House Bill No. 4290 — An Act to Promote Housing Choices.

In the One Hundred and Ninetieth General Court (2017-2018)

HOUSE OF REPRESENTATIVES, March 6, 2018. The committee on Housing to whom was referred the message from His Excellency the Governor (accompanied by bill, House, No. 4075) of Charles D. Baker recommending legislation to promote housing choices, reports recommending that the accompanying bill (House, No. 4290), ought to pass [Representative Tyler of Boston dissents].

For the committee, KEVIN G. HONAN. FILED ON: 3/6/2018

HOUSE . . . . . No. 4290

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Section 4A of chapter 40 of the General Laws, as appearing in the 2016 Official Edition, is hereby amended by adding the following paragraph:-

By a majority vote of their legislative bodies, and with the approval of the mayor, board of selectmen or other chief executive officer, any contiguous cities and towns may enter into an agreement to allocate public infrastructure costs, municipal service costs and local tax revenue associated with the development of an identified parcel or parcels or development within the contiguous communities generally, provided that said agreement is approved by the department of revenue.

SECTION 2. Section 1A of chapter 40A of the General Laws, as so appearing, is hereby amended by inserting after the introductory paragraph the following 9 definitions:-

“Accessory dwelling unit”, a self-contained housing unit, inclusive of sleeping, cooking and sanitary facilities on the same lot as a principal dwelling, subject to otherwise applicable dimensional and parking requirements, that: (i) maintains a separate entrance, either directly from the outside or through an entry hall or corridor shared with the principal dwelling sufficient to meet the requirements of the state building code for safe egress; (ii) is not larger in floor area than 1/2 the floor area of the principal dwelling or 900 square feet, whichever is smaller; and (iii) is subject to such additional restrictions as may be imposed by a municipality, including but not

18 limited to additional size restrictions, owner-occupancy requirements, and restrictions or

19 prohibitions on short-term rental of accessory dwelling units.

Rep. Provost's Analysis of Lines 11-17:

This definition should not be a problematic one, but in fact it would introduce ambiguity and confusion into our zoning laws. By defining – and restricting the size of - an "accessory dwelling unit" as one no larger than 900 square feet (subparagraph ii; lines 15-16), it conflicts with the existing definition of an "accessory dwelling unit" as a "dwelling unit of 600 square feet or less on the same lot as a Starter Home. An Accessory Dwelling Unit shall not qualify as a Future Zoned Unit or an Incentive Unit, but shall qualify as a Bonus Unit." (760 CMR 59.02, tracking MGL chapter 40R, section 2 [lines 116-121]) Even assuming that this direct conflict could be ironed out, there are deeper problems with this definition.

One of these problems is that, in zoning, "accessory" can apply to two different but interrelated concepts. "Accessory buildings" are generally smaller outbuildings located on the same lot as a principal structure: for example, a carriage house behind a Victorian home; a garden shed in the yard of a suburban ranch house; a separate workshop behind a craftsman's storefront. Another matter is whether an accessory structure is devoted to accessory use, secondary to the principal use of the principal structure, or represents a second principal use (generally disallowed under most zoning.)

The definition in H.4290 conflates these two categories. H.4280's definition could as easily apply to an additional dwelling unit within an existing residence – say, a 'granny flat' in an attic –as it could to an additional dwelling unit in an outbuilding – say, a 'granny flat' built on top of, or in, an existing garage. If this definition is meant to include both kinds of additional dwelling units – those within existing residences, as well as those within outbuildings – it is going to cause massive confusion in communities that are zoned for multiple-unit housing.

Somerville, for instance, currently does not permit "accessory dwelling units," but does allow multiple units to be constructed within a residential building. The description of such multiple units fits the first parts of H.4280's definition of an "accessory dwelling unit": each is " a self-contained housing unit, inclusive of sleeping, cooking and sanitary facilities on the same lot as a principal dwelling, subject to otherwise applicable dimensional and parking requirements, that: (i) maintains a separate entrance, either directly from the outside or through an entry hall or corridor shared with the principal dwelling sufficient to meet the requirements of the state building code for safe egress." Somerville doesn't view additional units in residential buildings as "accessory," but as part of the principal structure and use, since both are residential.

By contrast, Somerville's Zoning Ordinance, in section 2.2.3, defines as an "Accessory Structure ,"" Any structure designed, arranged, used or occupied primarily in conjunction with an accessory use(s) as defined in this Ordinance." Subject to certain other conditions, Somerville defines as an "accessory use": "One (1) or more permitted use(s) of a lot, structure or portion thereof for a purpose incidental to and customarily found in connection with a permitted principal use,…" (Sec.2.2.3.a) In the case of Somerville residential buildings, the most common accessory structures are probably chicken coops, household-use greenhouses ("no sales

permitted), garages or other outbuildings used for conducting permitted "home occupations," and garages to store personal automobiles.

Somerville is the 16th-most densely populated city in the United States, with 19,747 people per square mile; its population density is 22.5 times higher than the Massachusetts average. It is the most densely populated city in New England, and more densely populated than Chicago, San Francisco, or Miami. (See also: http://www.slate.com/blogs/moneybox/2013/06/01/somerville_density_without_tall_buildings.html) Despite this level of urban density, Somerville in the last 5 years has permitted and built another 1,200 residential units, has many more in permitting, and is contemplating, in its rezoning, allowing accessory dwelling units by permitting accessory buildings to be converted to residential use, as a second principal use on a single lot.

Daniel Bartman, the city planner who is writing Somerville's proposed new zoning ordinance, told me that H.4290's definition of "accessory dwelling unit" would not just make it hard for Somerville to permit such units, but would create ambiguity about the status of existing multiple dwelling units: "We need clarity about how [this definition] applies to residential buildings with multiple units. The mere presence of another [dwelling] unit on the same lot doesn't make it accessory."

There are probably other Massachusetts cities whose housing stock consists largely of two and three family homes, and whose zoning characterizes additional units in residential buildings as part of the principal use (i.e., residential.) I would guess that, like Somerville, they don't limit the size of such additional units, as long as they otherwise conform to local zoning requirements. These communities may well have thought that they could not lawfully limit the size of dwelling units created within existing homes, since, MGL chapter 40A, section 3, states that: "No zoning ordinance or by-law shall regulate or restrict the interior area of a single family residential building…."

H.4290's definition of "accessory dwelling unit" seems to assume communities of detached, single-family dwellings to be the norm. It's unclear how it would apply to existing multi-family dwellings in urban centers. It could render many existing additional units nonconforming, as many of these are larger than 900 square feet.

I would also urge elimination of the clause (subparagraph iii; lines 16-19) which recites as part of the definition of an accessory dwelling unit that it is subject to "such additional restrictions as may be imposed by a municipality." From my lawyer's point of view, I didn't think it prudent or desirable to have regulatory considerations intrude on zoning definitions. That view was validated by Dan Bartman's perspective as a planner: "My life's work is getting standards out of definitions;" he told me, " just say what a thing is, and regulate it someplace else."

It's also worth noting that there are non-municipal regulations which may be at odds with discretionary or as-of-right permitting of accessory dwelling units. For instance, Title 5 constrains the number of bedrooms which can be served by a single septic system. MGL ch.40R explicitly recognizes that there are such limitations; its section 6 (12) sensibly directs that "Housing density in any proposed district shall not over burden infrastructure as it exists or may be practicably upgraded in light of anticipated density and other uses to be retained in

the district…." Any changes to our zoning laws should recognize any such infrastructure limitations.

"As of right", development may proceed under a zoning ordinance or by-law without the need for a special permit, variance, zoning amendment, waiver, or other discretionary zoning approval.

"Lot", an area of land with definite boundaries that is used or available for use as the site of a building or buildings.

"Mixed-use development", development containing a mix of residential uses and non residential uses, including, without limitation: commercial, institutional, industrial or other uses; all conceived, planned and integrated to create vibrant, workable, livable and attractive neighborhoods.

Analysis of Lines 27-28: The "all conceived, planned, and integrated, etc.…" language sounds more like marketing than a definitional standard. While we all want development to be "attractive," etc., we should not have the definition of "mixed-use development" hinge on opinions about its design conception. As Somerville planner Dan Bartman advises: "just say what a thing is, and regulate it someplace else."

"Multi-family housing", a building with 3 or more residential dwelling units or 2 or more buildings on the same lot with more than 1 residential dwelling unit in each building.

"Natural resource protection zoning", zoning ordinances or by-laws enacted principally to protect natural resources by promoting compact patterns of development and concentrating development within a portion of a parcel of land so that a significant majority of the land remains permanently undeveloped and available for agriculture, forestry, recreation, watershed management, carbon sequestration, wildlife habitat or other natural resource values.

"Open space residential development", a residential development in which the buildings and accessory uses are clustered together into one or more groups separated from adjacent property and other groups within the development by intervening open land. An open space residential development shall be permitted only on a plot of land of such minimum size as a zoning ordinance or by-law may specify which is divided into building lots with dimensional control, density and use restrictions for such building lots varying from those otherwise permitted by the ordinance or by-law and open land. Such open land may be situated to promote and protect maximum solar access within the development. Such open land shall either be conveyed to the city or town and accepted by it for park or open space use, or be made subject to a recorded use restriction enforceable by the city or town or a non-profit organization the principal purpose of which is the conservation of open space, providing that such land shall be kept in an open or natural state and not be built for residential use or developed for accessory uses such as parking or roadway.

Analysis of Lines 36-48: This section creates a replacement for the existing "cluster development," which is described in section 9 of chapter 40A (lines 35 – 68). Sections 6 and 7 of H.4290 replaces two references to "cluster development" with "open space development," yet the bill seems to leave in place the existing statutory definition of "cluster development" in chapter 40A, section 9– an oversight?

The most significant difference between the two development concepts seems to be that in cluster development, open space not conveyed to the municipality or to a non-profit can be conveyed "to a corporation or trust owned or to be owned by the owners of lots or residential units within the plot," subject to a deed restriction that the land be kept "in a natural state." This latter ownership option does not exist for "open space residential development."

H.4290 keeps the other two possible ownership options for keeping the "significant majority" of land in this kind of development project "permanently undeveloped." It closely tracks the definition of "cluster development, reciting that "open land" which is part of an "open space residential development" be conveyed to and accepted by the municipality as "park or open space land," (vs. the "cluster development" requirement that the land be conveyed to the municipality "for park or open space use." Is this a distinction with a difference? Does it affect whether such land, once conveyed to a municipality, becomes subject to Article 97 of the state constitution?

What this new "cluster development" concept does not address – and should – is the broader problem of relying on a "recorded use restriction" to preserve open space, since our laws substantially limit use restrictions: Mass Gen. Laws ch. 184, §23, states that "Conditions or

restrictions, unlimited as to time, by which the title or use of real property is affected, shall be limited to the term of thirty years after the date of the deed or other instrument or the date of the probate of the will creating them, except in cases of gifts or devises for public, charitable or religious purposes. This section shall not apply to conditions or restrictions existing on July sixteenth, eighteen hundred and eighty-seven, to those contained in a deed, grant or gift of the commonwealth, or to those having the benefit of section thirty-two" – a requirement reiterated in 760 CMR 59.02.

It would seem that the only reliable way to set up a restrictive covenant in connection with "open space residential development" would be to assume that it is drafted to achieve the "benefit of section thirty-two." To outlast the 30 year limit on deed restrictions, covenants would have to create a "conservation restriction, agricultural preservation or watershed preservation restriction as defined in section thirty-one" [of ch. 184.] Otherwise, the use of restrictive covenants can't ensure "that a significant majority of the land remains permanently undeveloped."

Compliance would necessarily include local and state authorization and certification as required by section 32 of ch. 184, but it appears to be the only path to permanent preservation. The definition of "cluster development" should probably state that any "recorded use restriction" be made in accordance with MGL ch. 31 and 32. Section 6 (13) (b) of MGL ch. 40R, sensibly, does so: "A city or town may designate certain areas within a smart growth zoning district or starter home zoning district as dedicated perpetual open space through the use of a conservation restriction as defined in section 31 of chapter 184 or such other means as may be created by state law;" any zoning provision which relies on or requires use of a restrictive covenant should contain similar language.

SECTION 3. Said section 1A of said chapter 40A, as so appearing, is hereby further amended by inserting after the definition of "Special permit granting authority" the following 2 definitions:-

"TDR zoning", zoning that authorizes transfer of development rights by permitting landowners in specific preservation areas identified as sending areas to sell their development rights to landowners in specific development districts identified as receiving areas.

Analysis of Lines 52-54: First, what is, or can be, a "preservation area" – are there any requirements, or limitations? It's evidently not defined in this bill; is it defined elsewhere? Again, it seems odd that the creation of new substantive property rights would have its genesis in a pair of new definitions, especially when it would introduce such radical change to our established law of zoning, and of property rights.

This definition of "TDR zoning" would seem to create a private market in development rights, something which TDR has brought about in New York City: http://furmancenter.org/research/publication/buying-sky-the-market-for-transferable-development-rights-in-new-york-city Such marketable development rights would be a new feature in Massachusetts property law, as well as in its zoning law – for instance, In California, transferrable development rights have been held to be taxable: https://www.boe.ca.gov/proptaxes/pdf/220_0740.pdf and are used to generate revenue: Los Angles has "required developers to make a Public Benefit Payment to the City of $35 per square foot of transferred floor area to be used for affordable housing, open space, historic preservation, public transportation and public/cultural facilities…. a highly effective means of generating funding for downtown betterment." http://smartpreservation.net/los-angeles-california/

TDR is used in several cities, large and small, but was evidently "pioneered" by in New York City: https://www1.nyc.gov/site/planning/plans/transferable-development-rights/transferable-development-rights.page ; yet amid "calls from various quarters to reform existing mechanisms in order to facilitate their use or to subject them to greater public oversight" NYC's Department of City planning decided to "embark on a period of stakeholder engagement and careful reconsideration of the role of TDRs among the range of zoning and planning tools available in New York City."

TDR programs seem to be already in use in two Massachusetts municipalities, one of them Acton (see Acton Zoning By-Law, Section 5.4 Transfer of Development Rights; http://smartpreservation.net/acton-massachusetts/ .) Acton Planning Department Staff tell me that their TDR provision has been used "only once" so far, and that the process, which requires a Special Permit, "takes a lot of time." Interestingly, Acton's Zoning By-Law states in section 5.4.4.1 [that] "Development rights shall be considered as interests in real property. A landowner in a Receiving District may purchase some or all of the transferable development rights of a LOT in a Sending District, as authorized in the special permit, at whatever price may be mutually agreed upon by the two parties."

Cambridge in Section 17.7 of its Zoning Ordinance, sets up a TDR program, by special permit, which appears designed to concentrate development in its North Point area; a planning staff member told me it has been used twice. Prudently, the Cambridge ordinance does not speak of TDR as establishing "property rights." It avoids the question of the buying and selling of transferred development rights altogether, characterizing transferor properties as "donating lots," and transferee lots as "receiving lots."

Clearly, at least two communities have not felt the need for express state authorization to set up TDR zoning. If 40A is to be amended to expressly authorize TDR zoning, the Cambridge version seems to be the wiser model to follow. Unless Massachusetts lawmakers are fully confident that they understand the property law and taxation implications of making TDR a property right, it should be a zoning device only.

H.4290 (lines 100-102) would allow local zoning to establish TDR zoning "as of right, without the need for a special permit or other discretionary zoning approval." It is highly doubtful that any community would want to give up Special Permit control of TDR, but having this language in the

bill seems to uncomfortably reinforce the bill's presumption that TDR confers property rights. I would recommend avoiding such language altogether.

"Transfer of development rights", the regulatory procedure whereby the owner of a parcel may convey development rights, extinguishing those rights on the first parcel, and where the owner of another parcel may obtain and exercise those rights in addition to the development rights already existing on that second parcel. (emphasis added)

Analysis of Lines 55-58: This definition fleshes out the nature of property rights created by TDR zoning as envisioned by H.4290. As defined here, purchased development rights seem to be a form of property right which is not subject to zoning, since "the owner of another parcel may obtain and exercise those rights in addition to the development rights already existing on that second parcel." The additive nature of these property rights is potentially problematic, as there are no limits in this bill respecting the quantity of additional development rights which can be accumulated and applied to any given parcel in a "receiving area."

This conceptual scheme seems most like the "Special Purpose Districts" feature of TDR zoning in NYC: http://greenlightexpediting.com/the-three-types-of-development-rights-transfer/. Yet even in a city with the sophistication of NYC, its planning commission chairman, Carl Weisbrod, has said that "if totally unrestrained, T.D.R.s can clash with underlying zoning and conflict with the well-considered plan that zoning depends on for its legal support…." https://www.politico.com/states/new-york/city-hall/story/2015/02/city-may-alter-programs-that-allow-for-transfer-of-air-rights-020059

It seems doubtful that Massachusetts is ready for this regulatory challenge. Certainly few of its municipalities have the sophistication to handle claims to a development rights as property rights. For instance, it's possible that a municipality which attempted to limit the 'additive" nature of purchased TDR rights, as defined in H.4290, could incur potential liability on a "regulatory taking" claim – a consequence we probably want to avoid.

SECTION 4. Section 5 of said chapter 40A, as so appearing, is hereby amended by striking out the fifth paragraph and inserting in place thereof the following paragraph:-

Except as provided herein, no zoning ordinance or by-law or amendment thereto shall be adopted or changed except by a two-thirds vote of all the members of the town council, or of the city council where there is a commission form of government or a single branch, or of each branch where there are two branches, or by a two-thirds vote of a town meeting; provided,

however, the following shall be adopted by a vote of a simple majority of all members of the town council or of the city council where there is a commission form of government or a single branch or of each branch where there are two branches or by a vote of a simple majority of town meeting:

Should H.4290 be adopted in its present form, municipal attorneys or other staff will have to sort through any zoning proposal to separate provisions that require a supermajority vote from those which require a simple majority: "any amendment that requires a simple majority vote shall not be combined with amendments that require a two-thirds majority vote" (lines 90-91.) It makes sense to go through the new "simple majority" categories to determine how feasible they are to apply:

(1) An amendment to a zoning ordinance or by-law to allow any of the following as of right: (a) multifamily housing or mixed-use development in a location that would qualify as an eligible location for a smart growth zoning district under section 2 of chapter 40R of the general laws;

How is it possible for a municipality to know, in advance, whether a "location" would qualify as eligible "smart growth" location under MGL Chapter 40R, sec. 2? Going by that section's definition, these could be almost anywhere, at least in the urban core: "Eligible locations", [are] areas that by virtue of their infrastructure, transportation access, existing underutilized facilities, or location make highly suitable locations for residential or mixed use smart growth zoning districts or starter home zoning districts, including without limitation (1) areas near transit stations, including rapid transit, commuter rail and bus and ferry terminals; or (2) areas of concentrated development, including town and city centers, other existing commercial districts in cities and towns, and existing rural village districts."

This general description is more precisely defined in 760 CMR 59.02 as follows: "Eligible Location. An area within a Highly Suitable Location that qualifies under the criteria set forth in 760 CMR 59.04(1)(a). If a portion of a parcel of land falls within an Eligible Location, then all of such parcel, to the extent of its legal boundaries, may also be deemed an Eligible Location in the discretion of DHCD. Indeed, qualification as a "smart growth" district is a complicated process, spelled out in MGL ch. 40R, and DHCD's 43 pages of regulations pertaining to the "Smart Growth Districts and Starter Home Zoning Districts." First, a municipality applies for the designation; DHCD makes a "preliminary determination" of eligibility before the local vote on the ordinance or bylaw, following up by a "letter of eligibility." A recent report on Chapter 40R by the Citizens Housing and Planning Association (CHAPA) looks at the reason why more communities have not established "smart growth" districts; ineligibility of locations is high on the list.

I was a Somerville alderman when Chapter 40R was adopted, and suggested to our then-mayor that she have her planning staff consider using it at Assembly Square, which was at the time in the early stages of redevelopment and rezoning discussions. That administration rejected 40R on the grounds that it was too prescriptive, and didn't give our city enough "flexibility." In retrospect, I think Assembly Square – now a "Smart Growth" paradigm (See, eg, http://www.chrisleinberger.com/docs/reports/Boston.pdf) - probably would not have qualified as a 40R site, as it did not yet have its Orange Line station, but was an underutilized urban brownfield.

(b) accessory dwelling units;

've already discussed some of the problems connected with this bill's definition of an "accessory dwelling unit." Paradoxically zoning which allows what would otherwise be "accessory dwelling units" but are larger than 900 sq. feet – or in some cases, larger than 600 square feet - would require a supermajority vote. This result seems to be at odds with the policy of making it easier to zone for and build both accessory dwelling units and multi-family housing.

(c) or open-space residential development.

73 (2) An amendment to a zoning ordinance or by-law to allow by special permit:

The same considerations outlined for "as of right" uses will, under H.4290, apply to use by special permit as well. Municipal attorneys or other staff will have to separate provisions that require a supermajority vote from those which require a simple majority: "any amendment that requires a simple majority vote shall not be combined with amendments that require a two-thirds majority vote" (lines 90-91.)

74 (a) multi-family housing or mixed-use development in a location that would qualify as an eligible

75 location for a smart growth zoning district under section 2 of chapter 40R of the general laws;

This section tracks the language cited above, which presumes that municipalities can know, in advance, whether a "location" would qualify as eligible "smart growth" location under MGL chapter 40R, sec. 2.

76 (b) an increase in the permissible density of population or intensity of a particular use in a proposed

77 development pursuant to section 9 of chapter 40A of the general laws;

Because this bill is aimed at housing production, it should probably be limited to the "increase in the permissible density of population" clause of section 9 of 40A. "Density bonuses," as they are called in my community, are commonly interpreted as referring to bedroom count. Although the "intensity of a particular use" language appears in the same section, my recollection of the case law is that its more often applied to non-residential use, including quarries, agricultural uses, and industrial facilities; its inclusion in this section won't necessarily promote housing construction, and could have unintended consequences.

or a diminution in the amount of parking required for residential or mixed-use development pursuant to section 9 of chapter 40A of the general laws;

Was it intentional that this section should only apply to parking requirements for residential or mixed-use development authorized by special permit (MGL ch. 40A, section 9), and not for those developments when constructed as of right?

(3) Zoning ordinances or by-laws or amendments thereto that (a) provide for TDR zoning or natural resource protection zoning in instances where the adoption of such zoning promotes concentration of development in areas that the municipality deems most appropriate for such development, but will not result in a diminution in the maximum number of housing units that could be developed within the municipality;

While it appears to be an actual metric for determining when TDR zoning may be enacted locally by a simple majority, "the maximum number of housing units that could be developed within the municipality" is not really a knowable number. How one would calculate this "maximum number" depends on choosing a density assumption for the municipality – and that number is going to be very different, depending on whether one chooses the density of Bolton or Brookline, Somerville or Hong Kong.

Moreover, it's not really knowable in advance how transferred development rights are going to be used. TDR can be for residential or commercial development. Even if "the maximum number of housing units that could be developed within the municipality" were known or assumed, there's no way to determine in advance how TDR zoning would affect this number.

or (b) modify regulations concerning the bulk

and height of structures, yard sizes, lot area, setbacks, open space, parking and building coverage requirements to allow for additional housing units beyond what would otherwise be permitted under the existing zoning ordinance or by-law.

Although this section is ambiguous, too, it could create a disincentive for municipalities to change their zoning "to allow for additional housing units beyond what would otherwise be permitted." It encompasses the fundamentals of residential zoning so fully, that, interpreted most broadly, it would seem to leave only changes to non-residential zoning subject to a supermajority vote. Even mixed-use zoning would seem to fall under the simple-majority rule, since it allows for greater residential density.

(4) The adoption of a smart growth zoning district or starter home zoning district in accordance with section 3 of chapter 40R of the general laws.

Provided, further, that any amendment that requires a simple majority vote shall not be combined with amendments that require a two-thirds majority vote. provided, further, that if in a city or town with a council of fewer than twenty-five members there is filed with the clerk prior to final action by the council a written protest against a zoning change under this section, stating the reasons duly signed by owners of fifty per cent or more of the area of the land proposed to be included in such change or of the area of the land immediately adjacent extending three hundred feet therefrom, no change of any such ordinance shall be adopted except by a two-thirds vote of all members.

This section which to contemplate "protest" minor zoning amendments in places with relatively large, mainly owner-occupied parcels – the suburban assumption that seems to be at the heart of the "accessory dwelling unit" definition. In the case of a city-wide rezoning, in a city like Somerville, with tiny parcels, many small condominium associations, and two-thirds of its residential units occupied by renters, there would be effectively no right of protest. Many of the property owners are LLCs or trusts with no connection to the community, and only benefit from the increased value of their property, as its development potential increases – a motivation which is destabilizing to communities, as well as undemocratic.

SECTION 5. Section 9 of said chapter 40A, as so appearing, is hereby amended by inserting after the word "interests," in line 34, the following words:- ; provided, however, that

nothing herein shall prohibit a zoning ordinance or by-law from allowing transfer of development rights to be permitted as of right, without the need for a special permit or other discretionary zoning approval.

I do not believe that there is any way responsibly to allow transfer of development rights "as of right." I don't even see how, as a practical matter, it could be done. "As of right," after all, means that one need only go to the Building Department (or Inspectional Services, or whatever it's called locally) to pull a building permit, which must be issued, as there is no discretion in the process (see lines 20-22 of H.4290.)

Imagine a municipality which has set up an apparently simple, as-of-right TDR scheme which creates a "preservation area" of historic residential structures, and a "receiving area" in a run-down neighborhood in which the municipality would like to see investment. A property owner shows up at the municipal building department with "deeds" to transferred development rights (TDR) from property owners in the "preservation area." The TDRs amount to 12 additional stories of height, which the property owner wants to apply to a three story residential building in the low-income "receiving" neighborhood, which already is entitles to go to 5 stories, under base zoning.

In an "as of right" scenario, the building inspector theoretically would have to hand the property owner certificates to demolish the existing structure, and construct an 18 story tower. The municipality – which set up TDR with all good intentions - has no control, and the abutters have so say. The reason we have MGL chapter 40A section 9, which governs the special permit process, is to subject high impact development to discretionary review –and the exercise of TDR makes the strongest possible case for a discretionary process, to check the validity of transfers, and to assure that TDR is exercised for the public good.

SECTION 6. Said section 9 of said chapter 40A, as so appearing, is hereby further amended by striking out, in line 35, the word "cluster" and inserting in place thereof the following words:– open space residential.

SECTION 7. Said section 9 of said chapter 40A, as so appearing, is hereby further amended by striking out, in line 39, the word "cluster" and inserting in place thereof the following words:– open space residential.

SECTION 8. Said section 9 of said chapter 40A, as so appearing, is hereby further amended by inserting, after the word "control," in line 43, the following words:- ; provided, however, that nothing herein shall prohibit a zoning ordinance or by-law from allowing open space residential developments to be permitted as of right, without the need for a special permit

or other discretionary zoning approval.

Again, there would seem to be no way for a municipality to ensure that the requirements for "open space residential development" are met in the absence of a special permit. The expertise for assuring that the requirements set out in this bill have been fulfilled is beyond what can be reasonably expected from a building inspector. Remember, the ability to construct anything "as of right" entails going to the Building Department (or Inspectional services, or whatever it's called locally) and pulling a building permit (see lines 20-22) – NO discretion is involved.

SECTION 9. Said section 9 of said chapter 40A, as so appearing, is hereby further amended by striking out the 7th paragraph and inserting in place thereof the following paragraph:- 117 Zoning ordinances or by-laws may also provide that special permits may be granted for reduced parking space to residential unit ratio requirements after a finding by the special permit granting authority that the public good would be served and that the area in which the development is located would not be adversely affected by such diminution in parking.

I'm sure that my community is not the only one where a parking ratio reduction is just one element of the relief requested in a special permit application. It makes little sense for this aspect of potential relief requested needs requires only a simple majority vote if the special permit itself is of a kind which needs supermajority vote.

SECTION 10. Section 9, of chapter 40A, as appearing in the 2016 official edition, is hereby further amended after the last sentence on line 127 by inserting the following:- However, a special permit issued by a special permit granting authority shall require a simple majority vote for any of the following:

(a) multifamily housing that is located within .5 miles of a commuter rail station, subway station, ferry terminal, or bus station, provided, not less than 10 per cent of the housing is affordable to and occupied by households whose annual income is less than 80 per cent of the area wide median income as determined by the United States Department of Housing and Urban Development and affordability is assured for a period of not less than 30 years through the use of an affordable housing restriction as defined in section 31 of chapter 184.

One obvious objection to this increased-density-on-steroids approach to permitting is its one-size-fits-all effect, applying to all municipalities, regardless of density. Somerville, for instance, is the 16th-most densely populated city in the United States, with 19,284 people per square mile. Its level of population density is 2,963% higher than the Massachusetts average. There is no reasonable justification for expediting increased density in Somerville in the same manner as one would in a low density community.

Additionally, the affordability standards in this provision is weak in several ways. The 30 year affordability requirements of the 1970s gave rise to the "expiring use" crisis that many urban areas in Massachusetts are experiencing now. Any expedited permitting for affordable housing must be stronger than this, or it's just setting us up for future lack of affordability, and inevitable displacement of tenants in those "affordable" units – I would argue for a requirement of permanent affordability.

Additionally, setting 80% of median income as the standard for affordability creates too high a bar for many families who desperately need housing. The ten per cent inclusionary requirement seems insufficient as well – Somerville requires 20% inclusionary units, a standard which would become, if not non-conforming, at least harder to permit. Adoption of H.4290 would provide developers with an expedited end-run around Somerville's inclusionary zoning requirement for affordable units.

(b) mixed-use development in centers of commercial activity within a municipality, including town and city centers, other commercial districts in cities and towns, and rural village districts, provided, not less than 10 per cent of the housing is affordable to and occupied by households whose annual income is less than 80 per cent of the area wide median income as determined by the United States Department of Housing and Urban Development and affordability is assured for a period of not less than 30 years through the use of an affordable housing restriction as defined in section 31 of chapter 184.

See objections already stated.

(c) A reduced parking space to residential unit ratio requirement, pursuant to this section, provided that a reduction in the parking requirement will result in the production of additional housing units.

See objections already stated.

SECTION 11. Section 3 of chapter 40R of the General Laws, as so appearing, is hereby amended by inserting after the figure “40A,” in line 10, the following words:- ; provided, however, that a smart growth zoning district or starter home zoning district ordinance or by-law shall be adopted by a simple majority vote of all the members of the town council, or of the city council where there is a commission form of government or a single branch, or of each branch where there are two branches, or by a simple majority vote of a town meeting.

See objections already stated.

SECTION 12. Section 1 of chapter 40S of the General Laws, as so appearing, is hereby amended by striking out the word “properties” in line 51 and inserting in place thereof the following word:- buildings.

SECTION 13. Said section 1 of said chapter 40S, as so appearing, is hereby further amended by inserting after the figure “40R,” in line 61, the following words:- including without limitation smart growth zoning districts and starter home zoning districts as defined in section 1 of said chapter 40R.

SECTION 14. The secretary of housing and economic development shall report annually to the clerks of the house of representatives and the senate, who shall forward the report to the house of representatives and the senate, the chairs of the joint committee on housing, and the chairs of the senate and house committees on ways and means, on the activities and status of the Housing Choice Initiative, as described by the governor in a message to the general court dated December 11, 2017, including progress made towards the production of 135,000 new units by 2025. The report also shall include a list of all cities and towns that qualify as “housing choice” communities and a list and description of grant funds disbursed to such cities and towns and a description of how the funds were used to support the production of new housing

It is rather shocking that this bill requires reporting only on the “activities and status of the Housing Choice Initiative,” a specific program of DHCD, and not of the effects of passage of this bill on the increase in housing stock in our state. It also seems perverse that this bill does so little to address the affordability of housing produced pursuant to it. I mentioned that Somerville in

the last 5 years has permitted and built 1,200 residential units – in point of fact, these units are unaffordable to about 80% of Somerville residents, since the "market rate" housing being built here these days is "luxury condominiums."

Another disturbing omission of this bill is its total disregard for infrastructure - in urban, suburban, or rural areas. I've aware of an older development of 700 residential units on a lake in metro west, which do not have even septic systems, but only cesspits. As of 2010, 300 of these cesspits had failed; these dwellings are unsaleable, and can change hands only between family members.

Other built up areas, including in metro west, cannot at present be built to additional density because they have septic systems only, and not sewage treatment. Some communities are either water restrained, or will become so, because they are mismanaging their wells so as to deplete the aquifers they rely on. Many urban areas continue to build density without separating their combined sewer overflows, deferring into the future the costs of complying with the Clean Water Act.

Rep. Provost's Executive Summary

(Specific observations detailed in notes)

H.4290 is a wildly optimistic leap into supply-side economics as a means to solve the shortage of housing, and particularly affordable housing in Massachusetts. It's poorly thought out, and has not been brought into harmony with corresponding sections of chapters 40A and 40R. Its definition an "accessory dwelling unit," for instance, could call into question the zoning conformity of thousands of existing units in multifamily residential buildings all over the state.

The bill is not well drafted. For example, while its "open space residential development" aims to protect more undeveloped land than existing "cluster development," its protections for that open land are weaker than those that exist currently in MGL chapter 40R. It establishes – through two definitions –a new kind of transferable, marketable "development rights" (TDR) which will impact property and tax law in ways that have evidently not been considered by the drafters of the bill.

H.4290 requires that all zoning amendments be divided into two varieties: those provisions requiring a simple majority vote, and those requiring a supermajority. Separate votes must be taken on these different "kinds" of zoning provision. Yet the characteristics of these different kinds of provision are often ambiguous, and no effort seems to have been made to ask the municipal attorneys charged with separating parts of a zoning proposal how feasible their new sorting task may be.

The bill reflects a lack of understanding of the practical processes involved in both "as of right" permitting, and the issuance of special permits. The highly prescriptive nature of the bill could make it paradoxically more difficult to permit multi-family housing in municipalities which

already have liberal permitting standards. The only part of the bill which expedites permitting for developments with affordable units have affordability standards which are weak in several ways.

Other general considerations about H.4290

1) "One-size-fits-all" zoning

Chapter 40A of the General Laws provides a framework for local zoning which is almost evenhanded – although Boston is exempt from 40A, and has its own zoning code. Chapter 40B, originally enacted to facilitate regional planning, is better known for its "stick" sections, by which local permitting for low income housing can be bypassed in municipalities where less than 10% of the housing stock is deemed affordable. As a practical matter, 40B permitting is not actually feasible in municipalities with extremely high land values.

Trying another approach to encourage greater density of residential construction, the legislature about 15 years ago adopted the original legislation establishing MGL chapters 40R and 40S. These are "carrot" schemes, which incentivize communities to promote greater density by offering cash payments on approval of 40R districts. The failure of the commonwealth to make promised payments is probably one factor which has limited popularity of the program, along with its complexity and bureaucratic approval process.

H.4290 is an undisguised return to the "stick" approach; its increased-density-on-steroids expedited permitting would apply to all municipalities. It dictates the same permitting standards for all municipalities regardless of population density. Somerville, for instance, has 19,747 people per square mile, a level of population density 22.5 times higher than the Massachusetts average. There is no reasonable justification for expediting increased density in Somerville in the same manner as one would in a low density community.

Just as it does not make allowances for population density, H.4290 does not treat municipalities with high proportions of low income housing differently from those with low levels. It does not give different consideration to those which are generous in permitting residential construction from those which are not. It does not treat communities in financial distress, and may be unable to adequately fund their schools, from communities with great public and private wealth.

2) Insufficient attention to affordability

H.4290 makes the supply side assumption that if housing construction is unleashed, some of it, somewhere will be affordable. Empirical evidence from around the world shows this assumption to be untrue; real estate in stable democracies is now too desirable a commodity. As one British economist said about London's impossible housing shortage, "The market is broken, because demand is infinite."

One of the Somerville aldermen provided a more colloquial take on promoting production alone to lower housing prices: “It’s like trying to bring down the price of Toyota Camrys by building thousands of Lamborghinis.” Although Somerville has, in the last 5 years, permitted and built 1,200 residential units, these are unaffordable to about 80% of Somerville’s residents. Another way to put it is that people in Somerville already have the “choice” to leave Somerville to find housing they can afford, and more families, especially, are leaving every year.

As pointed out, the few provisions of H.4290 which make it easier to permit construction which includes “affordable” units is weak in many ways. The duration of affordability is too short, the means test too high for those who are struggling to find housing. Its thresholds undercut the affordability requirements in communities which take the provision of affordable housing much more seriously than this bill does.

3) Insufficient consideration for infrastructure limitations and needs

A disturbing feature of this bill is its total disregard for infrastructure. Urban, suburban, or rural areas are treated the same. Municipalities are subject to the same statutory changes which expedite permitting for more density, whether they have an abundant public water supply, intermittently reliable wells, or lens aquifer; whether they have sewage systems, septic systems, or cesspits; storm water separation or CSOs; adequate right-of-way widths for roads, or lack of same. H.4290 does not provide even the modicum of infrastructure consideration that exists in MGL chapter 40R.

Conclusion

H.4290 is not sufficiently well thought out and drafted to be passed into law in this session. Some of its shortcomings might be susceptible to repair by amendment (e.g. better protection for undeveloped land in “open space residential development”); other parts (e.g. the “accessory dwelling unit,” and TDR) need some careful thought about their goals and unintended consequences. Finally, this bill should be fully vetted by municipal land use lawyers and professional planners before it becomes another legislative disappointment.