

Comments on “Possible Framework for a ‘Land Use Partnership Act’” proposed by Greg Bialecki – Joel Russell

I write the comments below as an individual with expertise in land use planning and regulation, and a wide range of experience with land use regulation, planning, smart growth, and sustainable land use, in Massachusetts and several other states. I understand that today is the deadline. I will try to be brief.

It is apparent that Secretary Bialecki has spent much time and given considerable thought to the task he has undertaken. He has devised a scheme that is elaborate and clever, but in my view is largely unworkable. Here are some of my observations and concerns:

1. The new powers proposed to be granted to local governments are mostly very good. I think that the powers could go somewhat further, but they are a giant step beyond what we have with Chapter 40A now. However, as I explain below, I think they should be granted across the board, not selectively.
2. The principle that local governments should be held accountable for following statewide land use objectives is also fundamentally sound. These land use and planning objectives should be clearly stated in the legislation in a way that provides guidance and flexibility for different regions of the state. If done in this manner, with reasonable latitude to adapt to local circumstances, I think that they could apply statewide, without resorting to an “opt-in” provision.
3. The provision of a meaningful role for regional agencies as an intermediary, interpreting and applying statewide standards to different regions and facilitating regional cooperation, is excellent, as long as it substitutes for and does not duplicate state-level review.
4. The provision of adequate state funding is also sound - and essential.
5. These basic elements (1 through 4 above) are sound and are found in the legislation of most states that have moved ahead of the curve on land use legislation.
6. The problem with this proposal is the proposed mechanism for fulfilling these laudable principles. The proposal continues the historic distrust by the state of local government, and continues the practice of "Beacon Hill knows best." In my experience, Beacon Hill occasionally knows best, but more often, it does not. The state should be setting policy and establishing general rules of conduct, not micromanaging local government. This proposal gives local governments some of the powers enjoyed by municipalities in most other states, but it burdens the exercise of these powers with a dizzying array of oversight mechanisms. This kind of oversight, which is legalistic, bureaucratic, and overly detailed (right down to numerical standards), will make this system unworkable. There are other ways to achieve accountability. A review of other states' legislation is instructive (see especially Rhode Island, Maryland, California, Maine, New Jersey, Oregon, and Washington). Some states have achieved accountability through a combination of legislation and caselaw (e.g. New York). All involve some level of state and/or judicial oversight, but not in the heavy-handed manner proposed here. Let's not do to land use what MCAS has done to education.
7. This legislation still does not recognize the fundamental reality of the Massachusetts Home Rule Amendment and goes a giant step toward making our zoning act an even more confusing amalgam of enabling, restricting, prohibiting, and regulating what home rule purportedly already allows. If legislation like this is ever passed, there should be consideration of an express repeal, by constitutional amendment, of the Massachusetts Home Rule Amendment (at least with respect to those home rule powers

that relate to land use regulation), in order to avoid further compounding the confusion. (I do not favor this, of course. I would prefer to have legislation that acknowledges the existence of the Home Rule Amendment and that provides appropriate and respectful boundaries to Home Rule where necessary and appropriate to achieve state planning objectives.)

8. This legislation adds the complication of a two-class system, in which some municipalities are able to use a wider range of zoning tools than others. This will create needless confusion. There is no reason why the entire state cannot operate under the same principles and municipal land use tools, with a more flexible implementation mechanism that recognizes that they apply differently in different regions and in different local communities. While not a “one size fits all” solution, this proposal is a “two sizes fit all” solution, which will create more problems than it will solve.

9. While I agree with the principle of accountability to statewide land use objectives, the bureaucratic mechanism of two-tier review and approval by both regional agencies and the state, for those municipalities choosing to “opt-in,” makes this proposal overly burdensome and will deter municipalities from taking advantage of it.

10. On a more technical note, I am concerned with the way the word "consistency" is used, which is different from its usage in most other contexts, and in CPA-2 in particular. "Consistency" has in all prior discussions meant consistency between master plans and land use regulations (i.e. "horizontal consistency"), not consistency with statewide objectives ("vertical consistency"). While I have no objection to vertical consistency as a guiding principle, I think that this redefinition of the word “consistency” will lead to confusion over terminology. This issue can be resolved by providing a clear explanation of the differences between the concepts of horizontal and vertical consistency.

11. To end on a constructive note, I would suggest the following:

- The basic principles of broadened local regulatory powers, accountability to statewide policy goals, vertical and horizontal consistency, state funding for land use planning, and regional cooperation and oversight should be endorsed and a broad consensus built around them. Smart growth will be impossible without following all of these principles. But just as the state is seeking to streamline permitting for developers, the state should streamline land use regulation for its municipalities.
- An entirely different mechanism for integrating the basic principles into a revised regulatory framework should be created, preferably one which borrows from and builds upon the legislation and experience of other progressive states. Such a mechanism would follow more of a local-regional-state “partnership” model and less of a top-down command-and-control model. (Notwithstanding the use of the word “Partnership” in the title of the proposal, I don’t think this legislation is about partnership as much as it is about state control.) A mechanism modeled on what has worked best in other states would be preferable to either trying to fix the current tangle of Massachusetts statutes (Chapters 40A, 40B, 40R, 40S, 41, 43D, etc.) or trying to invent something totally new and different that has never been tried before, such as the proposal under consideration here.
- The creation of this new mechanism should be done with input from the many stakeholders involved, but with a clear goal of implementing smart growth, sustainability, efficiency, and climate change policies, and a willingness to let go of parochial advantages that each stakeholder group enjoys under current law.

I hope that these comments are helpful and that they are taken in the constructive spirit in which they are intended.

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