to the finding of successful solutions to housing needs that municipalities have substantive involvement in discussing and crafting those solutions. This council, which will be geared toward creating year-round affordable housing opportunities for seasonal communities will review and make recommendations related to seasonal communities but

there is no requirement that anyone on the council will be a municipal official. The qualifications list is too broad. As currently worded, there is no assurance that the SCCC would have any meaningful municipal representation. We recommend that the four regional members of the SCCC to be appointed by the governor [see Lines 748-750] should expressly provide that *the persons appointed by the governor shall be municipal officials, such as city or town manager, town administrator, director of economic development, or community planning official, from a municipality within each of these regions*. In the alternative, the council should be expanded to include a municipal official from each of these regions.

3. SECTION 11 (Fair Housing Trust Fund created as Section 2BBBBBB of MGL C. 29) – there are two related provisions in this Section that are of concern. They provide broad, undefined and unqualified authority to EOHLC to grant state taxpayer dollars to any private non-profit organization to fund private enforcement initiatives. In particular:

   - Subsection (b) includes the following in activities eligible for assistance from the fund: "private enforcement initiatives".
   - Subsection (d) includes as grantees eligible to receive funds: "any private, non-profit agency".

   These provisions would allow the Commonwealth to use taxpayer dollars to fund private organization's enforcement initiatives. It is unclear from this language, but as worded it appears that such "private enforcement initiatives" may be brought against municipalities. If that is the case, this would be a misguided, misappropriation of taxpayer dollars. Returning to our introductory comments above, increased communication and collaboration between state agencies, the Attorney General's office, and municipalities is what is needed. In the unlikely, and unfortunate, event that the Commonwealth believes enforcement action is needed against a municipality, that should be undertaken by the Attorney General's office. A private organization's use of state taxpayer funds should not be allowed to bring enforcement actions against local governments.

   Assuming that the intent was not to include such enforcement actions, we recommend the following additional sentence to the end of subsection (d) of Section 2BBBBBB under SECTION 11 of the Bill as follows:

   "In no event shall the expenditure of funds from the fund be permitted for use by any private entity to bring an enforcement initiative against any municipality of the Commonwealth."

SECTION 12 and **SECTION 13** would amend certain provisions of the Zoning Act (Chapter 40A) with respect to accessory dwelling units ("ADUs"), including a modification of the definition found in section 1A, and restrictions on the permitting approval process for ADUs. Certain of the changes are ill-advised as discussed below.

We express serious concerns about the following provisions of SECTION 13:

Lines 832-833: "The executive office of housing and livable communities may issue guidelines or promulgate regulations to carry out the purposes of this paragraph."

Prior to the adoption of Section 3A of Chapter 40A (known as MBTA Communities multifamily housing zoning), the Zoning Act governed all aspects of what and how a municipality[1] may adopt local zoning. To the extent that limitations were imposed on local zoning, those limitations were expressly set forth within the four corners of the Zoning Act, such as certain provisions of Section 3 and Section 6. It was unprecedented that the provisions of the Zoning Act would be subject to further regulations and guidelines, promulgated or issued, as applicable, by a state agency to dictate not only what can or cannot be included in a local zoning ordinance or bylaw, but what must be included.

While we have additional comments below regarding the amendments proposed in SECTION 12 and SECTION 13, even if they were to be adopted by the General Court as currently proposed they are self-explanatory. There is no reason why the existing ADU provisions of Chapter 40A or those that are proposed in this Bill need EOHLC to issue guidelines or regulations.

We underscore the concern that for many years there has been a substantive lack of communication and collaboration between the Commonwealth and municipalities and a failure to provide municipalities with a meaningful seat at the table for housing policy discussions. The adoption of Chapter 40A, Section 3A, together with these ADU proposed changes, and the changes to Chapter 40A, Section 5 discussed below, are examples of legislative action taken or proposed without meaningful dialogue.

More and more often, local zoning is now being written by the state through administrative agency regulations and guidelines. This is a direction that is not compatible with the intention and requirements of Home Rule as set forth in the Amendments to the Massachusetts Constitution. More importantly, we fear this progression risks a significant increase in tension between the Commonwealth and its municipalities to no gainful purpose. Such tension will only make these important and valid housing goals more difficult to achieve.

We provide the following comments to the text of SECTION 12 and SECTION 13.

- SECTION 12: Definition of "accessory dwelling unit". The change from "floor area" to "gross floor area" is not an improvement to the definition. Neither term is defined. In addition, gross floor area overstates the area of a primary dwelling that should be considered in connection with determining the size of an ADU. Gross floor area often includes unfinished spaces such as basements and attics, and arguably attached garages and enclosed porches. Use of this term is an unnatural inflation of the size of a primary dwelling in this context.

  We recommend that the term "gross floor area" be replaced with "*livable floor area*" and that a definition for this term be inserted as follows:

[1] Reference to municipalities in this letter is to the 350 cities and towns (exclusive of the City of Boston) which are subject to the provisions of General Laws c. 40A.

"Livable Floor Area" means the total floor area of a dwelling unit, but not including unfinished areas with more than one-half of their cubic area below finished grade, rooms for heating equipment, garages, unenclosed or unheated porches, breezeways or other unheated areas."

- SECTION 13 prohibits the requirement of special permits, but the Bill does not amend G.L Chapter 40A, Section 5(2) which refers to the quantum of vote for detached ADUs allowed by special permit, creating conflicting provisions within Chapter 40A.
- *SECTION 13. As discussed above, we strongly recommend the deletion of the following sentences at Lines 832-833: "The executive office of housing and livable communities may issue guidelines or promulgate regulations to carry out the purposes of this paragraph."

SECTION 15 would amend Section 5 of Chapter 40A to decrease the quantum of vote required for a municipality to adopt "inclusionary zoning" to a simple majority, consistent with changes previously made to Section 5 for other zoning amendments related to housing.

The MMLA supports the modification in proposed subsection (5) that would apply the simple majority quantum of vote to inclusionary zoning provisions of a bylaw or ordinance. However, SECTION 15 also contains substantive zoning requirements governing adoption and implementation of inclusionary zoning which do not belong in Section 5 and are ill-advised.

1. The existing provisions of the fifth paragraph of Section 5 govern quantum of vote. There is a list of the types of zoning amendments which require only a simple majority. They are not substantive provisions which govern the content of zoning. However, the second and third clauses of subsection (5) proposed in SECTION 15 are substantive in nature.

2. The second clause of subsection (5) in SECTION 15 is ambiguous. It states: "provided, that such zoning ordinance or bylaw shall not unduly constrain the production of housing in the area impacted by the inclusionary zoning ordinance or bylaw". Unlike the provisions of the rest of Chapter 40A, this sentence provides no legislative guidance to municipalities. In addition, Section 9 of Chapter 40A already provides some guidance on inclusionary zoning. It specifically provides that "zoning ordinances or by-laws may also provide for special permits authorizing increases in permissible density of population or intensity of a particular use in a proposed development." Such a clause does not belong in this subsection (5) both (a) because it incorrectly inserts a provision regarding bylaw/ordinance content into a section which governs process not content and (b) because such ambiguity is inappropriate in the General Laws of the Commonwealth. It appears to be merely an opening for the last clause inviting state agency oversight as discussed below.

3. The third clause of subsection (5) in SECTION 15 states: "provided, further, that the executive office of housing and livable communities may issue guidelines or promulgate regulations consistent with the purposes of this clause." This is problematic for numerous reasons:

- Inclusionary zoning, which provides for increases in density as referred to in Section 9 of Chapter 40A, is a type of zoning that many municipalities have already voluntarily adopted within their ordinance or bylaw. It has been successfully employed in many developments in those communities.

- While it is appropriate to have adoption of this inclusionary zoning be adopted by a simple majority, it is not necessary or appropriate to authorize a state agency to promulgate regulations or guidelines regarding inclusionary zoning. In fact, to insert state regulations into a type of housing which many municipalities have already voluntarily adopted, may in fact have the opposite affect and disincentive other communities who may have concern about the increase in state regulatory oversight of their local zoning. We note, for example, the affordability limits in section 3A of the Zoning Act are already in conflict with cities and towns who wish to do more than the minimum. The legislature and delegated state agencies should not impede these existing local efforts to increase the number and level of affordable housing units in new developments.

- Setting one size fits all requirements for inclusionary zoning is not the best strategy for municipalities or the Commonwealth, and likely increases resistance to same.

We therefore strongly recommend the following amendments to the text of SECTION 5 (at Lines 840-844):

> "(5) an inclusionary zoning ordinance or bylaw~~; provided, that such zoning ordinance or bylaw shall not unduly constrain the production of housing in the area impacted by the inclusionary zoning ordinance or bylaw; provided further, that the executive office of housing and livable communities may issue guidelines or promulgate regulations consistent with the purposes of this clause~~."

SECTION 105 [at Lines 2589-2593]. Section 105 of the proposed Act supplements the provisions of SECTION 104. SECTION 104 authorizes the Commissioner of DCAMM to dispose of certain surplus land of the Commonwealth for affordable housing purposes, subject to the provisions of said SECTION.

SECTION 105 would override Chapter 40A (the Zoning Act) and all other local zoning ordinances or by-laws, in connection with the development by private persons of land conveyed by the Commissioner for affordable housing purposes and severely restricts local review of such projects.

In offering our comments on SECTION 105, we again ask that you consider our introductory comments to this letter and our serious concerns about the lack of dialogue between the Commonwealth and its municipalities in advance of forwarding this Section and the other sections discussed above. We are also concerned about the pass through of significant benefits to private developers, of public (Commonwealth) resources.

We have a number of concerns with SECTION 105, some of which arise due to ambiguities in the wording of this section.

We have deconstructed SECTION 105 in order to facilitate our comments as noted below. SECTION 105 states as follows (with emphasis added):

[1st clause – See Note 1 below]: "**Notwithstanding chapter 40A of the General Laws, or any other general or special law, or any local zoning ordinance or by-law or any municipal ordinance or by-law to the contrary**,

[2nd clause - See 5th clause and Note 4 below]: **a city or town shall permit the residential use of real property conveyed by the commissioner pursuant to this section for housing purposes as of right**, as defined in section 1A of chapter 40A of the General Laws,

[3rd clause - See Note 2 below]: **notwithstanding any use limitations otherwise applicable in the zoning district in which the real property is located** including, but not limited to, commercial, mixed-use development or industrial uses;

[4th clause - See Note 3 below]: **provided, however**, that such **city or town may impose reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space and building coverage requirements**;

[5th clause - See 2nd clause and Note 4 below]: provided, further, that **the city or town may require site plan review**;

[6th clause - See Note 5 below]: and provided, further, that **the city or town shall permit no fewer than 4 units of housing per acre**.

Real property conveyed by the commissioner pursuant to this section shall include, without limitation, the amendment of use restrictions held by the commonwealth to allow for the use of such property for housing purposes. The secretary of housing and livable communities may promulgate regulations to implement this section."

***Note 1*:** The 1st clause overrides ALL local ordinances and state law which appears to include, without limitation, zoning, wetlands, Title 5, Zone II groundwater protection, stormwater, floodplain. We note that even state development projects are subject to all general and special laws (unless expressly excepted) and, as noted in our introduction, local Zone II protection, floodplain, and stormwater bylaws have been mandated by MassDEP. The intent of this SECTION to allow an affordable housing use regardless of local zoning is already covered in the 3rd clause. This clause is overly broad and requires significant redaction. If this concept remains then, similar to Chapter 40B, a minimum of 25% of the units must qualify as affordable.

***Note 2*:** The 3rd clause mandates allowance of an affordable housing use in any existing zoning district. Surplus Commonwealth property may be located in any area of any municipality – whether currently zoned residential, mixed-use, commercial, or industrial. We question whether the Commonwealth really intends this outcome with no regard to appropriateness of location or community character. While creation of affordable housing may be appropriate in residentially zoned areas, we ask the General Court to consider the impacts in other areas. For example, community downtowns which are struggling to maintain their character with no provision for allowing for mixed-use, or whether housing, particularly with children, in heavy industrial areas. This sweeping provision may result in substantial unintended consequences.

Note 3: This clause allows for reasonable regulation of the "bulk and height of structures and determining yard sizes, lot area, setbacks, open space and building coverage requirements". It appears to be a partial recitation of the regulation allowed under the so-called "Dover Amendment" found in Section 3 of Chapter 40A but it omits "parking" which is included in Section 3. This clause creates one of the ambiguities we have flagged. We assume that this provision is not intended to be implemented in the same manner as Section 3A of Chapter 40A (given the provisions of the 5th clause). Therefore, this clause should be revised consistent with Section 3A

Note 4: The 2nd clause mandates that any affordable housing use permitted under SECTION 104, shall be permitted as of right and the 5th clause allows the city or town to require site plan review. Unless the ambiguity noted in Note 3 above is addressed as recommended, this provision also creates an ambiguity between the relationship of the 4th clause and the 5th clause. With the clarification recommended in Note 3 above, the ambiguity would be alleviated.

Note 5: The 6th clause requires that a minimum of 4 units per acre be permitted. This provision should be modified in a manner similar to the provisions of subsection 3(a)(i) of section 3A of Chapter 40A

Most importantly, SECTION 104 would authorize DCAMM to dispose of surplus property for affordable housing uses, yet there is nothing in SECTION 105 which requires any level of affordability in developments on such land.

We recommend the following revisions to SECTION 105:

> Notwithstanding ~~chapter 40A of the General Laws, or any other general or special law, or~~ any local zoning ordinance or by-law ~~or any municipal ordinance or by-law~~ to the contrary, a city or town shall permit the residential use of real property conveyed by the commissioner pursuant to this section for housing purposes as of right, as defined in section 1A of chapter 40A of the General Laws, notwithstanding any use limitations otherwise applicable in the zoning district in which the real property is located~~, including, but not limited to, commercial, mixed-use development or industrial uses~~; provided, ~~however, that such city or town may impose reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space and building coverage requirements; provided, further, that the city or town may require site plan review; and provided, further,~~ that the city or town shall permit no fewer than 4 units of housing per acre, subject to any further limitations imposed by section 40 of chapter 131 and title 5 of the state environmental code established pursuant to section 13 of chapter 21A. A minimum of 10 percent of the units (but not less than one unit) shall qualify as affordable to families or individuals making 80 percent of area median income and such affordable units shall be eligible for inclusion on the subsidized housing inventory maintained by the executive office of housing and livable communities.

Thank you for your time and attention to these comments. As noted above, we are available to discuss the above in greater detail.

Sincerely

/s/ Karis L. North

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cc: Governor Maura Healey
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