



A Reform of Wetlands Regulations

By Kurt Gaertner

Introduction

The cost of housing in Massachusetts absorbs too much of the average resident's income and drives people and businesses out of the state. According to recent research studies, the problem is not a lack of land but an excess of regulation. I propose a concrete and politically palatable policy reform to ensure that septic and wetland regulations are used to protect the environment and public health. This reform would remove the temptation for towns to misuse these rules to discourage development.

The Problem

Housing prices in the Boston area are among the highest in the nation. According to recent research by economists Edward Glaeser¹ and Edward Moscovitch,² a fundamental cause of the rise in prices is the failure of Massachusetts to build enough housing to meet demand. Massachusetts is ranked 46th in the nation in per capita housing production. While current homeowners may be happy about high prices, too many people and businesses are being driven from the Commonwealth by housing cost inflation.

In addition to economists, other stakeholders blame the lack of housing production on local land use regulations. Doug Foy, former Secretary of the Office for Commonwealth Development (OCD), has referred to local land use regulations as “vasectomy zoning,” as these rules often limit housing production to reduce the number of children that a municipality must school. Many local communities limit housing production through land-use regulation for the rationally self-interested reasons of protecting property values and not having to provide additional services to extra residents.

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This benefits current residents and the politicians who depend on their votes, but it locks out everyone who was not lucky enough to have bought in ten years ago, especially those who are just starting their careers.

Policy makers have responded by offering financial incentives such as Chapter 40R and Commonwealth Capital, tools like the Massachusetts Smart Growth Toolkit, and planning grants under the Priority Development and Smart Growth Grant Programs. However, none of these programs targets the illegitimate use of land-use regulations such as Title V and the Wetlands Protection Act to limit development. Title V regulates septic systems while the Wetlands Protection Act addresses the impact of development on wetlands.

Title V

Title V (Chapter 21A S. 13; 310 CMR) of the State Environmental Code regulates septic systems across Massachusetts. Its aim is to protect public health from improperly disposed wastewater from homes and businesses that are not connected to public sewers. More than 30 percent of the homes in the state use a septic system, and improperly treated wastewater from them is a major contributor to pollution in coastal estuaries, ponds, rivers, and groundwater. While the state Department of Environmental Protection (DEP) sets minimum standards for the design and siting of septic system components such as tanks, distribution boxes, and leach fields, local boards of health retain the power to enact regulations more stringent than the state standard.

In *Residential Land Use Regulations in Eastern Massachusetts*, Pioneer Institute Environments Project Manager Amy Dain³ found that 58 percent of the cities and towns (109 of 187) in her Eastern Massachusetts study area had adopted local septic regulations more stringent than the state; it is reasonable to assume that a significant percentage of the state's 351 communities have tightened their regulations. Municipalities have enacted standards beyond those of Title V in a wide number of areas including leach field size, percolation rate, design flow, and depth to groundwater in order to compensate for differences in soil quality, natural resources, and health concerns

among municipalities. Title V was intended as a baseline that is generally considered sufficient to protect public health, allowing communities to be more stringent when circumstances warranted. The challenge is to know when locally adopted standards are preventing improperly treated wastewater, and when these standards are being diverted to control housing growth.

Wetlands Protection Act

The Wetlands Protection Act (Chapter 131 S.40; 310 CMR 10) regulates work in and next to coastal and inland wetlands that border surface waters, as well as in other resource areas such as land subject to flooding, riverfront areas, and land under water bodies. The regulations aim to promote flood control, prevent pollution and storm damage, and protect public and private water supplies, groundwater, fisheries, land containing shellfish, and wildlife habitat.

Under the Wetlands Protection Act, local conservation commissions, consisting of three to seven members appointed by the selectmen or city council, review (with DEP oversight) proposed developments that may impact wetlands. Commissions determine whether a proposed project falls under their jurisdiction through the review of "Requests for Determination of Applicability," evaluate "Notices of Intent" where projects require a permit, and issue permits known as "Orders of Conditions" that stipulate conditions to the developer. Finally, conservation commissions issue "Enforcement Orders" for violations of the regulations.

As with Title V, commissions can promulgate regulations more restrictive of growth than those of the state. Dain found that 70 percent of the municipalities (131 of 187) in her study area had passed wetlands bylaws or ordinances that give local conservation commissions authority to regulate activities/areas that are not covered under the state's Wetlands Protection Act. As with Title V, while the exact number is not known, it can be assumed that at least half of the communities in Massachusetts have tightened their regulations. Again, the challenge is to distinguish added regulations that offer needed protections from those that merely hinder the building of needed housing.

The Solution

The state should remove the temptation to misuse septic and wetland regulation by requiring communities to accommodate any shortfall in development “yield” (housing units or square feet of commercial or industrial space) resulting from the difference between state DEP and local standards. This accommodation would be achieved through open space residential design (OSRD). OSRD or cluster developments are more flexible than conventional subdivisions, because each individual lot need not meet every requirement on lot area, frontage, setback, height, septic systems, etc. These requirements may be relaxed in exchange for concentrating development on one part of the lot and permanently preserving open space. Communities would still be allowed to increase environmental regulation beyond state standards, but not at the cost of restricting development.

Imagine a community that zoned for one-acre lots in an area without public sewers. According to state wetland and septic regulations and local zoning, 16 houses could be built on a 25-acre parcel. However, because of the community’s stricter local wetlands and septic regulations, the yield drops to 13. The community, under this proposal, would then have to relax other standards, such as setback, frontage, or lot size, to ensure that 16 units could be accommodated on the lot. Essentially, a community that reduced development yield by applying stricter environmental standards would have to find another way to build the same number of units.

The OSRD approach ensures that a denser-than-usual development can be environmentally sound, even as it helps to relieve housing-price inflation. Unlike conventional subdivisions, which usually only allow single-family homes, cluster subdivisions often allow townhouses, duplexes, or even multi-family units. Moreover, cluster zoning can include density bonus provisions as an enticement to build a cluster subdivision instead of a conventional one, protect more open space, or provide affordable units within a cluster subdivision.

Many communities in Massachusetts already have OSRD or cluster development provisions, though

many bylaws or ordinances need improvements to make them more effective. Dain’s research found that 80 percent of the sampled municipalities (157 of 187) allowed some kind of flexible/cluster zoning, and that Belmont, Gloucester, Raynham, Sutton, and Upton allow flexible/cluster development by right, at least in some circumstances. Another measure of the broad adoption of cluster zoning is offered by participation in the state’s Commonwealth Capital Policy program. In fiscal year 2005, the first year of the program, 128 of 191 participating communities had cluster zoning in place and another 20 committed to pass a cluster provision within the next year.

Encouraging Broader Implementation of OSRD Provisions

I recommend a two-year grace period to allow more communities to implement OSRD zoning bylaws or ordinances. After the grace period is over, a community could enforce local wetlands or septic regulations stricter than those of the state DEP only if it has an OSRD provision. As an enforcement mechanism, if a community has OSRD, but the zoning as applied does not result in a subdivision or building permit for the yield expected under state standards, the developer could appeal to DEP. If the DEP finds in the developer’s favor, the project would only have to meet state DEP standards.

The two-year grace period allows communities to take advantage of available technical assistance resources. The Executive Office of Environmental Affairs (EOEA) Smart Growth Technical Assistance Grant Program is entering its third year of providing grants of up to \$30,000 to cities and towns to alter land-use regulations. In the first two years, 28 communities have been assisted with the drafting and passage of OSRD bylaws. In September 2005, the EOEA and the OCD released the Massachusetts Smart Growth Toolkit, which includes promotional materials and model bylaws for a dozen smart growth techniques, including OSRD.

By making OSRD implementation a prerequisite for a community’s stricter wetlands and septic regulations, the state would encourage the adoption of cluster-friendly zoning.

Moreover, because a community's OSRD zoning must accommodate yield lost to stricter-than-state wetlands and septic regulations, the community would have to develop zoning that actually works, unlike many current cluster zoning regulations. Because the loss of yield would vary by lot and by type of regulation, the cluster zoning would have to be highly flexible, capable of varying lot frontage, size, setback, etc. case by case to accommodate an unknown number of clustered units.

Relevance to Massachusetts

Because of the steep rise in the cost of housing, many policies have been implemented to increase the housing supply: Chapter 40R, Commonwealth Capital, the Massachusetts Smart Growth Toolkit, and planning grants under the Priority Development and Smart Growth Grant Programs. There have also been a number of proposals to address the constricting effect of local wetland and septic regulations - some more practical than others. Legislation (Sen. 492) has been filed, based on a recommendation of Governor Swift's Barriers to Housing Commission, that would require the DEP to review and approve local septic and wetlands regulations based on scientific evidence submitted by communities. While this could pressure communities not to lean on septic and wetland regulations to prevent development, it would burden the towns with compiling and submitting scientific evidence, and the state with reviewing the regulations of at least 175 communities.

The Pioneer Institute has presented other policy options for public comment. The Institute initially suggested the creation of uniform state standards and denying towns the right to enforce more stringent standards. Presumably, the existing state standards would have to be reconsidered, as they were always intended to allow local governments to be stricter. There are two problems with this approach. First, it would be difficult to create a state standard that would be sufficient to protect the environment and public health in widely divergent conditions from the sands of Cape Cod to the steep slopes of the Berkshires. The second problem is that even if such a standard could be developed, it would be a frontal assault on home rule powers that is unlikely to succeed.

Pioneer also put out for comment the creation of a panel of scientific experts to decide whether state, and subsequently local, regulations for the protection of water and wetland resources are justified, taking into account the need for varying standards. This suggestion differs from Sen. 492 in the role of the expert panel and the creation of a protocol for an analysis that municipalities would have to perform to demonstrate their regulations were legitimate. While this solution is not as draconian as an outright override of local control or as costly to the DEP and local governments as the scientific review suggested in Senate Bill 492, it still represents a significant effort on the part of all parties and the creation of a new government function.

Conclusion

Thanks to state and local wetlands and septic regulations, our natural resources and public health have greatly improved. However, in order to take advantage of the state's quality of life, residents must be able to afford to live here, which has become increasingly difficult. A policy that prevents illegitimate use of these regulations will help reduce the cost of housing while allowing towns their home rule privileges.

Works Cited

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