ENVIRONMENTAL LAW UPDATE 2024-2025

Gregor I. McGregor, Esq.

MCGREGOR LEGERE & STEVENS PC

McGregor Legere & Stevens PC

Massachusetts Environmental Lawyers For 50 Years

MACC Annual Environmental Conference

McGregor Legere & Stevens PC
15 Court Square, Suite 660
Boston, MA 0210

www.mcgregorlaw.com

Mr. McGregor thanks legal intern Julia Bloechl VLS for her valuable assistance

1. CHEVRON DEFERENCE TO AGENCIES OVERTURNED IN THE FEDERAL COURTS

- The conservative-dominated U.S. Supreme Court is an obstacle as it relates to environmental law. Last year it overturned precedent by way of the "Major Questions Doctrine" — allowing courts to reject agency claims of a regulatory authority when the underlying claim of authority concerns an issue of what SCOTUS called "vast economic and political significance" and when Congress has not clearly empowered the agency with authority over the issue.

- Invoking the Major Questions Doctrine the Court lessened protection of wetlands and wetland resources by limiting what can constitute "waters of the U.S." (*Sackett v. EPA*) and striking down plans to better regulate greenhouse gas emissions (*West Virginia v. EPA*).

- This year SCOTUS overturned the *Chevron Doctrine* under the Administrative Procedure Act in *Loper Bright Enterprises v. Raimondo*. This removes agency deference to decide on matters initially governed by the Congress but later needing clarification due to legislative language being ambiguous.

- *Chevron* reversed is a major change in administrative law. It opens new pathways for legal challenges to agency regulations. Complex issues usually left to specific agencies like EPA to parse because of the agency's specialized knowledge now can be left to the discretion of the judiciary. Litigation to get to that point is assured.

- This effectively means federal courts, in pending cases, would presume that Congress does not delegate to agencies such issues. This bodes ill for long-established mainstay environmental laws administered to EPA and many other agencies.

- Increased litigation is expected by those seeking to challenge regulations they believe are unreasonable, unsound, or inconsistent with congressional direction or intent.

- Statutes are frequently silent or unclear on critical subject matter, implementation, and enforcement, and challengers will no longer need to overcome automatic deference to agency interpretations.

- Although *Loper Bright* specified that preexisting decisions applying *Chevron* deference remain good law and subject to *stare decisis*, fresh challenges to long-established regulations may arise in as-applied settings.

- SCOTUS' ruling in *Corner Post, Inc. v. Board of Governors of the Federal Reserve System* opens the door to facial challenges to older regulations subject to the APA's general statute of limitations within six years of *injury* to the complaining party.

- Post-*Chevron*, agencies may pursue informal dispute resolution (negotiations, settlements, consent orders) to avoid final judgments which set precedents that could more broadly limit their regulatory powers against other parties.

- Agencies likely will be more cautious in adopting regulations, interpreting undefined terms, addressing statutory gaps, and doing rulemaking to address new problems, evolving situations, and science or technology not contemplated by Congress.

- Agencies probably will more fully describe their interpretive bases in proposed regulations, issue guidance documents instead, and issue reports to influence the courts if and when there are challenges.

- *Loper Bright* preserves the ability of Congress to enact or amend statutes with express and specific delegations of authority to agencies where it determines that agency expertise is essential to implementing the statute.

- Changes in Presidential administrations may not result in as many fluctuations in fundamental policy, shifts in legal interpretations, and reversals on regulations (e.g., EPA's back and forth on WOTUS rulemaking for decades under the CWA.

- As federal agencies face more regulatory challenges post-*Chevron*, state regulators may step in and fill gaps to varying degrees. Expect state officials to be more proactive rather than wait for Washington.

- Stakeholders like regulated entities, interest groups, and other interested parties may increase their regulatory input to lawmakers on statutory language, participating in public notice-and-comment processes, and clarifying what they see as the meaning of bills during the legislative process.

- As a result of the above, federal statutes are likely to be drafted and enacted (and older ones amended) to be much clearer in what the Congress wishes to delegate to the agencies to do and how to do it.

2. ARTICLE 97 : THE PUBLIC LANDS PRESERVATION ACT

- The *Public Lands Preservation Act* (PLPA), effective February 2023, codified the administrative process, documentation, and criteria for proposing a transfer or change of use of public natural resources lands, waters and other real estate interests that are protected by *Article 97 of the Amendments to the Massachusetts Constitution*.

- This new law, formally titled *An Act Preserving Open Space in the Commonwealth* governs Article 97 transactions, projects, and legislation. Implementing regulations from EOEEA were due in August 2024.

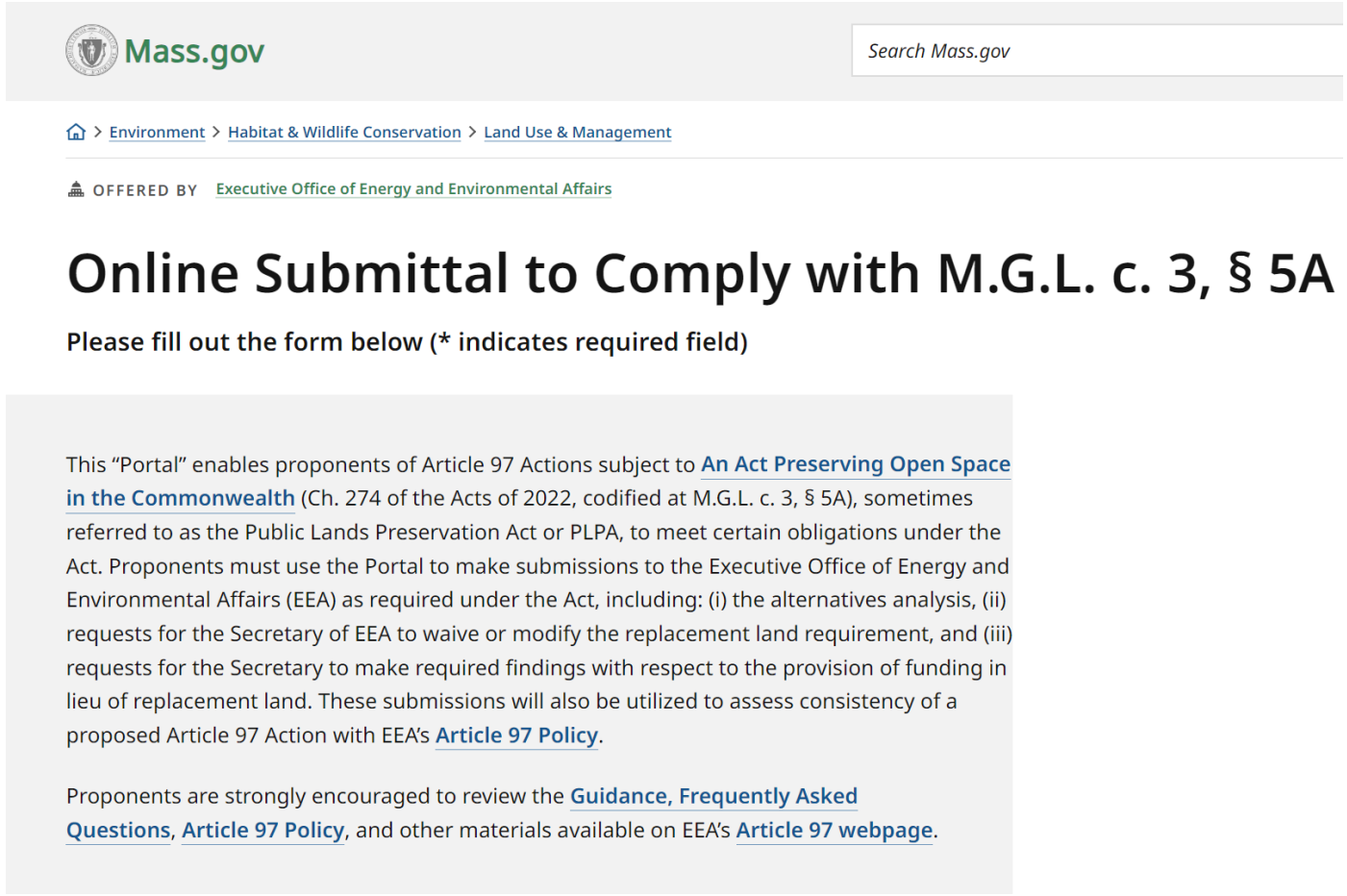
- Public and private landowners, property managers, facility operators, open space stewards, funding agencies, and the boards with care and control of "Article 97 Lands," and their legal counsel involved in projects and transfers, take note of the 2023 EEA Guidelines and new online Portal for proposals and submittals on "Article 97 Actions."

- In summary, the PLPA obligations include a written notification to the public and the Commonwealth, finding of necessity, alternatives analysis, replacement land, funding arrangements, any proposed funding-in-lieu of replacement, natural resource report, appraisal report, any waivers sought, approvals by public agencies, and submission of the authorizing legislation with some of that documentation to accompany it.

- The PLPA was first proposed over 20 years ago to strengthen and codify the state-announced goal of No Net Loss, which had been set by administrative policy, generally providing that Article 97 land to be transferred or changed as to use must be replaced with land of equivalent financial and natural resource value. The EEA issued and oversaw implementation of that policy.

- Know how to use the EEA form and the Portal to start the public notification and initial documentation toward the EEA findings needed for passage of a bill in the Legislature for an Article 97 transaction or change of use.

- EEA Regulations to implement the PLPA (aka Open Space Act) are overdue and expected early in 2025.



https://www.mass.gov/forms/online-submittal-to-comply-with-mgl-c-3-ss-5a

Questions should be directed to plpa@mass.gov

McGregor Legere & Stevens PC

3. CAPE COD SEPTIC SYSTEMS viz STRESSED WATERSHEDS

- MassDEP has targeted Cape Cod's nitrogen pollution with new watershed and septic system rules.

- Effective July 7, 2023, 314 C.M.R. § 21.00 designated 30 watersheds on Cape Cod as "Nitrogen Sensitive Areas." Such communities have 2 years to opt into the watershed permitting process with plans to address nitrogen pollution and restore estuaries.

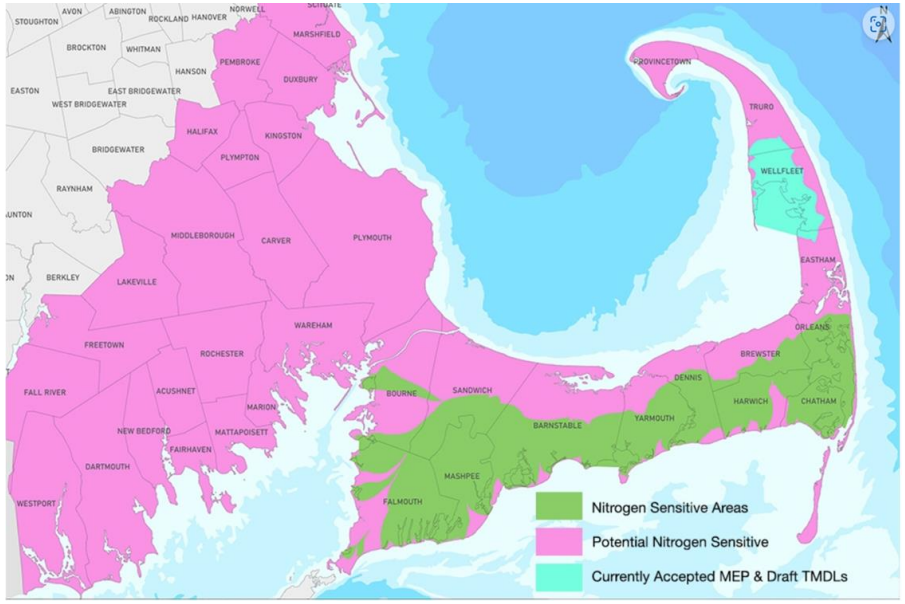
- Failure to obtain a watershed permit within those 2 years will require new septic systems in nitrogen-sensitive watersheds to include enhanced nitrogen-reducing treatment technology.

- Basically, MassDEP using its state Clean Water Act authority, has required the 11 towns on the Cape to remediate the excess nitrogen in Cape Cod waters. In communities that do not do so, owners of septic systems will have new obligations to meet within deadlines a few years out.

- Note that there are some stressed watershed designations effective immediately, timetables and options for actions applicable to Cape towns, and retrofit requirements that will apply to septic system owners depending on what town they are in, what watershed, and what is their septic systems' level of nitrogen compliance.

- A given community may seek exemption from the requirements by filing a Notice of Intent (to secure a Watershed Permit), an application for a Watershed Permit, or a De Minimis Nitrogen Load Exemption.

- Septic system owners within Nitrogen Sensitive Areas already designated in these regulations will need to add nitrogen removal to their Title 5 systems within 7 years from when these regulations took effect.



MCGREGOR LEGERE & STEVENS PC

- Basically, MassDEP created a voluntary Watershed Permit program for Cape Cod towns. If a town chooses to pursue and is subsequently granted a watershed permit, existing construction within that watershed will be exempt from the new rules as the town will be deemed to be making significant progress towards reducing nitrogen pollution.

- A Watershed Permit will provide for an approved watershed permitting approach to control nitrogen and other pollutants from entering the Commonwealth's coastal embayments, and estuaries of the Cape. If a town successfully files for and receives Watershed Permit, the amended Title V Regulations will not take effect in that watershed.

- A Watershed Permit will establish performance standards, authorized activities, and timeframes under an adaptive management framework to achieve nutrient load reductions necessary to meet the specific water quality and habitat quality restoration goals identified in a watershed analysis as being necessary to meet the designated uses of the Massachusetts Surface Water Quality Standards.

- A town has 2 years from July 7, 2023 to file a Notice of Intent to obtain a Watershed Permit. Doing so will stay the effect of the new Title V specifications.

- In summary, the amended Title V rules require existing septic systems to be upgraded to an Innovative Alternative (IA) septic system within 5 years of the 2-year window for the Watershed Permit should the town fail to receive one. This means that if a town fails to file notice to obtain a Watershed Permit within 2 years of being determined to be a Nitrogen Sensitive Area, then homeowners in the affected area would have 5 years from that date to upgrade their septic system to an IA septic system.

- To put a finer point on it, in the majority of the affected regions on the Cape, unless a town files an Intent to obtain a Watershed Permit by July 7, 2025, homeowners in the area would be required to upgrade to an IA septic system by July 7, 2030. If the town successfully files for and obtains a Watershed Permit by July 7, 2025, on the other hand, then its homeowners would not need to upgrade to an IA system by the 2030 deadline.

Town	Watershed	Town Approach	Notes
Barnstable	Centerville River	NOI Submitted	Submitted to DEP on Sept 1, 2023 for entire town
	Lewis Bay	NOI Submitted	Submitted to DEP on Sept 1, 2023 for entire town
	Popponesset Bay	NOI Submitted	Submitted to DEP on Sept 1, 2023 for entire town
	Rushy Marsh Pond	NOI Submitted	Submitted to DEP on Sept 1, 2023 for entire town
	Three Bays	NOI Submitted	Submitted to DEP on Sept 1, 2023 for entire town
Bourne	Megansett-Squeteague Harbor	NOI	Filed with Falmouth on 12.20.23
	Phinneys Harbor, Eel Pond, Back River	NOI	
	Rands Harbor		
	Wild Harbor		
Brewster	Pleasant Bay	Watershed Permit	Existing watershed permit
	Bass River	seeking exemption	de minimis
	Herring River (Harwich)	Considerng an NOI	Filed a NOI with the DEP on 11.21.23
	Swan Pond River	seeking exemption	de minimis
Chatham	Pleasant Bay	Watershed Permit	Existing watershed permit
	Stage Harbor	NOI Submitted	submitted to DEP on 12/6/23
	Sulfur Springs / Bucks Creek	NOI Submitted	submitted to DEP on 12/6/23
	Cockle Cove Creek	NOI Submitted	submitted to DEP on 12/6/23
	Taylors Pond / Mill Creek	NOI Submitted	submitted to DEP on 12/6/23
Dennis	Bass River	NOI	The Town is working on NOI filing as of 1.29.24
	Herring River (Harwich)	NOI	
	Swan Pond River	NOI	
Eastham	Exempt from filing Watershed Permit		
Falmouth	Bournes Pond	NOI	Approved by Select Board 8/28/23; Filed NOI with DEP on 12.20.23
	Falmouth Inner Harbor	NOI	Approved by Select Board 8/28/23: Filed NOI with DEP on 12.20.23
	Fiddlers Cove & Rands Harbor	NOI	Approved by Select Board 8/28/23; Filed NOI with DEP on 12.20.23
	Great Pond	NOI	Approved by Select Board 8/28/23; Filed NOI with DEP on 12.20.23
	Green Pond	NOI	Approved by Select Board 8/28/23; Filed NOI with DEP on 12.20.23
	Little Pond	NOI	Approved by Select Board 8/28/23; Filed NOI with DEP on 12.20.23
	Megansett-Squeteague Harbor	NOI	Approved by Select Board 8/28/23; Filed NOI with DEP on 12.20.23
	Oyster Pond	NOI	Approved by Select Board 8/28/23; Filed NOI with DEP on 12.20.23
	Quisset Harbor	NOI	Approved by Select Board 8/28/23; Filed NOI with DEP on 12.20.23
	Waquoit Bay/Eel Pond	NOI	Approved by Select Board 8/28/23; Filed NOI with DEP on 12.20.23
	West Falmouth Harbor	NOI	Approved by Select Board 8/28/23; Filed NOI with DEP on 12.20.23
	Wild Harbor	NOI	Approved by Select Board 8/28/23; Filed NOI with DEP on 12.20.23
Harwich	Allen Harbor	NOI	Approved by Select Board 9/25/23
	Herring River	NOI	Approved by Select Board 9/25/23
	Pleasant Bay	Watershed Permit	Existing watershed permit
	Saquatucket Harbor	NOI	Approved by Select Board 9/25/23
	Swan Pond River		
	Taylors Pond / Mill Creek		
	Wychmere Harbor	NOI	Approved by Select Board 9/25/23
Mashpee	Bournes Pond		
	Green Pond		
	Popponesset Bay	NOI	1.10.24- taking steps with Sandwich to file NOI with DEP
	Three Bays		
	Waquoit Bay	NOI	Working with Falmouth and Sandwich for NOI per 12.15.23
Orleans	Pleasant Bay	Watershed Permit	Existing watershed permit
Provincetown	Exempt from filing Watershed Permit		
Sandwich	Bournes Pond		
	Great Pond		
	Green Pond		
	Megansett-Squeteague Harbor		
	Phinneys Harbor, Eel Pond, Back River		
	Popponesset Bay	NOI	1.10.24 taking steps with Mashpee to file NOI with DEP

	Rands Harbor		
	Three Bays	NOI	
	Waquoit Bay	NOI	Working with Falmouth and Mashpee for NOI per 12.15.23
	Wild Harbor		
Truro			
Wellfleet	Wellfleet Harbor	Watershed Permit	Watershed permit plan under review by MassDEP - SB approved the plan June 23, 2023
Yarmouth	Bass River	NOI	Filed with DEP 12/6/ 2023
	Lewis Bay	NOI	Filed with DEP 12/6/2023
	Parkers River	NOI	Filed with DEP 12/6/2023

4. ENVIRONMENTAL JUSTICE : FEDERAL and MASSACHUSETTS LAW

- The Biden administration had prioritized justice and equity across all federal agencies through funding initiatives, personnel, policies, enhanced public participation, and other EJ-related efforts.

- The Inflation Reduction Act (IRA) and the Bipartisan Infrastructure Law included significant funding for EJ-related initiatives, which agencies are now working to implement.

- President Trump's early executive actions rescinded environmental justice initiatives dating back more than 30 years as a part of the US' objective of eliminating considerations of race, ethnicity, and diversity from the federal government.

- These actions are spread across multiple executive orders including: (1) rescinding the Clinton-era EO 12898 that first directed federal agencies to identify and address disproportionate effects of programs, policies, and activities on minority and low-income populations; (2) rescinding the Biden-era Justice40 program that targeted funding to disadvantaged communities; and (3) making a variety of organizational and personnel changes.

- Executive Order 14008, Tackling the Climate Crisis At Home and Abroad, was Biden's Justice40 initiative. It sought to channel 40% of the benefits of federal climate and infrastructure investments to disadvantaged communities. The scope was expansive, from legacy pollution cleanup to workforce development to housing assistance.

- Massachusetts, in 2024, adopted its first ever comprehensive environmental justice strategy (EJ Strategy) directing all EOEEA agencies to develop their own EJ strategies to ensure that the principles of EJ and equity are embedded into the work of EOEEA and its agencies when implementing their agendas and when transitioning to a clean energy economy.

- The EJ Strategy explains how EOEEA agencies plan to incorporate industry-specific EJ policies into their missions. It is intended to ensure that the principles of EJ and equity are embedded into the work of EAA and its agencies when implementing their agendas. This is a roadmap for EEA and its agencies to achieve such a just result and to reverse the environmental burdens that have historically plagued lower-income communities and communities of color.

- Massachusetts is focused on renewable energy and energy efficiency, as well as a strong prioritization of environmental justice. The transition to a clean energy economy while ensuring all residents of the state are equally benefitted from this new standard of living is known as a "just transition" and is a key focus of Massachusetts moving forward.

5. MBTA COMMUNITIES ZONING UPHELD

- Section 3A of the Zoning Act, G.L. c. 40A, "Multi-family Zoning as-of-Right in MBTA communities," applies to 177 municipalities but not Boston (where the Zoning Act does not apply).

- Any city or town served by the Massachusetts Bay Transportation Authority (MBTA) is required to have at least one zoning district "of reasonable size" in which multi-family housing is allowed as of right. The multi-family housing district cannot contain age restrictions and must be "suitable for families with children."

- The district must have a minimum gross density of 15 units per acre, subject to limitations of the Wetlands Protection Act and Title 5 of the State Environmental Code, and be located not more than 0.5 miles from a commuter rail station, subway station, ferry terminal, or bus station. G.L. c. 40A, § 3A.

- An MBTA community that does not comply with this provision shall not be eligible for funds from the Housing Choice Initiative, the Local Capital Project Fund, the MassWorks infrastructure program, or the HousingWorks infrastructure program. Id.

- The Executive Office of Housing and Livable Communities (EOHLC), formerly the Department of Housing and Community Development, in consultation with the Executive Office of Economic Development, the MBTA, and the state Department of Transportation, promulgated guidelines to determine whether a community has complied with this law.

- SJC ruled the Massachusetts' Attorney General can enforce this legal obligation against cities and towns. *Attorney General v. Town of Milton et al.*, 495 Mass. 183, 248 N.E.3d 635 (2025).

- The SJC invalidated the EOHLC Guidelines, however, as they did not comply with the state Administrative Procedures Act. They were not promulgated as regulations (public hearing/Secy of State filing) in order to have the force of law.

- EOHLC issued emergency regulations and soon will issue final regulations.

- Residents of Milton, which has four MBTA stations, in a referendum, voted down a proposed zoning scheme to satisfy the Act. The Attorney General sued.

- SJC ruled: “We conclude that the act is constitutional and that the Attorney General has the power to enforce it.”

- “Milton argues that § 3A violates the separation of powers doctrine because the act vests HLC with the power to make fundamental policy decisions by requiring what the town calls “transformative zoning changes” in MBTA communities. We are not persuaded.”

- “To determine whether a legislative delegation of authority violates the separation of powers doctrine, we consider three factors: ‘(1) Did the Legislature delegate the making of fundamental policy decisions, rather than just the implementation of legislatively determined policy; (2) does the act provide adequate direction for implementation, either in the form of statutory standards or . . . sufficient guidance to enable it to do so; and (3) does the act provide safeguards such that abuses of discretion can be controlled?’”

- Milton argued the penalties for noncompliance were explicit in the Act itself — being excluded from consideration for four specified grant programs. The SJC ruled, however, that the ineligibility for grant funding does not preclude the Attorney General from enforcing the law.

- “If we were to adopt the town's interpretation, the only consequence to an MBTA community for failing to comply with the act would be the loss of certain funding opportunities. Thus, those communities, like the town in this case, which choose to forgo the identified funding programs, would be free to ignore the legislative decision to require towns benefiting from MBTA services to permit their fair share of multifamily housing near their local MBTA stations and terminals. As the purpose of § 3A is to increase housing stock, the town's proposed reading of the act would thwart the Legislature's purpose by converting a legislative mandate into a matter of fiscal choice.”

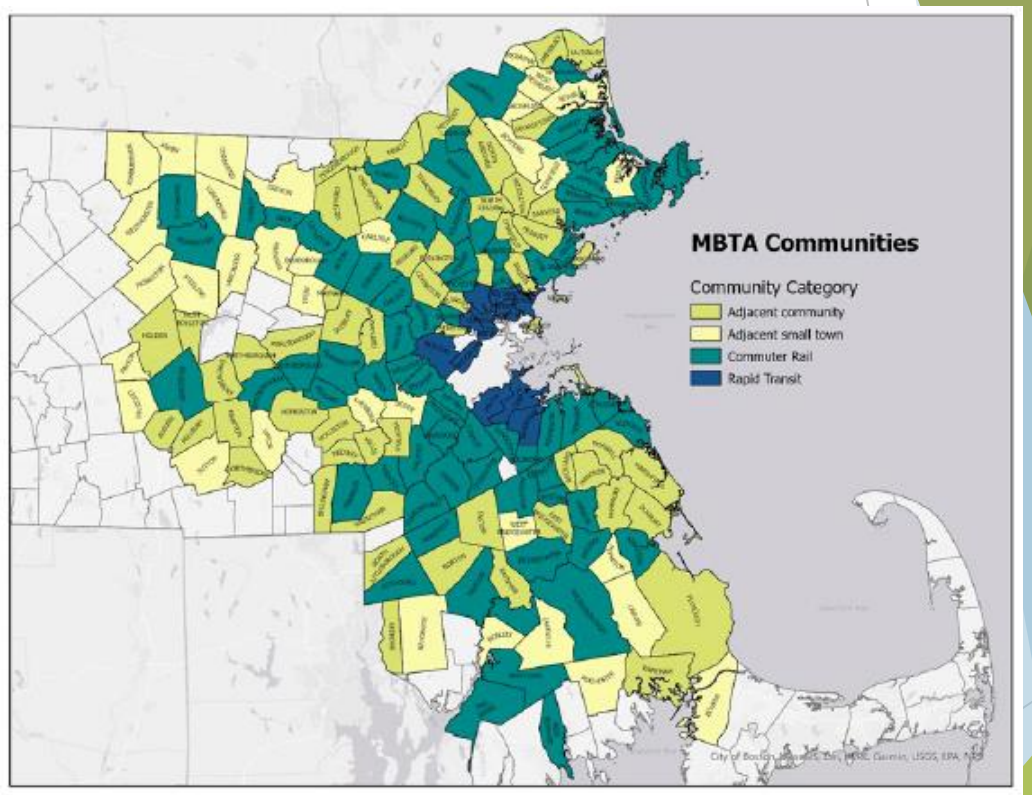
What is an MBTA Community?

- 177 municipalities
  - Defined by MGL 161A Section 1
  - Generally, have a fixed transit station or abut a municipality that does

- 4 Community categories
  - 1. Rapid Transit (12)
  - 2. Commuter Rail (72)
  - 3. Adjacent (58)
  - 4. Adjacent Small Towns (35)

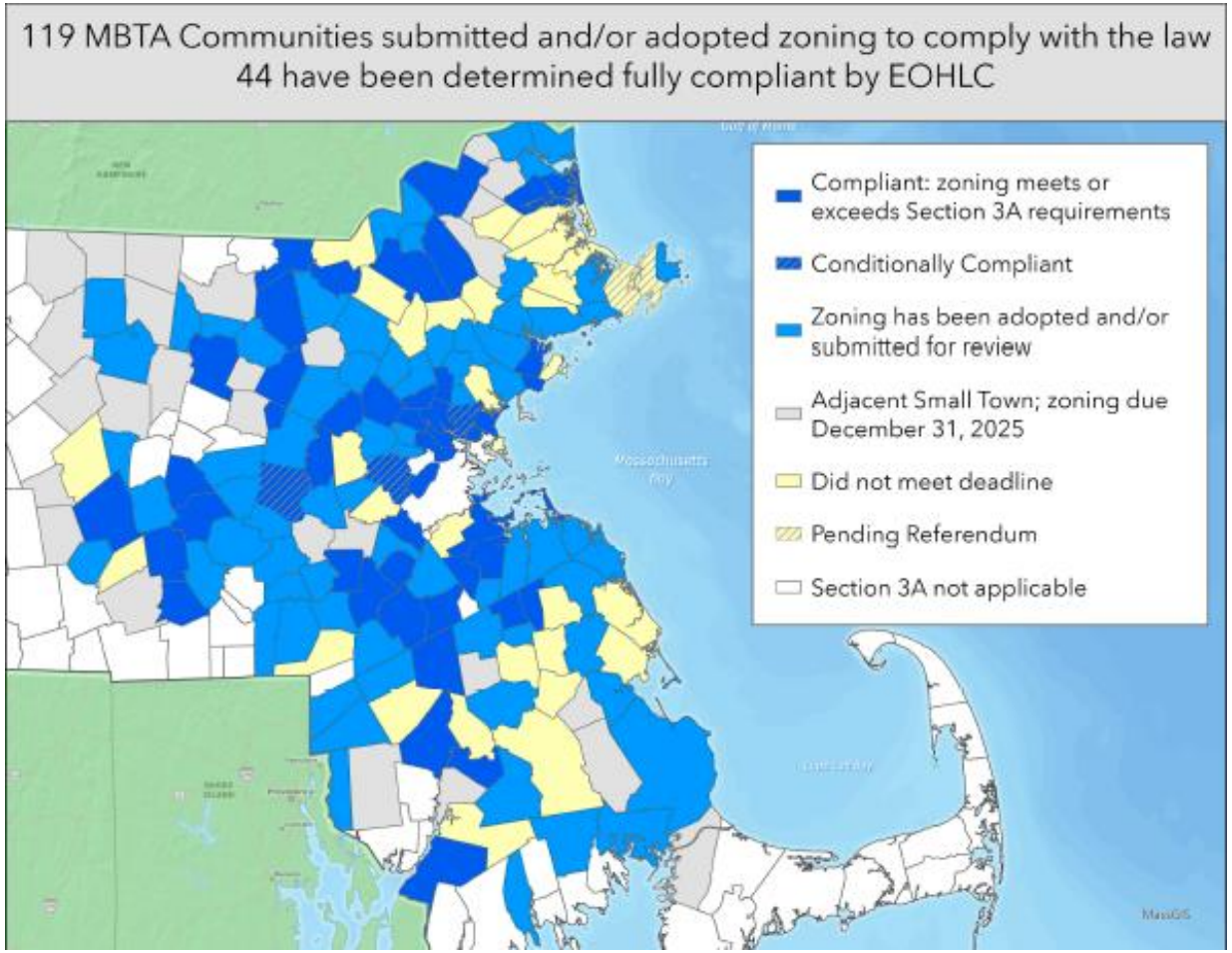
- Categories affect “reasonable size”, district location, and timeline

Source: EOHLC



MCGREGOR LEGERE & STEVENS PC

119 Municipalities Have Adopted Zoning to Comply with c40A s3A



MCGREGOR LEGERE & STEVENS PC

119 Municipalities Have Adopted Zoning to Comply with c40A s3A

1. Abington
2. Acton
3. Amesbury
4. Andover
5. Arlington
6. Ashland
7. Attleboro
8. Auburn
9. Ayer
10. Bedford
11. Belmont
12. Bellingham
13. Beverly
14. Billerica
15. Braintree
16. Bridgewater
17. Brockton
18. Brookline
19. Burlington
20. Cambridge
21. Canton
22. Chelmsford
23. Chelsea
24. Cohasset
25. Concord
26. Danvers
27. Dedham
28. Easton
29. Essex
30. Everett
31. Fall River
32. Fitchburg
33. Foxborough
34. Framingham
35. Franklin
36. Grafton
37. Harvard
38. Haverhill
39. Hingham
40. Holbrook
41. Holliston
42. Hopkinton
43. Hull
44. Kingston
45. Lakeville
46. Lawrence
47. Leominster
48. Lexington
49. Lincoln
50. Littleton
51. Lowell
52. Lynn
53. Lynnfield
54. Malden
55. Manchester
56. Mansfield
57. Marlborough
58. Maynard
59. Medfield
60. Medford
61. Medway
62. Melrose
63. Methuen
64. Millis
65. Natick
66. New Bedford
67. Newbury
68. Newburyport
69. Newton
70. Norfolk
71. North Andover
72. North Attleborough
73. Northborough
74. Northbridge
75. Norwell
76. Norwood
77. Peabody
78. Pembroke
79. Plymouth
80. Quincy
81. Randolph
82. Reading
83. Revere
84. Rochester
85. Rockland
86. Rockport
87. Salem
88. Salisbury
89. Scituate
90. Seekonk
91. Sharon
92. Shirley
93. Shrewsbury
94. Somerville
95. Southborough
96. Stoneham
97. Stoughton
98. Sudbury
99. Swampscott
100. Taunton
101. Topsfield
102. Tyngsborough
103. Upton
104. Wakefield
105. Walpole
106. Wareham
107. Watertown
108. Waltham
109. Wayland
110. Wellesley
111. West Boylston
112. Westborough
113. Westford
114. Westwood
115. Weymouth
116. Whitman
117. Winchester
118. Woburn
119. Worcester

6. TRUMP ADMINISTRATION EXECUTIVE ORDER ON NEPA REGULATIONS AND EXPEDITED PERMITTING

- On January 20, 2025, President Trump signed Executive Order 14154 titled *Unleashing American Energy*, which extends beyond energy projects to broadly reshape how federal agencies approve projects that impact the environment. The Order seeks to roll back existing environmental review regulations under the National Environmental Policy Act ("NEPA") and streamline federal permitting processes.

- The Order directs CEQ to propose rescinding its longstanding NEPA regulations by February 19, 2025. CEQ's authority to issue binding regulations has been subject to scrutiny in several ongoing court cases. The Executive Order's instruction to rescind CEQ regulations aims to reinforce the D.C. Circuit's November 2024 decision in *Marin Audubon Society v. Federal Aviation Administration* (*Marin Audubon*).

- Many federal agencies, including the Army Corps of Engineers and the Department of Transportation, have their own NEPA rules. The Executive Order instructs CEQ to assemble a working group to help agencies revise their regulations to be consistent with the new CEQ guidance and speed up approval timelines.

- The *Unleashing American Energy* Executive Order also endeavors to speed up federal permitting decisions by instructing agencies like the EPA and Army Corps of Engineers to eliminate delays in their review processes. This aligns with a 2023 amendment to NEPA called the "BUILDER Act" which expedites federal approvals for certain types of projects that fall under the definition of a "covered project," such as transportation and energy projects.

- The Executive Order specifically directs agency heads to expedite federal permit reviews for projects deemed critical to the U.S. economy or national security and to "undertake all available efforts to eliminate all delays within their . . . permitting processes, including . . . the use of general permitting and permit by rule."

- The Order further states that "[i]n all Federal permitting adjudications or regulatory processes, all agencies shall adhere to only the relevant legislated requirements for environmental considerations. . . [and] shall strictly use the most robust methodologies of assessment at their disposal and shall not use methodologies that are arbitrary or ideologically motivated."

- On a related front, *Seven County Infrastructure Coalition v. Eagle County* (Docket 23-975) is pending in the Supreme Court. This issue: does NEPA require an agency to study environmental impacts beyond those that are reasonably foreseeable results of the agency's action and which the agency has the authority to regulate?

- Previously in May of 2024 the CEQ had issued its “Phase 2” final NEPA rule, a sea change for NEPA reviews. NEPA would be no longer seen as merely a procedural “disclosure” or “study it first” statute, rather a fundamental charter for environmental protection.

- As a result, the Phase 2 rule introduced directives aimed at enhancing environmental outcomes, advancing climate change mitigation, bolstering resiliency, and safeguarding communities with environmental justice concerns.

- The revised regulations made several major changes:
  - Recast NEPA's purpose less as procedural and more as a planning tool to actually bring about positive environmental and social outcomes;
  - Minimized impact on environmental justice communities, addresses climate change, and builds ecosystem resilience;
  - Streamlined the NEPA process and documentation to be more efficient, e.g., page and time limits for environmental assessments (EA) and environmental impact statements (EIS);
  - Rigorous investigations of alternatives and mitigation strategies would be necessary to support Findings of No Significant Impact (FONSIs) for environmental assessments;
  - Specific attention would be required for climate change, environmental resiliency, Tribal treaty rights, and communities with environmental justice concerns;
  - The range of considered alternatives would need to expand to include those that minimize impacts on the human environment.

7. PFAS: EXPANDING REGULATIONS under FEDERAL LAW

- EPA issued a final rule in April 2024 listing two ubiquitous “forever” PFAS chemicals -PFOA and PFOS- as hazardous substances under Superfund (CERCLA).

- The listing triggers reporting, testing, cleanup, and monitoring responsibilities for arrangers, transporters, treaters, disposers and other Potentially Responsible Parties (PRPs), including manufacturers, users, and property owners and managers, under Superfund’s strict, joint and several, and retroactive liability features.

- Accordingly, the listing will affect real estate site assessments, Due Diligences in purchases, environmental audits, Innocent Landowner status, existing Superfund sites (and reopeners at closed sites), and those buying, selling, leasing, lending or investing in dirty property.

- Earlier that month EPA announced its final new drinking water standards under the Safe Drinking Water Act (SDWA) for six PFAS compounds. These new Maximum Contaminant Levels (MCLs) mean that public water systems (PWSs) nationwide must now sample for, monitor, and remove these chemicals that typically require them to install new treatment treatments and methods.

- EPA also proposed federal drinking water regulations to establish a PFAS standard at the significantly lower level of 4 ppt.

- However, on February 5, 2025, the EPA delayed until March 21, 2025, the effective date of a January 2025 rule adding nine per- and polyfluoroalkyl substances (PFAS) to the list of chemicals subject to toxic chemical release reporting under the Emergency Planning and Community Right-to-Know Act (EPCRA) and the Pollution Prevention Act (PPA).

- In the notice, EPA states it is delaying the effective date of the rule in response to President Trump's January 20, 2025, memorandum entitled "Regulatory Freeze Pending Review." It directed the heads of executive departments and agencies to consider postponing for 60 days the effective date for any rules published in the Federal Register that had not yet taken effect, for the purpose of reviewing any questions of fact, law, and policy that the rules may raise.

- The states, including Massachusetts, appear to be continuing to adopt tougher limits than EPA.

- MassDEP in recent years amended its public drinking water regulations, 310 C.M.R. § 22.00, to address Per- and Polyfluoroalkyl Substances (PFAS). Specifically, MassDEP has established a public water drinking standard of 20 parts per trillion (ppt) for the sum of six PFAS compounds, together with specific standards for the clean-up of each of the six PFAS in soils.

8. PRIOR PUBLIC USE: LAW ON CARE and CONTROL OF LAND

- *Carroll v. Select Board of Norwell* ruled on local land dedication under the Prior Public Use Doctrine. *Carroll v. Select Board of Norwell*, 493 Mass. 178, 223 N.E.3d 1178 (2024).

- This case upheld Norwell's designation of land for affordable housing, rejecting an attempt by residents to transfer the property to another purpose without the Select Board's determination under G.L. c. 40, Section 15A that the land was no longer needed for affordable housing purposes.

- "The issue on appeal is whether the totality of the circumstances test articulated in *Smith v. Westfield*…applies to the determination whether land is 'held by a city or town…for a specific purpose' under G. L. c. 40, § 15A."

- The SJC cites *Mahajan v. Department of Environmental Protection*, 464 Mass. 604 (2013) for its proposition, applied in *Westfield*, that land can become after-dedicated by actions evidencing that intent by a municipality.

- "In support of our conclusion, we draw upon the common-law doctrine of prior public use. The prior public use doctrine protects all public land, resolving potential disputes over intergovernmental transfers. Under that doctrine, land devoted to one public use cannot be diverted to another, inconsistent public use without plain and explicit legislation authorizing the diversion."

- On that common law foundation, the Court regards both Section 15A and Article 97 as codifications of the prior public use doctrine, developed in our common law as a means to resolve potential conflicts over the use of public lands between various governmental entities.

- Noting that case law is scarce on the standard for assessing specific-use designations under Section 15A, the SJC says it regards Article 97 as imposing a "corresponding standard" and so prior Article 97 cases "provide a useful framework for determining specific municipal use designations under § 15A."

- The Court in passing resolves a prior point of confusion and contention on the mechanics of dedication, arising from interpretation of *Hanson*:

- "To be clear, the court in Selectmen of Hanson did not adopt… a bright-line rule requiring towns to file deed restrictions or transfer control of property to specific entities in order to hold it for a specific purpose under G. L. c. 40, § 15A."

- This language eliminates a common misperception stemming from the Hanson case, leading some to think a deed transfer between town entities is needed to dedicate a piece of property. Not so.

9. STATE STORMWATER HANDBOOK AND STANDARDS UNDER REVISION

- An updated Stormwater Management Handbook is currently being drafted. Regulations relating to wetlands, stormwater, and certifications under 310 C.M.R. § 10.00 and 314 C.M.R. § 9.00 will likely be amended to conform to the new Stormwater Management Handbook. The public comment period ended March 1, 2024.

- Once new regulations are promulgated there will be a 6-month "amnesty" period whereby projects submitted during that time will not be subject to the new stormwater requirements. MassDEP's Draft Stormwater Management Handbook can be found at https://www.mass.gov/doc/massachusetts-stormwater-management-handbook/download.

- MassDEP's Stormwater Management Handbook and Stormwater Report Checklist can be found at https://www.mass.gov/guides/massachusetts-stormwater-handbook-and-stormwater-standards.

- Specifically, the MassDEP's Stormwater Advisory Committee is finalizing updates to the Handbook to better align with the federal EPA MS4 Permit as well as to promote Environmentally Sensitive Site Design (ESSD), Low Impact Development (LID), and resilience against increased flooding, storm damage, and runoff pollution.

- These measures are expected to provide consistency between federal and state regulations, simplify stormwater permitting, and help the 260 MS4 communities meet the MS4 deadline to adopt local rules with EPA's Minimum Control Measures.

- You may anticipate ESSD and LID requirements with an Alternative Analysis needed to document impracticality, increased stormwater recharge, treatment requirements, setbacks, plus in situ subsurface explorations as part of permitting.

- MassDEP will update the Wetlands Protection Act stormwater regulations pertaining to precipitation intensity and frequency by, at a minimum, adopting the NOAA Atlas 14-Precipitation-Frequency Atlas of the United States Volume 10 Version 3.0: Northeastern States, to address stormwater management and climate resilience i by incorporating the most recent storm data. MassDEP is also considering options for incorporating precipitation projections that account for future conditions.

- MassDEP presently plans to promulgate the new stormwater Handbook and regulations in early 2025 in tandem with the new coastal wetlands regulations.

10. MA COASTAL FLOODPLAIN RULES: SEA CHANGES IMMINENT

- MassDEP is to promulgate during 2025 a comprehensive suite of new regulations to deal with climate change in the form of storms, flooding, and sea level rise. They will affect three related regulatory and policy programs.

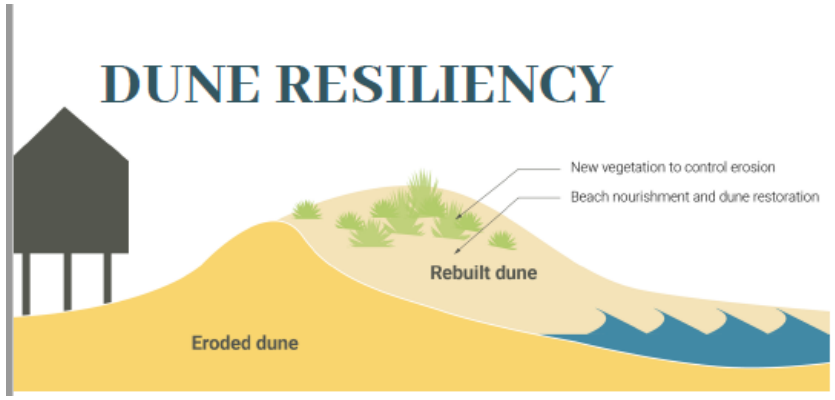
- These changes and the policies behind them have been long in the works, since the MassDEP regulations lacked since 1978 and 1983 any specified performance standards for Land Subject to Coastal Storm Flowage.

- These new rules will amend 310 CMR 10.00: Wetlands Protection, and 314 CMR 9.00: 401 Water Quality Certification for Discharges of Dredged or Fill Material, Dredging, and Dredged Material Disposal in Waters of the United States Within the Commonwealth; and 310 CMR 9.00: Waterways (including Tidelands and Great Ponds).

- 310 CMR 10.24(1)(b) is a proposed addition:

  “For work in any coastal Resource Area or Buffer Zone along the shoreline, the Applicant shall consider, and the Issuing Authority may require, the restoration, enhancement, or creation of wetland Resource Areas through natural methods and materials as an alternative to coastal engineering structures to promote resiliency along the shoreline. In planning shoreline protection projects, Applicants shall consult the resilientma.org website for the most current mapping and other available information related to shoreline change and sea level rise or similarly reliable local data acceptable to the Issuing Authority. Applicants and Issuing Authorities shall confirm that the proposed project design takes into account the characteristics of the site, including existing Resource Areas, wave energy, tidal range, elevation, intertidal slope, bathymetry, and erosion rate. The Issuing Authority shall require projects be designed to protect or enhance Resource Areas seaward of a seawall or other coastal engineering structure wherever practicable.”

- Notwithstanding the provisions of 310 CMR 10.24(2), the Issuing Authority may allow the conversion of one Resource Area to other Resource Areas to achieve greater shoreline resiliency, but there shall be no loss of Salt Marsh, no alteration of Primary Frontal Dune, and no cumulative net loss of or adverse effects on Resource Areas. The Issuing Authority shall confirm that the project will not cause an increase in flood velocity, volume, or elevation on other properties resulting in storm damage. The purpose of preserving and enhancing the adaptive capacities of Resource Areas whenever feasible is to provide coastal property owners with an effective means of shoreline protection in light of rising sea levels and increasing severity of coastal storms, while protecting the interests of M.G.L. c. 131, § 40.



- **<u>310 CMR 10.36 will contain performance standards for Land Subject to Coastal Storm Flowage.</u>**

- One goal is to promote coastal resiliency against worsening impacts of storms, flooding, and sea level rise with:
  - First-time standards to protect the coastal floodplain (Land Subject to Coastal Storm Flowage or "LSCSF") from damage to help maintain its natural capacity to protect structures and properties from storm damage and sea level rise
  - Provisions to support resilient shorelines, roadways, and water dependent uses and to allow scientific test projects to study effects of climate change

- Another objective is to promote resiliency against increasing flooding, storm damage, and runoff pollution through updated stormwater management standards by:
  - Incorporating current science and data for better rainfall estimates into updated stormwater management rules and replace outdated (60-year-old) precipitation data
  - Improving consistency between state regulations and EPA stormwater permit
  - Encouraging use of nature in design ("environmental design") through seven cost-effective green design credits in lieu of built structures

- These first of a kind rules are expected to be made final in early 2025.

11. LAND DEDICATION for CONSERVATION

- *Nahant Preservation Trust, Inc., et al v. Northeastern University Massachusetts,* 104 Mass.App.Ct. 698, 245 N.E.3d 227 (2024).

- At the center of the dispute is 12 acres of undeveloped registered land on a peninsula known as East Point in the Town of Nahant. Northeastern acquired a 20.4-acre parcel, including the 12 acres in question, from the Federal government in 1966 and has operated its Marine Science Center on a developed portion of the parcel since the late 1960s.

- The Town owns approximately 8 adjacent acres that it acquired from the Federal government in the mid-1970s and is now the site of a public park known as Lodge Park.

- When Northeastern announced plans to expand the Center by constructing a new research facility on the undeveloped portion of its parcel, the Town, Nahant Preservation Trust, Inc. (NPT), and 28 citizens of the Town mounted a vociferous opposition and sued.

- "…The public dedication doctrine is not intended to catch an owner by surprise. As noted, our cases make clear that '[t]he owner's acts and declarations should be deliberate, unequivocal and decisive, manifesting a clear intention permanently to abandon his property to the specific public use.'" *Longley*, 304 Mass. at 588.

- In cases where our courts have held that a private owner has made a public dedication of a park, the owner had made express promises, or shown parks on plans and then marketed and sold lots promising to keep the parks open. See, e.g., *Attorney Gen. v. Abbott,* 154 Mass. 323, 324-328 (1891) (corporation showed parks on plans, conveyed lots with promise that parks would be kept forever open to public, and maintained parks until all lots were sold).

- In *Smith*, 478 Mass. at 64, the finding that there had been a dedication was based on the acceptance of Federal funds to rehabilitate a playground with the "proviso that, by doing so, the city surrendered all ability to convert the playground to a use other than public outdoor recreation without approval."

- Here evidence of similar unequivocal acts by Northeastern was entirely absent, the Appeals Court found, from the summary judgment record.

12. THIRD PERMIT EXTENSION ACT PASSED

- On November 20, 2024, the Governor signed the "Mass Leads Act," an economic development bill including provisions to extend the life of many types of land use permits issued by municipal, regional, and state governments. As a result of the real estate downturn in 2008, the state enacted very similar permit extension acts in 2010 and then again in 2012.

- Like the first two, this latest act automatically extends by two years many but not all "approvals" concerning real estate use and development. As earlier, it extends such permits by operation of law, requiring no action by the permit holder or issuing authority. For that reason, there is no need for a document officially memorializing the extension. Also as earlier, this act could revive permits that have expired.

- Unlike the first two extension acts, though, this one explicitly provides that any approval in effect during the tolling period shall be governed by the applicable by-law or ordinance in effect at the time the approval was granted, unless the holder of the approval elects to waive this protection. Interestingly, there is no similar provision for approvals by regional or state entities.

- Specifically, Section 280 of Chapter 238 of the Acts of 2024 provides that "an approval in effect or existence" during the "tolling period" of January 1, 2023 to January 1, 2025, inclusive, shall be extended for a period of two years from its expiration date. Thus, expired permits might be revived. For example, a permit that had a stated expiration date of February 1, 2023 is now resurrected by this law by being extended, retroactively, two years. It now expires February 1, 2025.

- An "approval" is broadly defined as "any permit, certificate, order, excluding enforcement orders, license, certification, determination, exemption, variance, waiver, building permit . . . concerning the use or development of real property" from municipal, regional or state governmental entities under specific laws, including, but not limited to those pertaining to wetlands protection, waterways, subdivision, and zoning and the relatively new Starter Home Law (Chapter 40Y).

- Unlike before, certain approvals granted under the state's hazardous waste clean-up law, 21E, are included in the definition. Enforcement orders are specifically exempt and thus not extended. Federal permits and certain hunting, fishing and aquaculture licenses issued by the state also are not extended.

- This third Permit Extension Act means that one should look at each permit, determine whether it was in effect at any point between January 1, 2023 and January 1, 2025, and, if so, determine its expiration date, and then add two years to calculate the new expiration date.

- Some careful permit holders in 2010 and 2012, however, wanted to have a confirmatory vote, email, or letter acknowledging that their permit qualified for the extension and stating the new expiration In response to such needs or requests, some boards, agencies and officials like conservation commissions or their agents issued generic letters acknowledging the existence of a Permit Extension Act and stating its provisions. Others were willing upon request to issue a specific confirmation of a permit's new expiration. A few were willing to issue a corrected permit with new expiration so it would be self-contained and could be recorded if desired. Some state agencies such as MassDEP are expected to issue guidance documents.

- Land use permit holders and their legal counsel will want to check which of their real estate use and development permits are now valid two years longer than they thought. Municipal, regional, and state permitting entities will dust off what they did in 2010 and 2012 to educate and assist permit holders and the public, in addition to noting the new expirations in their official records.

13. ACCESSORY DWELLING UNITS (ADUs) LEGAL AS OF RIGHT

- A new housing statute makes it easier for homeowners to create accessory dwelling units (ADUs) on their residential properties.

- The Affordable Homes Act is Chapter 150 of the Acts of 2024. The ADU provisions are part of the state's broader efforts to address its housing affordability crisis and increase housing options, particularly in high-demand areas.

- Essentially ADUs are now legal almost everywhere "as of right." An ADU is a small, self-contained living space located on the same lot as a primary residence. It can take various forms, such as a basement apartment, garage conversion, house expansion, or detached house. ADUs typically have their own kitchen, bathroom, and separate entrance.

- The new ADU provisions are effective now. They require municipalities to allow ADUs as of right in most residential zoning districts, with some important limitations.

- The new ADU law presents a valuable opportunity for homeowners to add housing options to their properties while benefiting from rental income, increased property value, and greater flexibility for family living.

- The ADU cannot exceed 900 square feet or 50% of the size of the primary dwelling, whichever is smaller. ADUs are subject to reasonable restrictions such as compliance with Title 5 (septic systems), site plan review, dimensional setbacks, bulk and height limits, and restrictions on usage as a short-term rental.

- Now in Massachusetts they offer flexibility for homeowners to rent out the dwelling unit or use it for family members, such as aging parents or adult children.

- ADUs allowed “by right” means homeowners no longer need special permits or zoning variances to build them (subject to some local regulations).

- Neither the homeowner’s primary residence nor the ADU must be owner-occupied. This means the main building and/or the ADU can be occupied by anyone. In many cases, the law eliminates the need for additional off-street parking spaces for ADUs, particularly if the property is near public transit or in a densely developed area.

- Homeowners can convert existing spaces, like basements or garages, into ADUs, expand existing houses, or construct entirely new structures, providing more options for creating additional housing. Except in rural or less densely populated areas, most communities are required to adopt ADU-friendly zoning codes.

14. NEW STANDING and BOND REQUIREMENTS IN ABUTTER ZONING APPEALS

- The Affordable Homes Act § 1 and § 11 impose new obligations on plaintiffs in many types of zoning appeals to court.

- These apply in all abutter-commenced appeals under the Zoning Act (variances, special permits, ZBA/ISD appeals, site plan review, Chapter 40B comprehensive permits, and Chapter 40R plan review).

- Under the previous standard for standing, "parties in interest" had a presumption of standing. That presumption could be rebutted by evidence presented by the defendants (typically the board, landowner, developer, or other applicant or permit holder). If any one plaintiff had standing, there was no requirement for other plaintiffs to establish standing.

- The new standard eliminates the presumption of standing. Each plaintiff must prove their own standing. This means they must "sufficiently allege" and "plausibly demonstrate" so as to prove with "credible evidence" that they have some "measurable injury" which is "special and different" to them.

- Further, each plaintiff must prove a causal link between the specific zoning relief granted by the challenged permit and their alleged harms, that is the harms "likely flow from the decision."

- The Affordable Homes Act imposes stricter posting of bonds on abutter plaintiffs.

- Previous standard allowed courts to require plaintiffs to post a bond of up to $50,000 "to secure payment of costs." The meaning of this was litigated and the costs were limited and conditioned on a finding of "bad faith or malice." *Marengi v. 6 Forest Road, LLC*, 491 Mass. 19 (2022)

- The new standard specifies that imposing a bond is NOT conditioned on a finding of bad faith or malice.

- The purpose of the bond now is to "secure the payment of and to indemnify and reimburse damages and costs and expenses incurred in such an action." "Damages" may now include delay/carrying costs, property taxes, property insurance, debt service, etc.

- The revised provision increased the bond cap to $250,000.

- Legal fees may now be awarded to the defendants, but only upon a showing of bad faith or malice.

- No change to the provision of Ch. 40A, § 17 that there may be no award of costs against the board absent a finding of negligence, bad faith, or malice.

15. SOLAR ZONING SERIOUSLY LIMITS LOCAL OPTIONS

- The Appeals Court decided *Kearsarge Walpole LLC v. ZBA,* 240 NE 3rd 803 (8/22/24) on the issue whether a solar array may be sited outside of specific solar overlay zones adopted by the Town? This is an 'unreported' decision so it has illustrative but not precedential value.

- The case involves a dispute over whether a large-scale solar array may be sited in Walpole outside of overlay districts created pursuant to the Town of Walpole zoning bylaw." The issue was whether the bylaw violates G. L. c. 40A, § 3, ninth par., the so-called "solar energy provision." The Appeals Court concluded that under *Tracer Lane II Realty, LLC v. Waltham*, 489 Mass. 775, 781 (2022) the bylaw violates the solar energy provision.

- Lessons learned:
  - State Law bars "local interference" with regulation that "unduly restricts solar energy system."
  - Local regulation may not be necessary (or defensible) to protect the public health . . . if it undermines the state's goal.

- "In Tracer Lane, 489 Mass. at 782, the Supreme Judicial Court held that "[i]n the absence of a reasonable basis grounded in public health, safety, or welfare," a municipality may not create "[a]n outright ban of large-scale solar energy systems in all but one to two percent of a municipality's land area." To do so would violate the solar energy provision contained in G. L. c. 40A, § 3. In reaching this conclusion, the court presumed that the interest the municipality's code advanced -- "preservation of each zone's unique characteristics" -- was legitimate. Id. at 781."

- "Yet because nothing in the record in Tracer Lane suggested the "stringent limitation" of one to two percent of the land area was "necessary to protect the public health, safety or welfare," the Supreme Judicial Court determined that "the zoning code violate[d] the solar energy provision." Id., quoting G. L. c. 40A, § 3, ninth par."

- "Here, Walpole's bylaw establishes large-scale ground-mounted solar photovoltaic overlay districts (SPODs). Four sites in the town are designated as SPODs, covering between 1.85 and 2.07 percent of the total land area. The parcel at issue here is not located in a SPOD."

- “The town defendants argue that Tracer Lane is distinguishable in two important respects. First, unlike the bylaw in Tracer Lane, Walpole's zoning bylaw does not explicitly prohibit or limit solar installations to any particular zone, such that, theoretically, up to 10.14 percent of Walpole's total land area could be sited for large-scale solar development. Second, the town defendants argue that the interests advanced by its bylaw promote public health, safety, and welfare sufficiently to justify the burden placed on solar development. Specifically, the bylaw protects agriculture and open space values in the rural residential district. We are not persuaded.”

- “As to the argument that the bylaw allows the expansion of the SPODs, requiring every desired expansion of solar use to obtain discretionary zoning relief is exactly the local interference that G. L. c. 40A, § 3, ninth par., is designed to prevent. The issue is whether the bylaw “unduly restricts solar energy systems,” and as the bylaw currently stands, it does. Tracer Lane, 489 Mass. at 781. At any time, applicants interested in developing a new large-scale solar installation outside of the approximately two percent of land in the existing SPODs would have to petition to amend the Walpole zoning bylaws pursuant to the amendment process established in G. L. c. 40A, § 5, which essentially requires applicants to submit their proposed amendment to a public hearing and town vote.”

16. SUPREME COURT *SHEETZ* DECISION APPLIES REGULATORY TAKING PRINCIPLES TO IMPACT FEES

- *Sheetz v. County of El Dorado*, 601 U.S. 267 (2024) expands SCOTUS' *Nollan-Dolan-Koontz* trilogy to four regulatory taking cases. This impact fees case rules that monetary exactions are subject to the regulatory taking tests under the Fifth Amendment's Takings Clause, whether imposed as permit conditions or legislative enactments.

- In other words, the Takings Clause does not distinguish between legislative and administrative land-use permit conditions. This is instructive for impact fees and other types of exactions, which commonly are applied to classes or types of uses.

- George Sheetz challenged a $23,420 traffic impact fee for a building permit for his home. It was based on the county's General Plan rate schedule, not an individual determination. SCOTUS unanimously ruled the Nollan/Dolan test applies. This has major implications for how impact fees must be structured and justified.

- The Court clarified that there is no constitutional, historical, or precedential basis to differentiate between these scenarios. Thus, the Takings Clause prohibits both legislatures and administrators from imposing unconstitutional conditions on land use permits.

- The Court remanded the case to the California courts to determine, under the principles enunciated (and past precedents explained), if there was an unconstitutional taking without compensation.

- Justice Barrett and concurring opinions point out key issues remain: validity of this traffic impact fee; whether the permit condition imposed on a class of properties must be tailored with the same degree of specificity as a permit condition that targets a particular development; and whether the elements of the Taking Doctrine apply the same way within or outside a permit scheme.

- Most important, left open in general is how Regulatory Taking law applies to permit conditions, including impact fees, assessed through "reasonable formulas or schedules" on classes of developments.

- This last item has land use lawyers and planners on alert. The Kavanaugh concurring opinion, joined by Justices Kagan and Jackson, presages more jurisprudence on the "longstanding government practice" of imposing "permit conditions" generally and "impact fees" in particular, "through reasonable formulas or schedules" on classes of developments.

- Nollan/Dolan test applies equally to legislative and administrative permit conditions
- Impact on property rights must be analyzed the same way regardless of source
- Fees need an "essential nexus" and "rough proportionality" to development impacts
- Local governments must ensure fees are properly calibrated to actual impacts
- Decision may lead to more individualized fee determinations
- But does not prohibit reasonable formula-based fees that assess class impacts
- Beware charging the same fee for all residential units regardless of type or size
- SCOTUS has an abiding interest in reviewing local land use decision making.

17. MAJOR CHANGES TO THE MERGER DOCTRINE IN ZONING

- Section 6 of the Zoning Act, before the Affordable Homes Act, exempted from increased zoning restrictions (dimensional), provided, importantly, that at the time of recording or endorsement the lot:

  - Had at least 5,000 sq. ft. of land with 50 feet of frontage
  - Was not held in common ownership with adjoining land
  - Conformed to then existing zoning bylaw or ordinance
  - While this protected the rights to develop what were buildable lots but became undersized
  - Provided it remained in separate ownership from adjoining lot(s)
  - Formerly called “grandmother or grandfather lot(s)

- By the Merger Doctrine, "[A]djacent lots in common ownership will normally be treated as a single lot for zoning purposes so as to minimize nonconformities." *Preston v. Bd. of Appeals of Hull*, 51 Mass. App. Ct. 236, 238, (2001).

- The doctrine was created by common law, but is partially incorporated into Chapter 40A, § 6, which protects undersized lots from subsequent zoning changes, but only if they are not held in common ownership.

- Most merger cases involve situations where a single landowner owns (or a predecessor in title owned) two or more adjacent parcels, one or more of which are undeveloped.

- In the applicable circumstances the two or more lots would be deemed merged for zoning purposes, limiting development and making the resulting combined lot(s) larger.

- Merger does not affect tax parcel classification or legally change the lines of ownership.

- Merger was criticized for discouraging diversity in housing and ownership, and making small, starter or downsized houses expensive.

- The Affordable Homes Act, § 10 has modified the Merger Doctrine. There is no merger if, at the time the instrument creating the lots was recorded, all lots:

1. Conformed to then existing requirements of area, frontage, width, yard or depth,
2. Had at least 10,000 square feet of area,
3. Had at least 75 feet of frontage, and
4. Were located in a zoning district that allows for single-family residential use.

- Exception for "Starter Homes" Only: The revised merger doctrine allows a single-family residential structure to be constructed on the undeveloped (non-merged) lot, as long as the structure:

1. Does not exceed 1,850 square feet of heated living area,
2. Contains at least three bedrooms, and
3. Is not used as a seasonal home or short-term rental.

- Affordable Homes Act, § 10: No merger if, at the time the instrument creating the lots was recorded, all lots:

    1. Conformed to then existing requirements of area, frontage, width, yard or depth,
    2. Had at least 10,000 square feet of area,
    3. Had at least 75 feet of frontage, and
    4. Were located in a zoning district that allows for single-family residential use.

- Exception for "Starter Homes" Only: The amended merger doctrine now allows a single-family residential structure to be constructed on the undeveloped (non-merged) lot, as long as the structure:

    1. Does not exceed 1,850 square feet of heated living area,
    2. Contains at least 3 bedrooms, and
    3. Is not used as a seasonal home or short-term rental.

18. REGULATORY FREEZE of BUILDING PERMITS, SPECIAL PERMITS & SITE PLAN REVIEW

- Mass Leads Act, § 171, amends Ch. 40A, § 6, ¶ 2 to alter the freezes available for these key approvals.

- Building Permits: Construction or operations shall conform to any subsequent amendment of the zoning bylaw unless commenced not more than 12 months after issuance. In cases of construction, work must continue through to completion "as continuously and expeditiously as is reasonable." (Unchanged from prior version of Section 6.) This 12-month window is equitably tolled where "real practical impediments" prevent the use of the permit, where this or other permits are appealed, and when time is spent pursuing other permits needed for construction.

- Special Permits under Chapter 40A, § 9 and Site Plan Approvals per local bylaw: Construction or operations shall conform to any subsequent amendment of the zoning bylaw ***and any other local land use regulations*** unless the use or construction is commenced within 3 years after issuance. In cases of construction, work must be continued through to completion as continuously and expeditiously as is reasonable.

- Note the proviso making the work subject to any other local land use regulations if the 3 year window is closed.

- "Commencement of Construction": Construction involving the redevelopment of previously disturbed land is deemed to have commenced upon "substantial investment in site preparation or infrastructure construction." Phased construction must proceed "expeditiously, but not continuously" among phases.

19. AFFORDABLE HOMES ACT OTHER CHANGES

- Voluntary De-Registration of Land (Affordable Homes Act § 48)
- New funding programs added to MBTA Communities:

HousingWorks	Brownfields
Office of Travel & Tourism grants	MassDevelopment grants
Seaport Economic Council grants	Mass. Historical Commission grants
Mass Impact funding	Cultural Facilities Fund grants
Library grants	Economic development grants
Technical assistance grants	IT/infrastructure grants

- Priority in awards of state funding given to MBTA Communities-compliant municipalities
- Permit Regulatory Office within EOED (MLA, § 40)
- Veterans' preference in affordable housing (AHA, § 14)
- Proposed Amendment of EOHLC Ch. 40B regulations regarding Safe Harbor appeals
- Outdoor alcohol service (Acts of 2024, Chapter 88, § 4)

20. BROOKLINE GENERATIONAL BAN ON SMOKING PRODUCTS UPHELD BY SJC

- The Town of Brookline smoking ban case has implications for local environmental laws. *Six Brothers, Inc. v. Town of Brookline,* 493 Mass. 616, 228 N.E.3d 565 (2024).

- This was a dispute between retailers and Brookline over a bylaw that prohibits sales of tobacco to anyone born after January 1, 2000. The Supreme Judicial Court unanimously ruled in favor of Brookline, finding that the law did not conflict with state law.

- While the case involves tobacco, public health, science and politics, it illustrates municipal Home Rule principles, Massachusetts constitutional provisions, and legal openings for cities and towns to be tougher than the state on matters of important public policy and legitimate governmental purposes.

- In summary, against claims of express preemption, implicit preemption, equal protection (deprivation of a fundamental right, or restricting a suspect classification), and an arbitrary age cut-off date, the SJC presented the expansive jurisprudence on the subject and ruled the anti-smoking bylaw is rationally related to a legitimate governmental purpose.

- The SJC cited as applicable precedent some seminal cases upholding local environmental bylaws. For these reasons, the decision has lessons for environmental law, land use, and state-local relations.

- The retailers challenged Brookline's bylaw saying it conflicted with a state law setting the legal age to buy tobacco products at 21. The retailers pointed out that Brookline's bylaw, as the town's population ages over time, would effectively ban the sale of tobacco products.

- The SJC held that the generational ban didn't conflict with the state law, but instead augmented it. This is similar to what the SJC ruled in upholding local Home Rule wetlands bylaws in the early *Lovequist v. Conservation Commission of the Town of Dennis* case, ruling the Wetlands Protection Act is a minimum, not a maximum, of statewide protections and so did not preempt a new type of bylaw on the same subject. *Lovequist v. Conservation Commission of the Town of Dennis,* 379 Mass. 7, 393 N.E.2d 858 (1979).

- Here the SJC observes, “Local communities have a lengthy history of regulating tobacco products to curb the well-known, adverse health effects of tobacco use. For decades, such local laws have coexisted with State laws, often augmenting available Statewide protections.”

- The Attorney General had concluded, having reviewed the Town bylaw for validity, had ruled it was not preempted by the Tobacco Act.

    - “A statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated.”

Commonwealth v. Rainey, 491 Mass. 632, 641 (2023), quoting *Conservation Comm'n of Norton v. Pesa*, 488 Mass. 325, 331 (2021).

- "Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court"[emphasis added]); G.L. c.43B, §13. Importantly, State laws and local ordinances and bylaws can and often do exist side by side. See *Bloom v. Worcester*, 363 Mass. 136, 156 (1973)("[t]he existence of legislation on a subject, however, is not necessarily a bar to the enactment of local ordinances and by-laws exercising powers or functions with respect to the same subject"). This is particularly true of local ordinances and bylaws regulating public health, the importance of which we have long acknowledged."

…

"With deference to the role local communities historically have played as laboratories for potential Statewide standards, municipal laws are afforded "considerable latitude"; we require "a sharp conflict" between the local and State laws before concluding that the local law is preempted. (citations omitted)."

- Invoking Home Rule wetlands protection authority, the SJC cites another leading local wetlands case: *Oyster Creek Preservation, Inc. v. Conservation Comm'n of Harwich*, 449 Mass. 859, 866 (2007) (where State "act establishes Statewide minimum wetlands protection standards, ... local communities are free to impose more stringent requirements").

MCGREGOR LEGERE & STEVENS PC