Environmental Law Update 2022

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REAL ESTATE BAR ASSOCIATION WEBCAST
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AIR POLLUTION

Air Pollution: Mobile Sources: EPA

- August 2018, EPA issued a notice of proposed rulemaking that would freeze the corporate average fuel economy standards for automobiles at 2020 levels for six years. 83 Fed. Reg. 42,986 (Aug. 24, 2018). The proposed rule also sought to withdraw the EPA's approval of California's authority to set its own tailpipe emissions standards at a level more stringent than the federal.
- In April 2021, the EPA announced its reconsideration of the withdrawal of California's authority to set its own standards. In March 2022 the Biden Administration announced it is reinstating California's authority to set its own air standards.
- In August 2021, the EPA proposed to again tighten fuel economy and GHG emissions standards for passenger cars and light trucks for model years 2023-2026.
- EPA under the Biden Administration is back on track to tighten standards for cars and trucks, and other mobile sources, over the next several years.

Air Pollution: Mobile Sources: DEP

- DEP rules for Air Pollution Control for Mobile Sources, at 310 C.M.R. § 60.00, require MassDOT and regional metropolitan planning authorities to evaluate and track GHG emissions and impacts of transportation programs, plans, and projects.
- In August 2017, DEP promulgated amendments to 310 C.M.R. §§ 60.05–.06 establishing reporting requirements and limitations on the amount of GHG emissions from MassDOT vehicles and passenger vehicles owned or leased by the Commonwealth.
- In 2021, Massachusetts withdrew from the Transportation Climate Initiative ("TCI") program, which was designed to address GHG emissions from the transportation sector.

Source: Brill, Kahn, and Severance, Massachusetts Clean Air Act, Massachusetts Environmental Law (MCLE, Inc. 4th ed. 2016 & Supp. 2019, 2021).

In December 2021, MassDEP announced emergency regulations to immediately adopt California's **Advanced Clean Trucks** regulation, requiring an increasing percentage of zero-emission vehicle truck sales starting with Model Year 2025 and ramping up through Model Year 2035, accelerating the market for medium- and heavy-duty ZEVs.

Source: MassDEP Files New Regulations to Reduce Emissions, Advance Market for Clean Trucks in the Commonwealth | Mass.gov

CERTIORARI REVIEW

***Soroken v. Conservation Comm'n of Falmouth*, 98 Mass. App. Ct. 1118 (2020)**

- "In the context of this review of a conservation commission denial of a permit, we ask whether the commission's action was arbitrary or capricious, based upon error of law, or unsupported by substantial evidence." *Conroy v. Conservation Comm'n of Lexington*, 73 Mass. App. Ct. 552 (2009).
- An agency's selection between two conflicting evidentiary views will not be disturbed on appeal if that selection was reasonable. *Conservation Comm'n of Falmouth v. Pacheco*, 49 Mass. App. Ct. 737 (2000). We defer to the commission's reasonable interpretation of its bylaws. *Nelson v. Conservation Comm'n of Wayland*, 90 Mass. App. Ct. 133 (2016).
- In sum, the commission's findings were supported by substantial evidence and their reasonable interpretation of the regulations is entitled to our substantial deference. *See Rodgers v. Conservation Comm'n of Barnstable*, 67 Mass. App. Ct. 200 (2006).

Stockbridge Bowl Ass'n v. Town of Stockbridge Conservation Comm'n, Super. Ct., Docket No. 1976CV00032 (Dec. 3, 2019)

- Applicant Lake Association sought to professionally treat invasive species infested lake with a herbicides
- Hearing process had unsupported assertions (anecdotes of fish kills and other lakes treated with herbicides), fears rebutted by science (such as the herbicide is toxic to all plants), and concerns outside the jurisdiction of the ConCom (such as fears of health impacts from herbicide)
- Commission denied project purportedly under the local bylaw. Applicant appealed to court in certiorari, alleging Commission decision was not supported by substantial evidence
- A Commission decision must be set aside "if the evidence points to no . . . appreciable probability of the conclusion" or if it "points to an overwhelming probability of the contrary." *Rodgers v. Conservation Commission of Barnstable*, 67 Mass. App. Ct. 200 (2006)

Stockbridge Bowl Ass'n v. Town of Stockbridge Conservation Comm'n, Super. Ct., Docket No. 1976CV00032 (Dec. 3, 2019)

- Commission's decision was not based on substantial evidence. Court ordered Board to approve project under the bylaw, subject to the conditions required by the state Division of Fisheries and Wildlife and those recommended by the town's own expert
- Court had harsh comments for the Commission failing to control the hearing and focus on relevant evidence and applicable standards.
- Commissions must use the evidence before them to consciously weigh the dangers that invasive species pose against the scientifically studied and governmental licensed used and efficacy of herbicides
- Such care should be apparent in the administrative record of the public hearings, minutes of its meetings, its written decisions, and OOCs, ORADs, RDAs, and EOs that it issues.

CIVIL RIGHTS

Civil Rights

Gattineri v. Town of Lynnfield, 2021 WL 3634148 (D. Mass. Aug. 17, 2021) (Talwani, D.J.)

- Trial court granted Lynnfield's motion to dismiss plaintiff's civil rights claims under 42 U.S.C. § 1983 and state law arising out of actions taken by municipal defendants with respect to, inter alia, local laws and regulations governing wetlands, health, and access to and use of a water spring.
- Ruling: (1) claims that defendants violated plaintiffs' rights to freedom of assembly and free exercise of region were time barred, contradicted findings in prior state court actions, and/or did not allege a "significant interference" with plaintiff's ability to associate with others and practice his religion; (2) claim that defendants interfered with his "fundamental right to earn a living" failed because there is no such fundamental right; (3) equal protection claim failed because plaintiff failed to allege sufficient facts to establish that he was "similarly situated in all relevant respects" to others who received more favorable treatment; (4) conspiracy claims under 42 U.S.C. §§ 1985(3) and 1986 failed because he did not properly plead a violation of any constitutionally protected right.
- Court declined to exercise jurisdiction over state law claims, given dismissal of federal claims.

Credit: Michael K. Murray, Esq., "2021-2022 Zoning-Related Cases," MCLE Annual Environmental Law Conference, March 3, 2022

Civil Rights

Daly v. Town of Sandwich, 99 Mass. App. Ct. 1112 (2021) 2021 WL 710482)

- Appeals Court ruled for Sandwich on claim under G.L. c. 12, § 11H and 11I that town public health director violated plaintiffs' civil rights by informing her, in response to her inquiry, that she could remove a nonstandard denitrification treatment system on her property if she (1) reduced the number of bedrooms in her unit to two and (2) recorded a deed restriction reflecting so, and (3) removed the existing system and replaced it with an appropriate tank.
- Plaintiff had not alleged a right that was impaired by threats, intimidation, or coercion (a necessary element under the statute), or acted to her detriment based on the defendant's statement.
- She did not state a "class of one" equal protection claim under art. 11 of the Massachusetts Declaration of Rights (she had not shown that she received less favorable treatment from any "similarly situated" individual).

Credit: Michael K. Murray, Esq, "2021-2022 Zoning-Related Cases," MCLE Annual Environmental Law Conference, March 3, 2022

Thyng v. Quincy, 2017 WL 11571491, No. 10-1449 (Norfolk Super. Ct.) July 24, 2017. Settled 2021

- Thyng arranged in 1980 to sell his vacant lot along Quincy's waterfront as a buildable lot, believing his lot to be buildable because in 1997 the ZBA found the lot buildable.
- Notwithstanding, the Conservation Commission staff told prospective buyers Thyng's lot was unbuildable and they would need to obtain permits in order to build. Buyers backed out.
- Over the next decade the ConCom thwarted Thyng's attempts to build on his property by denying him permits.
- Thyng sued the City of Quincy, the ConCom, and all its members, in both their individual and official capacities, under federal and MA civil rights laws, and MA equal rights act.
- A two-week jury trial in 2015 resulted in jury verdicts. In 2017 judgment was entered against the individual defendants (not the City), for damages, interest, attorneys' fees, and costs for $1,295,205.90.
- In June 2021, the parties reached a settlement. The City of Quincy, on behalf of the individuals found liable, paid Thyng $1.35 million on June 17, 2021.

CLIMATE

Climate: GHG Emissions

- On January 31, 2022, the Department of Public Utilities approved a new three-year plan aiming to incentivize homeowners to switch from oil or gas to electric. https://fileservice.eea.comacloud.net/FileService.Api/file/FileRoom/14461268
- The Commonwealth's climate law mandates that greenhouse emissions be cut in half by 2030 and reduced to net-zero by 2050.
- The DPU Order, however, mandates that the State retain some fossil fuel incentives.
- Critics of the order want changes made to the statutes governing MassSave so DPU Orders can better advocate for decarbonization.

Source: With new Mass Save three-year plan, Massachusetts sharpens its best climate-fighting tool - The Boston Globe

Climate: Infrastructure

- In September 2016, Governor Baker signed **Executive Order 569**, which directs the state government, as well as Massachusetts cities and towns, to begin planning and preparing for the ongoing impacts of climate change by assessing vulnerability and adopting strategies to increase the adaptive capacity and resiliency of infrastructure and other assets.
- In 2017, the **Municipal Vulnerability Preparedness (MVP)** grant program was created, which provides support to cities and towns to identify climate hazards, assess vulnerabilities, and develop action plans to improve resilience to climate change. Refer to https://resilientma.org/mvp
- Communities that complete the MVP Planning Grant process become designated as an MVP Community and are eligible for MVP Action Grant funding to implement the priority actions identified through the planning process. See https://www.mass.gov/service-details/mvp-action-grant
- The **2018 Massachusetts State Hazard Mitigation and Climate Adaptation Plan** includes robust identification, evaluation, and prioritization of strategies to reduce current and future threats and vulnerabilities across Massachusetts. See https://www.mass.gov/service-details/massachusetts-integrated-state-hazard-mitigation-and-climate-adaptation-plan.

Climate: Policy Roadmap

- The **Environmental Bond Bill** funds climate change adaptation, environmental protection, and community investments in Massachusetts, including municipal infrastructure improvements to adapt to and mitigate the effects of climate change.
- In 2021, Governor Baker signed **An Act Creating a Next Generation Roadmap for Massachusetts Climate Policy** with new interim goals for emissions reductions, protections for Environmental Justice communities, voluntary energy efficient building code for municipalities, and an additional 2,400 Megawatts of off-shore wind energy by 2027.
- **Massachusetts 2050 Decarbonization Roadmap Report:** outlines eight potential pathways to Net Zero emissions by 2050 and includes details for specific sectors: Energy Supply, Transportation, Buildings, Land Use, Non-Energy, and Economic and Health Impacts.
- The Interim **2030 Clean Energy and Climate Plan (CECP)** sets an interim 2030 statewide emissions limit of 45% below 1990 levels. This CECP reflects MA nation-leading energy and clean transmission procurement from offshore wind, hydropower, and the SMART solar program.
- The Massachusetts 2050 Decarbonization Roadmap Report and the CECP can be found at https://www.mass.gov/news/baker-polito-administration-releases-roadmap-to-achieve-net-zero-emissions-by-2050

Source: Biancavilla, Hegemann, Kaplan and Rinaldi, BSC, Environmental Science for Lawyers, Massachusetts Environmental Law (MCLE, Inc. 4th ed. 2016 & Supp. 2019, 2021).

Climate: Energy

- It must consider the Environmental Justice Principles and the Secretary's standards and guidelines for their implementation, administration, and periodic review.
- Regulations implementing the Climate Roadmap Act amendments to MEPA are under development, so check to see whether and how they make more specific the directives of the statute and deal with the thorny issues of equitable distribution of energy and environmental benefits and environmental burdens.

Source: Lyman, MEPA Review, Massachusetts Environmental Law (MCLE, Inc. 4th ed. 2016 & Supp. 2019, 2021).

COVID-19

COVID-19

- Remote access to state and local public meetings was extended until at least July 2022.
- Certain eviction protections for residential tenants affected by COVID-19 were extended until April 2022.
- Virtual notarization allowed until December 2021.
- On June 14, 2021, the Executive Office of Energy and Environmental Affairs and the Executive Office of Housing and Economic Development issued joint guidance related to the calculation of permit deadlines tolled during the pandemic.
- Deadlines were tolled for 462 days. The tolling provisions apply only to permits issued before March 10, 2020, not to those issued during the State of Emergency.
  - *The Massachusetts Association of Municipal Conservation Professionals (MSMCP) has issued a simple calculator to calculate these tolled permit expiration dates for any permit issued BEFORE the State of Emergency:* **www.tinyurl.com/MSMCPTollingTool**

DRINKING WATER

Drinking Water: EPA PFAS

- On October 18, 2021, EPA announced the agency's PFAS Strategic Roadmap: EPA's Commitments to Action 2021-2024: https://www.epa.gov/pfas/pfas-strategic-roadmap-epas-commitments-action-2021-2024
  - Research: EPA intends to invest in research, development, and innovation to "increase understanding" regarding the different types of PFAS, effective interventions for contamination, and effects on human health and the environment.
  - Restriction: EPA aims to prevent PFAS from entering the environment by regulating production and requiring more in-depth reporting. This includes "plac[ing] the responsibility for limiting exposures and addressing hazards of PFAS on manufacturers, processors, distributors, [and] importers[.]"
  - Remediation: EPA aims to "broaden and accelerate the cleanup of PFAS contamination."
  - EPA will require that companies and government facilities report air, water and land releases in the 2022 TRI reporting year, with forms due by July 1, 2023.

Drinking Water: DEP PFAS

- Per- and polyfluoroalkyl substances are a family of chemicals used since the 1950s to manufacture stain-resistant, water-resistant, and non-stick products. PFAS are widely used in common consumer products as coatings, on food packaging, outdoor clothing, carpets, leather goods, and ski and snowboard waxes. Certain types of firefighting foam may contain PFAS.
- PFAS in drinking water is an important emerging issue nationwide. Because PFAS are water soluble, over time PFAS from some firefighting foam, manufacturing sites, landfills, spills, air deposition from factories and other releases can seep into surface soils.
- From there, PFAS can leach into groundwater or surface water, and can contaminate drinking water. PFAS have also been found in rivers, lakes, fish, and wildlife.
- See MassDEP's PFAS webpage https://www.mass.gov/info-details/per-and-polyfluoroalkyl-substances-pfas

Drinking Water: DEP PFAS

- According to MassDEP, "Studies indicate that exposure to sufficiently elevated levels of certain PFAS may cause a variety of health effects including developmental effects in fetuses and infants, effects on the thyroid, liver, kidneys, certain hormones and the immune system. Some studies suggest a cancer risk may also exist in people exposed to higher levels of some PFAS.
- Scientists and regulators are still working to study and better understand the health risks posed by exposures to PFAS, and MassDEP is following developments in this burgeoning area closely." https://www.mass.gov/info-details/per-and-polyfluoroalkyl-substances-pfas
- On October 2, 2020, MassDEP published its PFAS public drinking water standard, called a Massachusetts Maximum Contamination Level (MMCL), of 20 nanograms per liter (ng/L) (or parts per trillion (ppt)): https://www.mass.gov/doc/per-and-polyfluoroalkyl-substances-pfas-drinking-water-regulations-quick-reference-guide/download
- MassDEP's Interim Guidance on Sampling and Analysis for PFAS at Disposal Sites Regulated under the Massachusetts Contingency Plan October 21, 2020, provides guidance regarding when and how to sample and analyze for PFAS at disposal sites regulated under the Massachusetts Contingency Plan (MCP).

Source: Cox, Environmental Issues in Real Estate Practice, Massachusetts Environmental Law (MCLE, Inc. 4th ed. 2016 & Supp. 2019, 2021).

ENFORCEMENT

Conservation Restrictions

Wellesley Conservation Council, Inc. v. Pereira, 98 Mass. App. Ct. 194 (2020)

- The Appeals Court addressed the scope of enforcement options available to the holder of a Conservation Restriction (CR), in particular whether injunctive relief (like restoration and replanting) is the sole remedy for violations of the CR's terms, or does it include money damages.
- The answer is yes to money damages, in addition to legal fees. The holder of a CR may sue for all these judicial remedies. There are thousands of CRs held in Massachusetts by land trusts, environmental organizations, municipalities, and others.

Maroney v. Planning Board of Haverhill, 97 Mass. App. Ct. 678 (2020)

- Under G.L. c. 148A, § 2, notice of violation must specify offense charge and time and place of the violation; include a schedule for assessment of fines; for a continuing violation, indicate that it must be corrected within 24 hours; and say the alleged violator must return the notice to the municipal hearing officer and, within 21 days, either pay the full assessed fines or request a hearing before the municipal hearing officer
- The Appeals Court noted the purpose of these procedures, like those for violations of zoning and in 21D, is to give adequate notice of the violation in amount of any proposed fine, as well as provide for a relatively efficient administrative process to either pay the fine or dispute it and obtain a hearing
- Ruling: City of Haverhill's filing of a counterclaim in a civil action brought by the alleged offender was not a permitted way to seek monetary fines for violating a zoning ordinance or bylaw
- Many lessons for any local officials who have been given the power to issue citations using the noncriminal disposition procedure per G.L. c 40 s. 21D
- Court ruled Building Inspector's cease-and-desist letters did not identify any amount of fine or state that fines would be imposed for work done prior to the date of the letters.

ENVIRONMENTAL JUSTICE

Environmental Justice

***City of Brockton v. Energy Facilities Siting Board*, 469 Mass. 196 (2014)**

- SJC affirmed the siting board's decision approving a power plant and held that the agency's application of the then initial state environmental justice policy was subject to judicial review.
- Significantly, however, the court confirmed the additional substantive obligations arising from the environmental justice policy, holding that it imposes a "general, but affirmative, requirement on all agencies covered by it . . . to develop strategies designed to proactively promote environmental justice in all neighborhoods in a manner tailored to and consistent with that agency's 'specific mission.'" 469 Mass. at 204 n.17.

Environmental Justice

- **Climate Roadmap Act** required "additional measures to improve public participation by" any affected environmental justice population. G.L. c. 30, § 62J (added by 2021 Mass. Acts c. 8, § 60).
- Amendments to MEPA Regulations at 301 CMR 11.00 were promulgated on December 24, 2021.
- MEPA Interim Protocol for Analysis of Project Impacts on Environmental Justice Populations, effective Jan. 1, 2022: https://www.mass.gov/doc/final-mepa-interim-protocol-for-analysis-of-project-impacts-on-environmental-justice-populations-effective-date-of-january-1-2022/download
- MEPA Public Involvement Protocol for Environmental Justice Populations, effective Jan. 1, 2022: https://www.mass.gov/doc/final-mepa-public-involvement-protocol-for-environmental-justice-populations-effective-date-of-january-1-2022/download
- An agency acting on project or permit for which an EIR is required due to its location within or near a neighborhood with an identified environmental justice population has new particular EJ obligations .

INFRASTRUCTURE

Federal Infrastructure Investment and Jobs Act (IIJA)

- $1.2 trillion investment for modernizing the energy grid, reducing reliance on carbon-based energy, and protecting areas most vulnerable to climate change and extreme weather.
- Lots of benefits for municipalities along with a variety of industries, including energy producers, financial investors, forest and agricultural interests, technology innovators and many others.
- Text of the Act: Alternative Fuels Data Center: Infrastructure Investment and Jobs Act of 2021 (energy.gov)

IIJA: Clean Energy, Efficiency, and Electrical Grid Upgrades

- Approximately $65 billion is directed towards clean energy, building efficiency, and grid upgrades, including batteries, carbon capture, hydrogen, nuclear, and hydropower, such as clean energy supply chains, carbon capture and removal, clean hydrogen manufacturing and recycling program, nuclear reactors set for closure, and hydroelectric facilities.
- There are funds to audit, upgrade, and retrofit residential and commercial buildings, grants for public schools, and weatherization assistance for low-income households.
- Large sums are allocated for grid resilience, grid flexibility, transmission lines, and Columbia River hydro.

IIJA: Climate Resilience

- Over $47 billion is allocated towards climate resilience projects, primarily addressing three types of climate-disasters: fires, floods, and drought. These include prevention and management, ecosystem restoration, fish passages, and road closures.
- There are grants to reduce flooding in at-risk communities; funds for building the backlog of Army Corps of Engineers projects for risk management and aquatic ecosystem restoration; and more for NOAA projects to expand natural ecosystems, prevent shoreline erosion, and to create new flood mapping and modeling programs.
- Loans and grants to at-risk communities and the FEMA Flood Mitigation Assistance program to assist state and local governments with reducing flood risk to homes and businesses.
- Droughts are addressed mainly through the Aging Infrastructure funding for the Bureau of Reclamation to fund water infrastructure upgrades and repairs.

IIJA: Contaminated Site Cleanups and Brownfields

- CERCLA fees expired in 1995, and the Superfund funding ran out in 2003.
- The IIJA reinstates fees on certain chemicals beginning July 1, 2022, until December 31, 2031.
- The Act also makes billions available for five years to investigate and remediate Superfund sites, and more to clean up PFAS and other chemicals, reclaim abandoned mine lands, and plug orphan oil and gas wells; provide Brownfields grants and technical assistance for Tribes, states, and communities to assess, clean, and reuse contaminated properties (all state cost share requirements for this section have been waived).
- The Brownfields funding will include both competitive and categorical grants to support state-led Brownfield redevelopments.

IIJA: Water Pollution and Water Infrastructure

- The IIJA allocates more than $66 billion for drinking water infrastructure, including $10 billion in grants for states and water utilities to treat Per- and Polyfluoroalkyl Substances (PFAS) contamination and $15 billion in Drinking Water State Revolving Funds to be directed toward lead line replacement.
- Congress also made a $43.4 billion commitment for the State Revolving Loan Funds used to help water suppliers finance water infrastructure projects.
- The IIJA establishes a Clean Water Infrastructure Resiliency and Sustainability Program at EPA to provide grants to owners or operators of publicly-owned treatment works (POTW) to address climate change.

Source: Ross and Pollack, "Congress Approves $1.2T Investment in Clean Energy, Climate Resistance, Natural Resources," news/Martenlaw (November 10, 2021).

Brookline No-Fossil-Fuel Bylaw

Attorney General's Case #10315

- On February 22, 2022, the Attorney General) disapproved Brookline's attempt to regulate "On-Site Fossil Fuel Infrastructure" through the adoption of zoning by-laws regulation building materials used in construction.
- Based upon conflicts between the by-laws and the statutory language of G.L. c. 40A, § 3, the preemptive scope of the State Building Code, and the authority granted to the Department of Public Utilities to regulate the sale and distribution of gas pursuant to c.164
- Attorney General determined the Town "cannot regulate, through its zoning by-laws, building materials or construction methods, and cannot add an additional layer of regulation to the comprehensive scope of regulating in the Building Code and Chapter 164."

FEDERAL REGULATIONS

Federal Regulatory Rollbacks

During the Trump Administration there were many rollbacks and wholesale revisions of environmental and land use laws, regulations, programs, grants and subsidies, and even international compacts, effected by innumerable Executive Orders and other executive actions.

Under the Biden Administration a concerted rollback of the rollbacks is underway.

Just for water issues alone, for example, here are some subjects of these reversal and revision efforts:

Clean Water Act, Waters of the United States, Stream Protection Rule, Surface Mining, Reclamation & Enforcement, Offshore Wind Permits, Land Conservation Programs, Reforestation Projects, National Parks & Marine Sanctuaries Antiquities Act Designations, Oil & Gas Drilling in National Parks, Monuments, Refuges and Offshore Preserves, Offshore Exploration, Development and Leasing Plans

Federal Regulatory Tracker

- Harvard Law School hosts the Regulatory Tracker (formerly the Regulatory Rollback Tracker) online resource to follow and update the Biden Administration reversals of the Trump Administration environmental Executive Orders, Regulation changes, Guidelines, and Convention and Treaty actions.
- The Tracker covers comprehensively the environmental, climate, clean energy, land use, and related litigation in the federal courts and legislation in Congress.
- You may subscribe for free and receive the monthly alerts with active links to all sources, and research the Tracker for current information. There are also the EPA Mission Tracker, Environmental Justice Tracker, and others of interest to specific industries.

Regulatory Tracker - Environmental & Energy Law Program - Harvard Law School

Regulatory Changes Tracked

- Repeal of Trump's Affordable Clean Energy (ACE) Plan
- EPA and Coe recission of Trump's Navigable Waters Protection Rule (WOTUS)
- EPA and NATSA repeal of Trump's auto and truck emissions preemption rule
- New Mercury and Air Toxics Standards (MAT)
- GHG Standards for Power Plants
- Methane Standards for Oil and Gas Facilities
- Cross State Air Pollution Rule (CSAPR)
- EPA NAAQS for Ozone and Particulate Matter (PM)
- Update Clean Air Scientific Advisor Committee (CASAC)

Regulatory Changes Tracked

- Effluent Limitations Guidelines for Steam Electric Power Plants
- NEPA and CEQ revisions on GHG and Climate Change
- Phase 1 NEPA revisions and Environmental Justice objectives
- Oil and Gas Exploration and Development on Federal Lands
- DOI and BLM revisions on Renewable Energy offshore and onshore
- FWS revisions re Migratory Birds Treaty Act
- Federal Oil and Gas Leasing Pause and Review program
- FEMA consideration on Environmental Justice
- HFCs and the Kigale Amendment

PUBLIC LANDS

Public Lands

***Mahajan v. DEP*, 464 Mass. 604 (2013)**

- SJC reversed and remanded a Superior Court decision that Article 97 applied to waterfront property at issue on the Long Wharf in Boston. The Court ruled the land was not dedicated to Article 97 purposes but acknowledged that properties acquired pre-Article 97 or without Article 97 dedication could become Article 97-protected by dedication thereafter.

***Smith v. City of Westfield*, 478 Mass. 49 (2017)**

- A parcel in Westfield was deemed to be conservation land and had a long history of designation as a playground following city council votes, acceptance of a federal grant restricting changes in land use, and a state program requiring that land developed with such funds be subject to Article 97 protections.
- Unlike *Mahajan* where the court held that land was not subject to Article 97, see *Mahajan v. Dep't of Env't Prot.*, 464 Mass. 604, 619–20 (2013), the court in *Smith* decided that, where land has been dedicated as a public park and the public accepts such use by using the land as a public park, such land is governed by Article 97. *Smith v. City of Westfield*, 478 Mass. at 64.

Public Lands

***Smith v. City of Westfield*, 100 Mass. App. Ct. 1107 (unreported decision; text available at 2021 WL 3889532), rev. denied, 488 Mass. 1107 (2021)**

- This is subsequent litigation challenging the park transfer and change of use.
- To remove federal restrictions on the development of the playground, the City asked for and received approval from the federal government to substitute another parcel, Ponders Hollow, for the playground, and to convert Ponders Hollow into a public park.
- The city council voted to transfer Ponders Hollow from the fire department to the department of parks and recreation.
- Thereafter, plaintiffs filed two separate actions.
- They were rendered moot when the City decided to cancel the project.

Credit: Michael K. Murry, Esq., "2021-2022 Zoning-Related Cases," MCLE Annual Environmental Law Conference, March 3, 2022

Public Lands

***Town of Sudbury v. Mass. Bay Transp. Auth.*, 485 Mass. 774 (2020)**

- A doctrine prior to Article 97 protects public lands from being used for other purposes without legislative authorization, meaning a bill in the Great and General Court passed by majority vote. This is the doctrine of **Prior Public Use**. It serves as a kind of traditional backup to Article 97 for dedicated public land uses.
- The SJC considered whether the scope of the doctrine of prior public use extended to and consequently barred the diversion of public land devoted to a specific public use to another inconsistent but private use.
- The Town sought to prevent the MBTA from entering into an option agreement with NSTAR Electric Company d/b/a Eversource Energy for an easement to install an electric transmission line underneath the Right-of-Way, without the requisite legislative authority. Under the doctrine of prior public use, public lands acquired for one public use may not be diverted to another inconsistent public use without "plain and explicit legislation."

Public Lands

***Town of Sudbury v. Mass. Bay Transp. Auth.*, 485 Mass. 774 (2020)** (cont.)

- SJC specified pleading requirements: subsequent public use, previous devotion to only one public use, inconsistent subsequent use, and lack of legislative authorization.
- Declined to expand doctrine of prior public use to subsequent private uses by private entities.
- SJC reasoned the purpose of toctrine is "to resolve conflicts over the use of public lands between State-chartered corporations, municipalities, and other governmental agencies that might claim authority to use another government entity's land or to take the land by eminent do-main, in a potentially never-ending cycle of takings."
- Added to extend doctrine to reach inconsistent private uses would be a sweeping change that would not advance the purposes of the doctrine, would create wide-spread uncertainty concerning numerous existing holdings of private land that were transferred by public entities, and "would render future developments between public and private entities…prohibitively expensive and time-consuming to undertake."

REGULATORY TAKINGS

Cedar Point Nursery et al. v. Hassid et al., 141 S.Ct. 2063 (2021)

- A California regulation allowed union organizers access to farmers' property for unionization efforts 3 hour per day for 120 days a year. The growers asserted it was an unconstitutional taking requiring compensation.
- Physical access to private property required by regulation constitutes a per se taking requiring compensation regardless that the access is not permanent or continuous for 24 hours per day, 365 days a year.
- Court said that less than continuous occupation goes to the amount of compensation payable, not to whether it is a per se taking.
- Regulations which restrict property use but are NOT a per se taking, on the other hand, are addressed on a balancing test involving the economic impact of the regulation, interference with a reasonable investment backed expectations, and the character of the government action.

Cedar Point Nursery et al. v. Hassid et al., 141 S.Ct. 2063 (2021)

- As the California rule requiring access constituted a per se physical taking under the Fifth and Fourteenth Amendments to the U.S. Constitution, it was inappropriate to apply the factors set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), for determining whether regulatory takings that do not constitute per se takings have gone "too far."
- The majority reasoned that the regulation "appropriates for the enjoyment of third parties the owner's right to exclude…'one of the most treasured' rights of property ownership." (quoting *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 435 (1982)), akin to the appropriation of an easement that was found to constitute a physical taking in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

Cedar Point Nursery et al. v. Hassid et al., 141 S.Ct. 2063 (2021)

- Helpfully to those of us dealing in environmental regulations, the Court adds that "many government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights," such as the right to enter property out of necessity in the event of a nuisance; "the government may require property owners to cede a right of access as a condition of receiving certain benefits, without causing a taking," provided the condition bears an "essential nexus" and "rough proportionality" to the impact of the proposed use of the property (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994)).
- "Under this framework, government health and safety inspection regimes [such as where the government conditions the grant of a permit or license on allowing reasonable health inspections] will generally not constitute takings."

Pakdel v. City and County of San Francisco, 141 S.Ct. 2226 (2021)

- Takings jurisprudence requires that courts know the extent of a regulation's interference with property rights prior to making any adjudication on its validity. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985).
- A property owner has an actionable 5th amendment takings claim when the government takes their property without paying for it and so may bring suit in federal court under section in 1983 at that time, without exhausting state court suits. *Knick v. Township of Scott, Pennsylvania*, 862 F.3d 310 (2019). This made federal courts more readily available.
- The Supreme Court in *Pakdel v. City and County of San Francisco*, 141 S.Ct. 2226 (2021), effectively overturned *Williamson*. It set a Finality Rule for challenging a regulatory taking. "Once the government is committed to a position . . . the potential ambiguities evaporate in the dispute is ripe for judicial resolution."

Pakdel v. City and County of San Francisco, 141 S.Ct. 2226 (2021)

- At issue was the application of state law and local restrictions on conversion of tenancy in common into condominium type. The bottom line is that once it is clear that the government is committed to a position, the dispute is ripe for judicial resolution
- While the case was below, the Supreme Court in *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019) had repudiated the exhaustion requirement articulated in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), that plaintiffs must seek compensation in state court before pursuing a federal taking claim under 42 U.S.C. § 1983.
- Most recently the 10th circuit applied these finality principles in *North Mill Street, LLC v. City of Aspen*, 6 F.4th 1216 (10th Cir. 2021). "The finality requirement does not require landowners to exhaust administrative procedures, or to 'submit applications for their own sake.' . . . Instead, a 'final decision' has been reached in a regulatory taking claim becomes prudentially ripe for judicial resolution '[o]nce the government is committed to a position .'"

STORMWATER

Stormwater Management

- MassDEP convened a stormwater Advisory Committee in preparation for updating the **Massachusetts Stormwater Handbook** and the **Massachusetts Wetlands Protection Act (WPA)** stormwater regulations (310 CMR 10.05(6)). MassDEP is undertaking these updates as part of its mission to protect wetland and water resources of the Commonwealth. The Advisory Committee is focused on two topics:
  - Aligning the WPA Stormwater Management Standards with the Municipal Separate Storm Sewer System (MS4) General Permit Post-Construction Stormwater Rules, and
  - Updating Precipitation Projections for Stormwater Management
- Information on the goals and membership of the AC can be found here: https://www.mass.gov/info-details/massachusetts-stormwater-management-updates-advisory-committee.

Storm Water Management

- The **2016 Massachusetts Small MS4 General Permit** was signed April 4, 2016 and became effective July 1, 2018. EPA proposed modifications to the 2016 MA MS4 General Permit on April 23, 2020 and finalized those modifications on December 7, 2020.
- This permit covers small municipal separate storm sewer systems (MS4s) located in the Commonwealth, including for:
  - traditional cities and towns (NPDES Permit No. MAR041000);
  - state, federal, county, and other publicly owned properties (nontraditional) (NPDES Permit No. MAR042000); and
  - state transportation agencies (except for MassDOT Highway Division) (NPDES Permit No. MAR043000).

Storm Water Management

- The current permit and appendices, including all modifications: https://www.epa.gov/npdes-permits/massachusetts-small-ms4-general-permit
- Authorization Letters and Annual Reports for this Permit: https://www.epa.gov/npdes-permits/regulated-ms4-massachusetts-communities
- Specific community information on the regulated communities in Massachusetts: https://www.epa.gov/npdes-permits/regulated-ms4-massachusetts-communities

Source: Biancavilla, Hegemann, Kaplan and Rinaldi, BSC, Environmental Science for Lawyers, Massachusetts Environmental Law (MCLE, Inc. 4th ed. 2016 & Supp. 2019, 2021).

SUPERFUND

Superfund

***Atlantic Richfield, Co. v. Christian, et. al.*, 140 S.Ct. 1335 (2020)**

- Involved arsenic and lead contamination of more than 300 square miles of land in Montana by a smelter operated by Atlantic Richfield Company (ARCO). For 35 years, EPA worked with ARCO to clean up the site. In 2008, landowners within the ARCO Superfund site sued in state court, under Montana law, seeking damages and other relief for trespass, nuisance and strict liability claims. The plaintiffs' proposed a restoration plan that went beyond the cleanup efforts being implemented by ARCO.
- Because the case arose under state law, not federal, and CERCLA does not "strip[] state courts of jurisdiction to hear their own state claims," jurisdiction in the state courts is appropriate.
- Prior to this decision, it was unclear whether state law claims could be used to challenge cleanups overseen by EPA under CERCLA. In addition, EPA settlements usually have set a limit on the responsible party's liability under CERCLA.

Superfund

***Atlantic Richfield, Co. v. Christian, et. al.*, 140 S.Ct. 1335 (2020)**

- Holding: Superfund does not preclude state court jurisdiction over state law claims for more cleanup or larger damages than EPA has ordered or agreed, but there is a catch (extra cleanup of the same property within the Superfund site needs EPA prior approval).
- The upshot is that owners of and others liable for contaminated property under Superfund also may be subject to state court lawsuits liable under state common law principles for remediation beyond what EPA has required, provided that the plaintiffs obtain EPA approval for the extra remedial work. They can sue for additional or different remedial actions, monetary obligations, and natural resource damages.
- Supreme Court's decision may encourage citizen groups, without ownership interest in affected properties, to sue in state courts to enforce state Superfund and other pollution laws. In Massachusetts, resident groups can sue alleged violators to enforce state environmental requirements, such as in M.G.L. c. 21E, using the so-called 10-citizen-suit statute. M.G.L. c. 214, §7A.

WATER POLLUTION

Water Pollution: Jurisdiction

- The Trump Administration' s **Navigable Waters Protection Rule** also redefined the key jurisdictional term "waters of the United States" (WOTUS) and specfically excluded twelve (12) categories of features that know longer qualify, such as those that only contain water in direct response to rainfall (e.g., ephemeral features); groundwater; many ditches; prior converted cropland; and waste treatment systems.
- The Rule also defined "**adjacent wetlands**" as only wetlands that are meaningfully connected to other jurisdictional wetlands (i.e., by directly abutting or having regular surface water flooding from jurisdictional waters).
- The Biden Administrations agencies are currently working to revise a new Rule. Refer to https://www.epa.gov/wotus/about-waters-united-states and the Federal Register for up-to-date information.

Source: Biancavilla, Hegemann, Kaplan and Rinaldi, BSC, Environmental Science for Lawyers, Massachusetts Environmental Law (MCLE, Inc. 4th ed. 2016 & Supp. 2019, 2021).

Water Pollution: Point Sources

- The U.S. Supreme Court ruled that the CWA requires a permit when there is a direct discharge, or the functional equivalent, from a point source to navigable waters. In determining this, the Supreme Court affirmed that groundwater can be a "point source" as defined by the CWA and that groundwater is also a "navigable water" under the CWA. *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S.Ct. 1462 (2020).
- This is a new concept in CWA jurisprudence. Any pollutant discharged through a point source (a discernable, confined, and discrete conveyance, such as a pipe), into waters of the United States, can be subject to a permit under the Clean Water Act. This has been the National Pollutant Discharge Elimination Permit Program (NPDES) program since 1972. This ruling expands the understanding of that jurisdiction.
- Pollutants described in the Act range from the obvious—solid waste, sewage, chemical wastes—to the less intuitive—cellar dirt, and agricultural waste.
- The Supreme Court narrowed the lower courts' rulings, citing that statutory context of the CWA as limiting the reach of the phrase "from any point source" to a narrower range of circumstances than "fairly traceable" suggests. Instead, the Court used the phrase "functional equivalent of a direct discharge" to pinpoint when a discharge to groundwater needs an NPDES Permit.

Water Pollution: Point Sources

- The Court emphasized that to make the determination of whether discharge to groundwater is the "functional equivalent" of a direct discharge into navigable waters, "time and distance will be the most important factors." Other factors include the nature of the material through which the pollutants travel, and the extent to which the pollutant is diluted when it reaches navigable waters.
- The holding in *County of Maui, Hawaii v. Hawaii Wildlife Fund et al.* is a wakeup call to groundwater dischargers nationwide. While the discharge of pollutants into groundwater alone does not necessarily require an NPEDES Permit under the Clean Water Act, the decisional law now recognizes that it may. This has real, practical implications.
- Those discharging pollutants into groundwater must now account for the reality that pollutants in groundwater can and do easily traverse sight-unseen into navigable waters, thus granting regulatory jurisdiction over the discharge to the EPA under the CWA. Due to the subjective term "functional equivalent" in the Court's decision, the applicability of this new case is not black and white.

Water Pollution: Construction General Permit

- On February 16, 2022, the EPA **Construction General Permit** (CGP) expired.
- The EPA issued a revised CGP under the National Pollutant Discharge Elimination System (NPDES) for stormwater discharges from construction activities. The 2022 CGP, which became effective on February 17, 2022, replaced the 2017 CGP. The new permit will be in effect for the next 5 years (2022 – 2027).
- The NPDES stormwater program requires permits for discharges from construction activities that disturb 1 or more acre and for discharges from smaller sites that are part of a larger common plan of development that involves 1 or more acre.
- The CGP allows operators to discharge stormwater associated with construction activities in locations where the EPA is the NPDES permit authority, including the District of Columbia, Idaho, Massachusetts, New Hampshire, New Mexico, and most Indian Country lands.

Source: https://www.swca.com/news/2022/01/regulatory-alert-epas-2017-construction-general-permit-expiring?utm_source=newsletter&utm_medium=email&utm_content=EPA&utm_campaign=Regulatory%20Alert%20-%20EPA%20CGP%20Expiring

Water Pollution: Construction General Permit

- Coverage under the CGP is obtained by submitting a notice of intent (NOI) through the EPA's eNOI online system at least two weeks prior to the start of any land-disturbing activities.
- Additionally, a project-specific stormwater pollution prevention plan (SWPPP) must be prepared in accordance with the requirements of the CGP.
- Throughout the duration of construction, the contractor must adhere to the requirements of the SWPPP, edit and update it as required, and take all corrective actions as determined by the CGP-required inspections.
- 2022 CGP: https://www.epa.gov/npdes/2022-construction-general-permit-cgp
- **Existing sites** currently permitted under the 2017 CGP will have 90 days to update their existing SWPPPs and submit a new Notice of Intent to the EPA via the NPDES eReporting Tool (NeT) following the issuance of the 2022 CGP.
- **New sites** and projects that seek to discharge stormwater from construction activities will be governed by the new 2022 CGP.

Source: https://www.swca.com/news/2022/01/regulatory-alert-epas-2017-construction-general-permit-expiring?utm_source=newsletter&utm_medium=email&utm_content=EPA&utm_campaign=Regulatory%20Alert%20-%20EPA%20CGP%20Expiring

WETLANDS AND WATERWAYS

Commercial Wharf East Condominium Ass'n v. Department of Environmental Protection, 99 Mass. App. Ct. 834 (2021)

- Appeals Court addressed whether the use of part of a wharf for condominium parking spaces is a use authorized by either a legislative act or a G.L. c. 91 license.
- The Court ruled that 310 CMR 9.00 et seq. did not exempt existing unauthorized uses on Commonwealth tidelands, such as the parking spaces. Therefore, the current use was unauthorized and required a license—despite its use as a parking lot for nearly 50 years.

Dobinski v. Conservation Comm'n of Eastham, No. 20-P-1313, 2022 WL 120451 (Mass. App. Ct. Jan. 13, 2022)

- A local conservation commission decision based on municipal bylaws and regulations that are less stringent than or consistent with the WPA is preempted by a DEP superseding order issued under the WPA.
- The WPA "establishes minimum Statewide standards leaving local communities free to adopt more stringent controls." *T.D.J. Dev. Corp.*, 36 Mass. App. Ct. at 125-126, *quoting Golden v. Selectmen of Falmouth*, 358 Mass. 519, 526 (1970).
- "A decision rendered by a conservation commission pursuant to more stringent local bylaws or regulations is not preempted by the WPA and trumps DEP approval under the WPA. *Oyster Creek Preservation, Inc. v. Conservation Comm'n of Harwich*, 449 Mass. 859, 865 (2007). Thus, we must first determine whether it was arbitrary and capricious for the commission to read the ACEC regulations as more stringent than the WPA. We conclude it was not."

Wetlands: Statute of Repose

***Conservation Commission of Norton v. Robert Pesa*, 488 Mass. 325 (2021)**

- Seminal case of the Supreme Judicial Court supporting a conservation commission, under the state Wetlands Protection Act, in a long-running attempt to get compliance from recalcitrant landowners. The case is of singular importance to commissions and DEP which also enforces the Act.
- The original property owner in 1979 filed a Notice of Intent with the commission to construct a store and parking lot. The commission approved with a permit. Construction took place, but a Certificate of Compliance was never requested. The owner died and the property transferred to his wife. In 1984, 1987 and 1988 the commission sent letters about excess fill beyond the project plans. In 2015 the Commission issued an enforcement order directing new owners remove and restore. They did not appeal that order or comply with it. In 2016 the commission sued the new owners in Superior Court which ruled for the landowners.

Conservation Commission of Norton v. Robert Pesa, 488 Mass. 325 (2021)

- The SJC ruled the 3-year time limit for actions against new owners did not apply to just the first new owner. Rather, the Act permits an action to be initiated against any subsequent owner within 3 years of that particular person obtaining title.
- This case gives Commissions, MassDEP, the Attorney General, and citizens and municipalities a useful weapon to cure historic fill violations. Each transfer of title renews the opportunity for the Commission or other plaintiff to enforce against each subsequent owner who allows unauthorized fill to remain in place.
- Issuing an administrative enforcement order, however, is not sufficient to toll the statute, a common misperception. Rather, it is this author's opinion that the enforcement action must be a court action, namely a civil suit, criminal prosecution, or maybe an M.G.L. c. 21D so-called non-criminal monetary citation.

Wetlands: Sea Level Rise

- Recognizing that FEMA's 100-year floodplain mapping can be inaccurate or outdated, many coastal communities allow the coastal floodplain, usually called **Land Subject to Coastal Storm Flowage ("LSCSF")**, to be defined by the FEMA maps, surge of record, or flood of record, whichever is greater.
- Some communities define the top of coastal bank at a higher point than DEP would under the WPA.
- **MassDEP's Wetlands Resiliency Regulations:** MassDEP is preparing wetland resilience regulation changes likely available for public comment late spring/early summer 2022.
- These will include standards for LSCSF and revised stormwater management standards. The stormwater changes will incorporate precipitation data addressing increasing rainfall, align with the EPA MS4 General Permit to the extent possible, and encourage Environmentally Sensitive Site Design (ESSD). Also expected are new limited projects and rules for coastal resiliency and scientific test projects.

Wetlands: 21 Days

***Boston Clear Water Company, LLC v. Town of Lynnfield*, No. 21-P-166, split op. (Mass. App. Ct. Jan. 26, 2022)**

- Whether a commission's failure to conduct a hearing within twenty-one days of receiving an applicant's notice of intent, pursuant to G. L. c. 131, § 40, and its town bylaw, caused it to lose its authority over the proposed project and as a result forfeit the right to enforce its bylaw.
- Recall a commission loses its Home Rule bylaw jurisdiction (no need for the local permit) if it fails to issue its permit/denial by 21 days from the close of the public hearing (by virtue of the SJC in *Oyster Creek Preservation, Inc. v. Conservation Comm'n of Harwich*, 449 Mass. 859, 866 (2007)). Now, by virtue of the *Boston Clear Water* case, it loses it by failure to convene the hearing by 21 days from the NOI being filed.
- The upshot is the only permit needed is a Superseding OOC from DEP.

ZONING

Zoning: Housing Choice Act

- The **Housing Choice Act of 2020** was passed by the Legislature and signed by Gov. Charlie Baker in January 2021 as part of an economic development bill. It is under the jurisdiction of the Executive Office of Housing and Economic Development (EOHED).
- **HCA** made substantive changes to the Zoning Act and Chapter 40R (Smart Growth Districts), effective January 14, 2021. It lowers the quantum of vote needed for town meeting or city council approval of certain zoning by-laws or ordinances from 2/3 to majority; lowers the quantum of vote needed to grant certain types of special permits from 2/3 to majority; adds several new definitions to the Zoning Act; and adds zoning requirements specifically for "MBTA Communities."
- **Practice Note**: the Housing Choice Act favors types of **as-of-right** developments, density, or intensity, reduced parking, dimensional specifications, transferable development rights, and more, in eligible multi-family or mixed-use developments, eligible residential and open space residential developments, eligible locations, and some other eligible situations.
- MBTA municipalities are required to have a zoning by-law or ordinance that provides for at least one district of reasonable size in which multi-family housing is permitted as of right. For preliminary list of 175 cities and towns. See G.L.c. 161A, Section 1.

Zoning: Housing Choice Act

- What is an "MBTA Community"?
- “MBTA community” is defined by reference to M.G.L. c. 161A, sec. 1:
  - one of the “14 cities and towns” that initially hosted MBTA service;
  - one of the “51 cities and towns” that also host MBTA service but joined later;
  - other “served communities” that abut a city or town that hosts MBTA service; or
  - a municipality that has been added to the MBTA under G.L. c. 161A, sec. 6 or in accordance with any special law relative to the area constituting the authority.

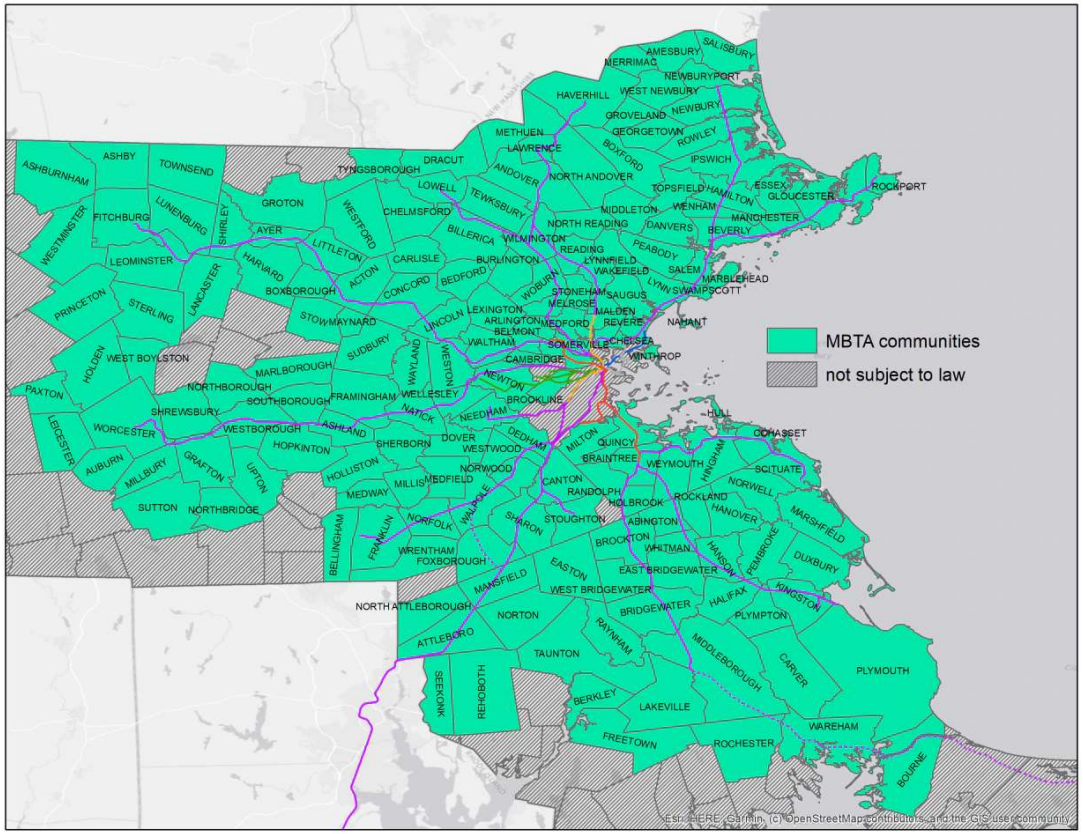
Zoning: Housing Choice Act

- Draft Guidelines: https://www.mass.gov/doc/draft-guidelines-for-mbta-communities/download
- The guidelines state that the multi-family zone must:
  - Have minimum gross density of 15 units per acre.
  - Have not more than ½ miles from a commuter rail station, subway station, ferry terminal or bus station, if applicable.
  - Have no age restrictions.
  - Be suitable for families with children.

Zoning: Housing Choice Act

- All 175 MBTA and MBTA-adjacent municipalities must submit a basic form with some zoning details and hold a briefing with their city or town council or select board by May 2, 2022
- If the municipality does not adopt the requisite zoning, it cannot qualify for the Local Capital Projects Fund, MassWorks Infrastructure Program, and Housing Choice Initiative Program.
- According to a spokesperson for EOHED, municipalities will be able to set rules covering things like: height limitations, lot coverage limitations, maximum floor area ratio, set back requirements, parking space requirements.
- Public comment period will end on March 31, 2022. Final guidelines will be issued in summer 2022.
- https://www.mass.gov/info-details/multi-family-zoning-requirement-for-mbta-communities

Zoning: Housing Choice Act



Zoning: Housing Choice Act: Examples

- To calculate the number of housing units each community must allow, the state looked at existing housing stock and access to public transit. The minimum number is 750 and applies to Boxford, Topsfield, Georgetown, Rockport, and Wenham, among others. On the higher end are Somerville (9,067), Medford (6,443), Peabody (4,638), and Salem (4,070).
- Concord is considered a commuter rail community, which means that 15% of its total housing stock will need to be multifamily, according to the new guidelines. The Town has a housing stock of 7,295 units, according to the 2020 Census, and so its minimum required multi-family unit capacity is 1,094.
- That unit capacity is the number of multifamily units that can be developed as of right within the multifamily district. If the Town cannot meet the required 1,094 units inside those 50 acres, the district will need to be larger.

THANK YOU!