Statement of the Real Estate Coalition In Opposition To S.81, *An Act Promoting Housing and Sustainable Development*
September 28, 2017

Introduction

The following is a detailed analysis of S.81, *An Act promoting housing and sustainable development,* by the Greater Boston Real Estate Board (GBREB), the Massachusetts Association of Realtors® (MAR), NAIOP – The Commercial Real Estate Development Association, and the Home Builders & Remodelers Association of Massachusetts (HBRAM) (collectively the "Real Estate Coalition").

Increased housing production is a top priority for the Real Estate Coalition. Most of the regions with which Massachusetts competes for skilled workers are building more housing and have lower housing costs. The proponents of this legislation acknowledge the lack of workforce housing in Massachusetts. Given that the organizations that make up our Coalition represent those who own, develop, broker, manage and finance housing and commercial real estate projects, there is no question we would support legislation that would actually result in the production of much needed housing. S.81, however, does not accomplish this. Instead, the bill would limit predictability and add financial risks for residential and commercial growth in the Commonwealth. It makes numerous changes, both large and small, to the Zoning Act, Chapter 40A, which would apply statewide - most of which will add significant expense and delay to the land development process in Massachusetts.

The analysis is organized into three parts. **Part I** provides a brief summary of provisions in the bill that the Real Estate Coalition supports. **Part II** provides a brief summary of those provisions that, while positive from the standpoint of the Real Estate Coalition, require revisions to make them workable. **Part III** identifies provisions that are unacceptable to the Real Estate Coalition for the reasons explained.

While we acknowledge that, as a result of meetings organized by the Special Counsel to the Office of the Senate President in Spring 2016 with members of the Smart Growth Coalition and the Real Estate Coalition, some changes were made to an earlier version of the bill, we oppose S.81 given the impact the negative provisions, as outlined in Part II and Part III of this memo, would have on development in Massachusetts.

Part I: Provisions of S.81 the Real Estate Coalition Supports

Planning Board & ZBA Training Program (Section 1) [NEW]
Summary: This section directs the Department of Housing and Community Development (the "DHCD") to establish and conduct an annual program of education and training for members of local planning boards and zoning boards of appeal.
Comment: Local planning board and zoning board members generally are citizen volunteers who would benefit from an annual education and training program.

Accessory Dwelling Units (Section 5)
Summary: This section would prevent cities and towns from prohibiting or requiring a special permit for accessory dwelling units ("ADUs") in single-family residential districts on lots that have at least 5,000 square feet of area or meet the requirements of Title 5. Communities would be allowed to adopt reasonable dimensional regulations and to limit the total number of ADUs to a percentage of not less than 5% of the total non-seasonal housing units in the municipality.
Comment: ADUs provide low priced housing units that can be integrated into existing single family neighborhoods with little or no negative impact on the character of the neighborhood.

Special Zoning Provisions (Section 16)
Summary: This section would delete several paragraphs of Section 9 ("Special Permits") of the Zoning Act pertaining to transfer of development rights, planned unit development, cluster housing, and multifamily residential use in non-residentially zoned areas.
Comment: As discussed in Part II below, Section 6 of S.81 would require municipalities to include multifamily development and cluster development (i.e., open space residential development) by-right in their zoning bylaws or ordinances.

Special Permits – Lapse and Voting Standards (Sections 17-20)
Summary: These sections would: (1) reduce the voting requirement for approval of a special permit to a simple majority vote, unless the municipality has adopted an ordinance or bylaw requiring a supermajority vote; (2) increase the minimum period for exercise of a special permit from two years to three years; and (3) establish a process for the extension of a special permit prior to lapse.
Comment: These provisions would make it easier for landowners and developers to obtain a special permit and reduce time constraints on the exercise of a special permit.

Hazardous Waste and Site Assignment Facilities (Sections 19-20)
Summary: Sections 19 and 20 make minor clarifications to the zoning provisions applicable to hazardous waste facilities and facilities subject to a site assignment.
Comment: These minor changes would clarify that these provisions apply to land "principally" zoned for industrial use.

Land Use Dispute Avoidance (Section 21)
Summary: Section 21 would introduce a new Section 9G to the Zoning Act. Section 9G would establish an optional mediation process by which a landowner seeking development approval(s) may elect to enter into a "land use dispute avoidance process" in order to avoid or minimize land use disputes.
Comment: The proposed land use mediation process is optional and reflects the increased use of dispute resolution methods in litigation.

Notice Requirements (Section 23)
Summary: This section would add the local Board of Health to the list of "parties in interest" required to be given notice of a public hearing under Chapter 11 of the Zoning Act.
Comment: The change is relatively minor and is consistent with the current practice of many municipalities.

Judicial Appeals – Bond Requirement (Section 24)
Summary: This section would authorize courts to require non-municipal plaintiffs challenging the approval of a special permit, variance, or site plan to post a surety or cash bond in an amount up to $15,000.
Comment: Given the cost of litigation, the $15,000 cap is too low and should be increased to at least $50,000. For comparison, the bond requirement under chapter 40R §11 specifies twice the net carrying costs and attorney fees. Nonetheless, this provision would establish an important policy that a frivolous appeal of a zoning permit should not be without cost to the plaintiff.

Subdivision Plans (Sections 31-32)
Summary: Section 31 would remove the three-year limit on planning board authority to prohibit the construction of any buildings on park land shown on a plan. Section 32 would authorize the recording of plans that adjust property lines but do not create additional lots or render an existing nonconforming lot or structure more nonconforming without planning board review.
Comment: These changes would make it easier for landowners to process and record lot line adjustments.

Judicial Appeals – Subdivision Decisions (Sections 33, 36)
Summary: These sections would amend the appeal provisions of the Subdivision Control Law to establish that such appeals are "in the nature of certiorari" under G.L. c. 249, §4 and would require a plaintiff challenging a decision approving or denying a subdivision plan to allege the specific reasons for the appeal under the planning board's rules and regulations and specific facts establishing how the plaintiff is aggrieved by the decision.
Comment: The review of subdivision decisions "in the nature of certiorari" should be more efficient than the current de novo review, because the court relies on the record that was already before the planning board rather than holding a new evidentiary hearing.

Land Court Permit Session (Section 35)
Summary: This section would amend G.L. c. 185, § 3A to allow cases to be transferred to the permit session by filing a notice demonstrating compliance with the jurisdictional requirements of the permit session.
Comment: These provisions would make it easier to transfer a case to the Land Court.

Part II: Provisions of S.81 the Real Estate Coalition Could Support with Revisions

Zoning Act Definitions (Sections 3, 3A)
Summary: These sections modify the current definition of "Transfer of development rights" contained in the Zoning Act, and introduce new definitions for the following terms: "Affordable housing"; "By-right" or "as of right"; "Development impact fee"; "Inclusionary housing units"; "Inclusionary zoning"; "Municipal affordable housing concessions"; and "Natural resource protection zoning." Section 3 also amends the definition of "Cluster development" somewhat differently than Section 9 of the Zoning Act and gives the same definition to the term "open space residential development."

Critique: Providing standard definitions for terms that are commonly used in the Zoning Act is a beneficial revision. However, some definitions in this section contain embedded regulatory provisions. For example, the definition of "inclusionary housing" provides that "a municipality may set the income thresholds for inclusionary housing at a level at or below 120 per cent of median income." In addition, the definition of "Transfer of development rights" eliminates the current law's requirement that there be a density bonus to offset the cost of acquiring the development rights of one parcel while also purchasing the title to the parcel to be developed.

Revisions Needed: Regulatory requirements should not be embedded in the definitions, but should be contained in the operative sections of the Zoning Act. Definitions that pertain to provisions of S.81 that are unworkable for the Real Estate Coalition (see Part III below) should be deleted—these include the definitions of "Development impact fee"; "Inclusionary housing units"; "Inclusionary zoning"; and "Municipal affordable housing concessions."

Multifamily Zoning (Section 6)[1]
Summary: Section 6 would require zoning ordinances and bylaws to provide at least one district "of reasonable size in which multi-family housing is a permitted use as of right." The minimum density of these multifamily districts would be set at 8 units per acre in rural towns and 15 units per acre in all other municipalities.

Critique: The requirement that municipalities adopt zoning for multifamily development by right is a step in the right direction to address the Commonwealth's housing needs, but the proposed "reasonable size" standard is too vague.

[1] Section 44 establishes an effective date of July 1, 2019 for the multifamily zoning provisions of the S.81.

Revisions Needed: A better approach would be to require that the multifamily zoning districts cover a minimum percentage of a municipality's developable land area. A good example of this approach is found in Section 1 of the Senate Bill No. 94 (i.e., the "HOME Bill"), which would require zoning ordinances or by-laws to permit multifamily development by right "in one or more zoning districts that together cover *not less than 1.5% of the developable land area* in a city or town."[2] While subjecting multi-family districts to the provisions of title 5 of the state environmental code, this section does not exempt them from local title 5 regulations that could effectively preclude such housing from being built.

Open Space Residential Development (i.e., Cluster Development) (Section 6)

Summary: Section 6 would also require zoning ordinances and bylaws to provide for "open space residential development" ("OSRD")—which has the same meaning as "cluster development"—by-right, subject to review and approval of the planning board pursuant to the Subdivision Control Law.

Critique: The requirement that OSRD be permitted by right is helpful, but the provision is flawed. First, rather than requiring that OSRD be permitted by right in any zoning district where conventional subdivision design is permitted, Section 6 of S.81 only requires that OSRD be permitted by right "in a specific district ... or in multiple districts through overlay zoning." Second, the bill expressly permits municipalities to require a "yield plan or a calculation ... to determine the yield of housing units in an open space residential development."

Revisions Needed: The OSRD provisions should be revised so that OSRD is permitted by right in any zoning district where conventional subdivision design is permitted. Section 6 should also be revised to state that the right to choose between submission of a yield plan or a yield calculation rests with the applicant, not the municipality.

Site Plan Review (Sections 21, 39)

Summary: Section 21 of the bill would establish express statutory authorization for site plan review by creating a new Section 9D under the Zoning Act. S.81 addresses concerns raised with an earlier version of this bill by providing for administrative site plan review for uses that are permitted by-right and limiting the scope of mitigation to "direct adverse impacts of the proposed improvements on that portion of properties and public infrastructure located within 300 feet of the parcel boundary." S.81 also changed the recording provision to require that a notice of site plan approval, rather than the approved site plan itself, be recorded in order for the site plan approval to take effect.

[2] The complete text and legislative history of Senate No. 94 is available online at https://malegislature.gov/Bills/190/S94/Senate/Bill/Text

Critique: Proposed Section 9D(g) would inappropriately allow a third party to appeal site plan approval of a use that is permitted by right. In addition, Section 21 does not establish zoning freeze protection for site plan approval.

Revisions Needed: Section 9D(g) should be revised in a manner that restricts the right to appeal a site plan review decision involving a use that is permitted by right to the applicant(s). In addition, Section 21 should be revised to establish zoning freeze protection for site plan approval.

Variances (Sections 22, 40)

Summary: Section 22 of S.81 would re-write Section 10 of the Zoning Act, which contains the substantive standards for the issuance of variances. The section would establish a "practical difficulty" standard for non-use variances and would retain the existing "substantial hardship" standard for use variances.

Critique: The proposed practical difficulty standard appears to be similar to, and not appreciably more flexible than, the existing substantial hardship standard. For example, Section 22 would require that the practical difficulty "relate to the physical characteristics ... of the site or of the structures thereon." It would require that the condition be "unique and ... not also apply to a substantial portion of the district or neighborhood," while the hardship standard just requires that it be "not generally affecting the zoning district." The practical difficulty standard would also require an applicant to show that there is no other "feasible" way to accomplish its objective without a variance—this standard would be difficult to meet to the extent that most "practical difficulties" can be resolved through engineering or simply building a smaller building or project. Sections 22 and 40 would change the current rule that use variances "run with the land" to provide that this is the case "only if [so] determined by the permit granting authority." This change would be harmful to landowners by making it difficult to obtain financing for a use that benefits from a use variance or to transfer a property that contains a use authorized by a variance.

Revisions Needed: A better approach to the "practical difficulty" standard is found in Section 2 of the House No. 1090 (*An Act to establish commonsense permitting reforms for businesses and landowners*):

In making its determination, the permit granting authority shall take into consideration the benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety, and welfare of the neighborhood by such grant. In making such determination, the permit granting authority shall also consider: (1) whether an undesirable change will be produced in the character of the neighborhood or a significant detriment to nearby properties will be created in the granting of the dimensional variance; (2) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than a dimensional variance; (3) whether the requested dimensional variance is substantial; (4) whether the proposed variance will have a significant adverse impact on the physical conditions in the neighborhood; and (5) whether the alleged difficulty was self-created, which consideration shall be relevant to

the decision of the permit granting authority, but shall not necessarily preclude the granting of the dimensional variance.[3]

Most importantly, Sections 22 and 40 should be revised so that all variances, including use variances, run with the land. The current language would have a detrimental impact on project financing and creates tremendous uncertainty for future owners/developers.

Master Plans (Section 25)
Summary: Section 25 of the bill would improve Chapter 41, Section 81D by *mandating* master planning for cities and towns and re-writing the standards for a municipal master plan, including a more thorough and detailed set of requirements for planning.

Critique: Although Section 25 would require that a master plan be "internally consistent in its policies, forecasts and standards," it does not expressly require that a municipality's zoning ordinance or bylaw be consistent with its adopted master plan.

Revisions Needed: Section 25 should be revised to require that a municipality's zoning ordinance or bylaw be consistent with its adopted master plan.

Part III: Provisions of S.81 the Real Estate Coalition Opposes

Local Zoning Authority (Section 4)
Summary: This section would add a new Section 1B to G.L. c. 40A that confirms the home rule authority of cities and towns to exercise planning and zoning powers.

Critique: The proposed authority language is unnecessary, since it is already well established that municipalities are allowed to adopt zoning ordinances or bylaws under home rule authority, provided that they do not conflict with state law.

Certified Communities Program (Section 2)
Summary: This section would create an opt-in program in which qualified municipalities could obtain "certified community" status. Certified communities would be entitled to certain "privileges and powers" and would receive priority consideration in the award of discretionary funds for municipal infrastructure and certain other discretionary funds and grants administered by the Commonwealth. The DHCD is directed to develop incentives that would benefit both municipalities and developers.

Critique: The proposed certified communities program is unduly bureaucratic, with multiple state agencies involved in developing and implementing the program. The program is also poorly defined and ill-conceived—there is no indication as to what "privileges and powers"

[3] H.1090, sec. 2.

certified communities would receive or what incentives would be offered to entice cities and towns to participate in the program.

Zoning Amendments/Voting (Sections 7-10)

Summary: These sections would allow municipalities to change the voting requirements for the adoption of zoning bylaws, ordinances, or amendments. Municipalities would be allowed to adopt an ordinance or bylaw changing the current two-thirds majority requirement to a different requirement in the range between a simple majority vote and a two-thirds majority.

Critique: Reducing the voting requirements will facilitate the adoption of zoning amendments. Whether the flexibility is desirable or not will depend on the details of the particular amendment being considered. In some cases, making it easier to change zoning would be beneficial to developers or property owners. However, it could also allow municipalities to more easily adopt anti-growth zoning amendments to the detriment of property owners. On balance, the proposed change would detract from the stability and predictability that the current two-thirds voting requirement provides.

Zoning Freeze Provisions (Sections 11-15)

Summary: These sections of the bill would amend the permit and plan freeze provisions of Chapter 6 of the Zoning Act. Sections 11-13 would improve upon the existing permit freeze provision by changing the key event for a zoning freeze from the *issuance* of a building permit or special permit to the *submission* of a complete application for a building permit or special permit prior to the first notice of the public hearing on a zoning amendment. Section 15 addresses a significant concern raised in an earlier version of the bill—which would have limited the scope of plan freezes to the particular subdivision plan submitted rather than to the "land shown on the plan" as the law currently states. S.81 restores the "land shown on the plan" as the scope of the plan freeze. However, Section 15 would change the law of plan freezes in a negative way by requiring that a definitive plan or preliminary plan application be submitted "before the *public hearing*" on a zoning amendment, rather than the current standard which requires that the application be filed "before the *effective date* of [the] ordinance or by-law."[4]

Revisions Needed: Sections 13 and 15 should be revised to include standards for determining what constitutes a "complete application" with respect to permit and plan freezes respectively. Further, the requirement that the definitive plan be "substantially similar to the preliminary plan" is too vague and should be eliminated. Section 13 should be revised to eliminate the requirement that "written notice of the submission has been given to the city or town clerk" in the case of a *building permit* application. In addition, Section 15 should be revised to retain the current plan freeze requirement that the application need only be filed "before the *effective date* of [the] ordinance or by-law."[5]

[4] G.L. c. 40A, § 6, par. 5 (emphasis added).

[5] G.L. c. 40A, § 6, par. 5 (emphasis added).

Development Impact Fees (Section 21)[6]

Summary: This section would add a new Section 9E to the Zoning Act, which would establish statutory authority for municipalities to impose development impact fees for water, wastewater, stormwater management, solid waste, roads, and parks and recreation.

Critique: Development impact fees involve complex legal, planning, and economic principles that are not adequately addressed by Section 9E. It is generally recognized that development impact fees increase the cost of new development, especially for residential projects, which may reduce the number of projects that are economically feasible. To the extent that the increased development costs are passed on to consumers in the form of higher prices, impact fees also make housing less affordable. In states that have authorized impact fees by statute, impact fees are the *exclusive* means for local governments to address capital facilities and services needs to serve growth in communities. By contrast, the proposed Section 9E would not prevent a municipality from imposing *both* development impact fees and other burdensome and costly mitigation requirements as a condition of development approval. It would merely require that the development impact fees "be proportionately reduced to the extent that a municipality imposes other fees or requirements, otherwise imposed by law, for mitigation of development." This proposed proportional reduction is an unworkable solution because it lacks standards for calculating the value of non-monetary "requirements" imposed by the municipality. Also, the development impact fee provisions have legal/methodological shortcomings previously noted, one glaring provision being the imposition of impact fees to remedy "a preexisting deficiency to the extent that the preexisting deficiency is exacerbated and not solely to remedy the preexisting deficiency." In addition, the bill would allow a community to demand payment of a development impact fee upon the issuance of the building permit and commencement of construction including site preparation work which is a very problematic provision. Development impact fee statutes differ from state to state, but most development impact fee enabling acts contain or address the following elements:

- Express grant of municipal authority to adopt a development impact fee ordinance or bylaw
- Declaration of nexus, rough proportionality, and reasonable benefit requirements
- A list of eligible public facilities for which development impact fees may be imposed
- Minimum planning requirements, including the adoption of a master plan and capital improvements plan (CIP)
- Development impact fee study requirement
- Timeframes for the assessment, collection, and expenditure of fees
- Whether municipalities are authorized to recoup pubic facilities costs incurred prior to the development, provided that capacity is available to serve the development

[6] Other Sections of S.81 that pertain, directly or indirectly, to development impact fees are Section 3 (definition of "development impact fee) and Section 43 (effective date of development impact fee provisions).

- Recalculation requirement, mandating that municipalities recalculate development impact fees after completion of a CIP and refund excess money collected if actual costs were less than projected
- Types of projects for which municipalities can or must grant a DIF exemption/waiver
- Offsets and credits (e.g., for developer construction of off-site facility improvements) to ensure that new development does not pay twice for the same facilities
- Procedural requirements for adoption of local development impact fee ordinance
- Development impact fee money accounting and spending restrictions and requirements
- Refunds for failure to spend development impact fee money within required timeframe
- Phase-in period to soften the impact on the real estate industry
- Minimum development impact fee bylaw/ordinance requirements
- Procedures for appeal of development impact fee assessment and for developer to seek an individualized impact fee where the developer disagrees with the schedule of impact fees established by ordinance.

The inadequacy of the provisions in Section 21 is readily apparent when compared to the proper development impact fee statutory provisions outlined above.

Inclusionary Zoning (Sections 21)[7]

Summary: Section 21 would add a new Section 9F to the Zoning Act. Section 9F would authorize municipalities to impose mandatory inclusionary zoning requirements upon development projects. "Municipal affordable housing concessions" (e.g., density, floor area ratio, building height bonuses, or reduced parking requirements) would not be required features of the inclusionary zoning.

Critique: By expressly authorizing municipalities to impose mandatory inclusionary requirements, the bill would unfairly burden developers with the substantial costs of fulfilling society's obligation to ensure the availability of affordable housing. It would significantly impact the cost of development in these municipalities, and would necessarily increase the cost of market rate housing to the detriment of first-time homebuyers and others looking to move into or remain in the community, who do not qualify for subsidized housing. The burden to provide affordable housing options should either be shared more broadly, or provided on a voluntary basis in response to meaningful incentives consistent with a plan for the creation of such housing. The availability of "municipal affordable housing concessions" (i.e., incentives) should be required, not optional. Development under G.L. c. 40B is a market-based approach that has been successful in providing affordable housing. In addition to the policy arguments against Section 21, a mandatory inclusionary zoning ordinance would be vulnerable to challenge as an *unconstitutional exaction* under the United States and Massachusetts Constitutions. Mandatory

[7] Other Sections of S.81 that pertain, directly or indirectly, to inclusionary zoning are Section 3 (definitions of "inclusionary housing" and "inclusionary zoning") and Section 37 (establishing a 3-year period for existing inclusionary zoning bylaws and ordinances to be revised to conform to the inclusionary zoning requirements of the S.81).

inclusionary zoning requirements arguably implicate the *Koontz*[8] requirement that a governmental approval may not be tied to a condition that cannot satisfy the *Nollan/Dolan* Dual Nexus Test.[9] It is questionable whether a mandatory inclusionary requirement could satisfy the *Nollan/Dolan* Dual Nexus Test requirement that the amount or extent of the exaction must be "roughly proportional" to the development's impact.

Minor Subdivisions (Sections 26-29, 32, and 34)[10]

Summary: These sections of the bill would establish a "minor subdivision" process that would replace the approval not required ("ANR") process in cities and towns that choose to adopt a minor subdivision ordinance or bylaw.

Critique: This opt-in approach would result in a patchwork of subdivision controls across the Commonwealth in which some communities have an ANR process and others have a minor subdivision process. Eliminating the use of ANRs would be significant from the perspective of the Real Estate Coalition to the extent that land divisions that formerly would have qualified for ANR would now be subject to review in a minor subdivision process, or full subdivision review if it involves the creation of more than six residential lots. This type of review will likely involve additional time, less certainty, and more burdensome conditions than the current ANR process. Importantly, the bill provides that municipalities may impose the exact same "procedural and substantive requirements" to a minor subdivision that are applicable to a full subdivision. Further, the review period of 21 days for ANR filings would be increased to 85 days under the proposed minor subdivision process. While the concept of a minor subdivision on an existing street may be a good one in the abstract, it should not come at the expense of the sole means of expeditious land division under ANR endorsement.

In conclusion, each of our four organizations join together in opposing S.81. We believe the proposed legislation will simply not encourage economic development, support smart growth or produce much needed housing. We urge the committee to recommend S.81 "ought not to pass."

[8] *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013).

[9] *See Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 687 (1994).

[10] In addition to Section 27, which defines the term "minor subdivision," and Section 34, which authorizes cities and towns to regulate minor subdivisions, other sections of S.81 that pertain, directly or indirectly, to minor subdivisions are Sections 15, 26, 27, 28, 29, 32, and 33.