Report of
The Governor's Special Commission on
Barriers to Housing Development

January 2002

TABLE OF CONTENTS

I. INTRODUCTION 1

BACKGROUND 1
EXECUTIVE ORDER 426 1
THE COMMISSION 1
THE SUBCOMMITTEES 2
HOW TO READ THIS REPORT 3

II. RECOMMENDATIONS OF THE BUILDING CODE SUBCOMMITTEE 4

III. RECOMMENDATIONS OF THE TITLE 5 SUBCOMMITTEE 9

IV. RECOMMENDATIONS OF THE ZONING SUBCOMMITTEE 16

V. APPENDICES

A. Executive Order 426 ..... A-1

B. Barriers Commission Members B-1

C. Notes From Barriers Commission Meetings C-1

D. The Building Code Subcommittee Report D-1

E. The Building Code Subcommittee Minority Report E-1

F. Written Comments on The Building Code Subcommittee Report F-1
- Board of Examiners of Electricians, Board of Examiners of Plumbers And Gas Fitters, and the Division of Professional Licensure F-1

G. The Title 5 Subcommittee Report G-1

H. The Title 5 Subcommittee Minority Report H-1

I. Written Comments on The Title 5 Subcommittee Report I-1
- Charles River Watershed Association I-1
- Environmental League of Massachusetts I-3
- Home Builders Association of Massachusetts I-5
- Massachusetts Association of Health Boards I-8
- Massachusetts Association of Realtors I-20
- Massachusetts Audubon Society I-22

J. The Zoning Subcommittee Report J-1

K. The Zoning Subcommittee First Minority Report (Broadrick Minority Report) K-1

L. The Zoning Subcommittee Second Minority Report (Smolak Minority Report) L-1

M. Addendum to the Zoning Subcommittee Second Minority Report (Smolak Minority Report) M-1

N. Written Comments on the Zoning Subcommittee Report N-1
- Department of Environmental Protection N-1
- Metropolitan Area Planning Council N-5

O. Written Comments on all Three Subcommittee Reports Submitted by the Executive Office of Environmental Affairs O-1

I. Introduction

Background

While the Commonwealth of Massachusetts has experienced a strong and growing economy driving household incomes above the national average and attracting professionals from other regions, the commonwealth's economic competitiveness is weakened by a housing shortage and dramatic rises in housing costs. In October of 2000, the Executive Office for Administration and Finance released a Policy Report titled Bringing Down the Barriers: Changing Housing Supply Dynamics in Massachusetts. This report examined housing trends and barriers to housing production in the Commonwealth and outlined initiatives to remove unnecessary barriers to the development of housing affordable to households across a broad range of incomes. The report identified the inability of the private sector to produce housing at a pace that meets the growing demand as one of the key factors contributing to the housing shortage and escalating housing costs. Regulations and requirements relating to housing development that are unnecessarily restrictive, conflicting, duplicative or inconsistently interpreted and enforced by local officials and inspectors were found to impede residential development and the production of housing at the rate of demand. As a means of addressing these impediments to housing development the report proposed a special commission to recommend statutory, regulatory and operational changes to reduce unneeded barriers to housing development.

Executive Order 426

On January 23, 2001 Governor Paul Cellucci implemented this proposal by issuing Executive Order 426 (E.O. 426) Establishing The Governor's Special Commission on Barriers to Housing Development. The Governor's Special Commission on Barriers to Housing Development (the Commission) consisted of 18 appointees of the Governor, including a representative of the Executive Office of Administration and Finance, Housing and Community Development, Environmental Protection, Public Safety, Public Health, and of the Massachusetts Housing Finance Agency. Other members appointed to the Commission had knowledge and experience in municipal government, local housing issues or housing development. Ms. Jane Wallis Gumble and Mr. Gary Ruping co-chaired the Commission. A list of the members of the Commission is provided in Appendix B.

The Commission

The first meeting of the Commission was held on April 12, 2001. At this meeting members discussed the themes and findings of the Barriers Report and the charge of the Commission. They also decided that the Commission would be able to successfully investigate and propose strategies for reducing barriers to housing development by forming separate subcommittees to address issues related to Building Codes, Zoning, and Title 5. Each sub-committee met numerous times to discuss barriers to housing

development related to their specific topic, and to develop a report with recommendations for the Commission to evaluate. Representatives from the three sub-committees presented interim reports to the Commission on June 25, 2001. Notes detailing the discussions at both of these meetings are included in Appendix C of this report. The Commission met on October 9th, 16th and 23rd to discuss the final subcommittee reports and recommendations. Based on the information provided in the subcommittee and minority reports, as well as in various written comments, Commission members voted on whether or not to adopt each recommendation from the three subcommittees at these meetings. Copies of each subcommittee report, and all corresponding minority reports and written comments are included in the appendices of this report.

The Subcommittees

E.O. 426 charged the Commission with systematically reviewing and advising the Governor on which governmental requirements, as interpreted or enforced, impede the development of housing, raise housing production costs and exacerbate the Commonwealth's housing supply shortage. The Commission was also charged with making recommendations to the Governor as to specific legislative, regulatory, policy and operational changes that are required to remove or otherwise ease, such barriers to residential development so as to create housing that is affordable across a wide range of incomes and available throughout a broad spectrum of the Commonwealth's neighborhoods. The Commission was specifically directed to form two committees: the Building and Specialty Code Committee (Building Code Subcommittee) and the Septic System Regulatory Review Committee (Title 5 Subcommittee). The Commission added a third Subcommittee (Zoning) to logically divide the effort required by the language of E.O. 426.

The subcommittees were composed in such a way as to represent all stakeholders and included people beyond Commission Members with expertise on the subcommittee topic. The subcommittees each held between 5 -12 meetings, with information sent out between meetings. There was ample opportunity to provide feedback to the subcommittee members.

The Building Code Subcommittee consisted of 21 individuals representing interests from state regulatory agencies, municipal government, professional trade and licensing organizations, the State Fire Marshal's office and local building and fire inspectors. They met four times to identify and discuss specific barriers regarding interpretation, enforcement and processes related to the state building code and local bylaws that act like the building code and to propose recommendations to overcome those barriers. In addition, DHCD representatives who staffed the subcommittee held two focus groups - one was with the Southeastern Massachusetts Building Officials Association and the other one was with the Fire Prevention Association of Massachusetts.

The Title 5 Subcommittee consisted of 19 individuals representing interests from local and regional boards of health and planning agencies, state agencies, environmental protection organizations, and private housing developers. They met five times to

determine whether local municipalities have regulations or by-laws relating to Title 5 that vary from the state's requirements, and if so, whether such variations are justified by sound scientific principles. If they found it necessary, they were asked to make recommendations to ensure that Title 5 is addressed and enforced on the local level in accordance with sound scientific principles so that housing development is not unnecessarily impeded.

The Zoning Sub-Committee of the Barriers to Housing Commission consisted of 21 individuals representing interests of both for-profit and non-profit developers, banks, municipalities, and local and regional planners. They met 11 times to examine local land use regulatory issues affecting housing production and to develop recommendations to overcome those barriers.

How to Read This Report

The recommendations from each Subcommittee and any related amendments proposed by the Commission are detailed in the following pages. The recommendations are grouped by subcommittee and then by general topic. A brief summary statement written in **bold** typeface precedes each recommendation from the various subcommittees. Three headings follow the summary statement: Recommendation, Dissenting Views, and Commission Vote. The exact text of the recommendation as presented by the subcommittees to the Commission appears next to the "**Recommendation**" heading. In some cases the commission adopted new recommendations or amendments that were not part of the Subcommittee's original recommendation. Any amendment to a subcommittee recommendation that was adopted by the Commission appears in *italic underlined* typeface within the text of the recommendation. Any aspects of the recommendation that were opposed are discussed under the "**Dissenting Views**" heading. The "**Commission Vote**" heading reflects how the Commission voted on the subcommittee's recommendation and discusses any related amendments proposed or adopted by the Commission.

II. Recommendations of the Building Code Subcommittee

The Building Code Subcommittee proposed the following recommendations to the Commission. The Fire Prevention Association of Massachusetts submitted a Minority Report. The Board of Examiners and Electricians, the Board of Examiners of Plumbers and Gas Fitters and the Division of Professional Licensure jointly submitted comments. The Building Code Subcommittee Report, the Minority Report and the Jointly Submitted Comments are included in Appendices D, E, and F respectively. The recommendation of the Commission and an explanation of any minority or dissenting views follow each of the Building Code Subcommittee's proposed recommendations. Any amendments proposed or adopted by the Commission are noted in the discussion of the Commission Vote.

CONFLICTING AND DUPLICATIVE CODES

II.1. File Legislation to create a Code Coordinating Council at the state level to coordinate the building and specialty codes, and create a forum for discussing the processes for the promulgation of regulations, licensing, inspections and appeals. Recommend that the Secretary of Administration and Finance will chair this Code Coordinating Council.

Recommendation: Create a Code Coordinating Council at the state level to coordinate the building and specialty codes, and create a forum for discussing the processes for the promulgation of regulations, licensing, inspections and appeals. Recommend that the Secretary of Administration and Finance will chair this Code Coordinating Council.
The Council shall:

- Address areas of overlap in the promulgation of the various codes to prevent conflict and duplication.

- In addition, the Code Coordinating Council may also look at areas related to the administration of the building and specialty codes to insure systemic coordination of related procedures such as licensing, inspections and appeals within the required statutory framework. Examples of issues that came up during the subcommittee meetings that would be appropriate to address include:

  - Develop a shared understanding of the roles, expectations and limits of authority of the various code promulgating authorities defined by statute.
  - Perform a comprehensive analysis of the administrative appeals processes for all promulgating agencies and boards to insure that there is an appeals process across those agencies and boards. Furthermore, that in cases where an efficient and accessible appeals process is unavailable to the public, make specific recommendations regarding the

development of such appeals process for the specific board or promulgating agency. Suggest legislation if necessary.

- Review the existing timeframes for permitting and appeals and suggest modifications that logically consider licensing procedures in the building process.
- Establish a guidebook for communities, which present a model protocol to promote the coordination of the permitting, licensing, inspections, and other processes necessary prior to the issuance of certificates of occupancy.

Proposed Legislation:

AN ACT CREATING THE COMMONWEALTH'S CODE COORDINATING COUNCIL

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. Chapter 7 is hereby amended by inserting after section 4P thereof, the following section, Section 4Q.

There is hereby established within the Executive Office for Administration and Finance, A Code Coordinating Council.

Said Council shall review the state building code and the various specialized codes of the Commonwealth to coordinate and make recommendations which will eliminate redundancy, minimize inconsistencies and conflicts and maximize the efficiency of the code promulgation process. The Council shall consist of the Secretary or his designee, the State Fire Marshal or his designee, the Commissioner of the Department of Public Safety or his designee, the Chairman of the Board of Fire Prevention Regulations or his designee, the Chairman of the State Board of Electrical Examiners or his designee, the Chairman of the Board of Building Regulations and Standards or his designee, the Chairman of the State Board of Plumbers and Gasfitters or his designee, the Commissioner of the Department of Public Health or his designee, the Chairman of the Architectural Access Board or his designee, the Chairman of the Elevator Board or his designee and the Attorney General or his designee.

The Secretary of the Executive Office for Administration and Finance shall serve as Chairman and will have the exclusive responsibility for the conduct of the Council. The Chairman may employ such technical experts and other assistants as may be required for the Council to perform its duties. The Chairman may from time to time request the advice and input from local officials and other interested parties.

The Chairman may promulgate such rules and regulations that govern the conduct of the Council as may be reasonably necessary to effectuate the provisions of this Section.

Dissenting Views: The Minority Report agreed with the need to establish a code coordinating council to assist in streamlining the regulatory process, but expressed concern that the committee's efforts were biased towards the Building Code and stressed the need for neutrality among the various codes. The Jointly Submitted Comments supported the establishment of this council as long as the Electrical and Plumbing Boards were included, noting their concern that the council had the potential to promulgate code without recognizing and preserving the specialized codes.
Commission Vote: The Commission unanimously passed the recommendation and the proposed legislation.

INCONSISTENT INTERPRETATION AND ENFORCEMENT OF CODES

II.2. In order to achieve consistent interpretation and enforcement of building codes, require minimum training and continuing education requirements for local officials, regulators, design professionals and practitioners.

Recommendation: Require minimum training and continuing education requirements for local officials, regulators, design professionals and practitioners. Offer joint training for overlapping topics and topics that are often sources of conflict or confusion. Offer separate and specific training for inspectors, promulgation officials, developers, architects, builders and other affected trades. Establish minimum and continued educational requirements for inspector certification and professional licensure. Note: All fire certification is done by Fire Training Council pursuant to statute. Standardize the term of certification. Note: All fire certification is done by Fire Training Council pursuant to statute. Establish a dedicated funding stream to pay for this training and education.
Dissenting Views: The Minority Report noted that regulatory groups have extremely limited budgets that don't allow for training. The Minority Report noted the need to establish a funding source for this training. It also noted that by statute, minimum qualifications for fire officials are established by the Training Council.
Commission Vote: Passed Unanimously

INADEQUATE USE OF CURRENT TECHNOLOGY

II.3. Use current technology to make code compliance and enforcement a more user-friendly efficient process by implementing computerized permitting and tracking in every community and by creating a state code website.

Recommendation: Use current technology to make code compliance and enforcement a more user-friendly efficient process. Provide every community with equipment and software for computerized permitting and tracking. Develop a single website with all the state codes and the capacity to keyword search all of them. Develop the capacity at Secretary of States office for electronic public access of information.
Dissenting Views: None
Commission Vote: Passed Unanimously

INADEQUATE LOCAL STAFFING

II.4. Recommend staffing requirements for state regulating agencies and local communities commensurate with housing activity and responsibilities to ensure sufficient resources to process applications and inspections efficiently.

Recommendation: Recommend staffing requirements for state regulating agencies and local communities commensurate with housing activity and responsibilities to ensure sufficient resources to process applications and inspections efficiently. Consider the staffing levels recommended by the Insurance Services Organization (ISO). Recommend a process for continually monitoring manpower requirements for proper code enforcement at the state and local level. It was also recommended that the money collected by towns from building fees be dedicated to funding local officials' departments/staff, or be passed along to the general fund where it would be used to fund the training of local officials.
Dissenting Views: The Jointly Submitted Comments supported this recommendation, but noted that they would oppose any efforts to privatize state and local inspectional functions.
Commission Vote: Passed Unanimously

INADEQUATE STATE LEVEL STAFFING

II.5. Establish six (6) Regional Code Support Centers.

Recommendation: The Department of Public Safety in conjunction with the Department of Fire Services shall establish six (6) Regional Code Support Centers. The Objectives of the Centers are:

- To provide a regional resource for local officials for technical assistance on State Building Code and specialty codes as they relate to specific projects within the region.
- To provide a regional presence, for the support of local municipalities in the event on an emergency situation occurring within the region.

- To provide a source for initial mediation of construction or design issues prior to the formal filling of an appeal with the appropriate appeals board time saving issues.
- To develop and deliver regional joint training of local officials who enforce state codes.
- To provide regional reference document resource for local officials.
- Align Building and Fire Districts within state for unified approach on code related issues.
- It is recommended that each Regional Code Support Center be staffed with appropriate personnel from the appropriate state regulatory agencies to provide services.
- These recommendations are subject to funding for appropriate staffing levels.

Dissenting Views: None
Commission Vote: Passed Unanimously

LOCAL REQUIREMENTS THAT EXCEED MUNICIPAL AUTHORITY

II.6. Provide appropriate training for municipal regulators, planning boards and legal counsels in an effort to prevent the creation of local building codes that represent a barrier to building construction, especially residential development.

Recommendation: Provide appropriate training for municipal regulators, planning boards and legal counsels in an effort to prevent the creation of conflicting local building codes that represent a barrier to building construction, especially residential development. In cases where municipalities have adopted conflicting building code-like language in contradiction to c.802 of the Acts of 1972, as amended and/or MGL c.143 §§ 93-100 as applicable, the Attorney General shall submit written notification to communities and work with the subject communities, to rectify the identified legal conflicts.

In order to accomplish this, the investigation and evaluation of conflicting local building code-like requirements must be completed and documented in a Final Report. The Attorney General must review all findings to determine if such local regulations, requirements, policies, conflict with the requirements of c.802 of the Acts of 1972, as amended and/or MGL c.143 §§ 93-100, as applicable.
Dissenting Views: Minority Report suggested legal counsel for BBRS and the specialized codes meet with the Attorney General's Office to discuss how the issue of Home Rule Authority would affect the implementation of this recommendation. The Jointly Submitted Comments noted that the analysis of the data collected would require legal review due to the complexity of the laws concerning zoning and local versus state authority.
Commission Vote: Passed Unanimously

III. Recommendations of the Title 5 Subcommittee

The Title 5 Subcommittee proposed the following recommendations to the Commission. A Minority Report was submitted by members of the Title 5 Subcommittee to the Commission as well as written comments from the Massachusetts Association of Realtors, the Massachusetts Audubon Society, the Charles River Watershed Association, and the Environmental League of Massachusetts. The Title 5 Subcommittee Report, the Minority Report and all written comments are included in Appendices G, H, and I respectively. The recommendation of the Commission and an explanation of any minority or dissenting views follow each of the Title 5 subcommittee's proposed recommendations. Any amendments proposed or adopted by the Commission are noted in the discussion of the Commission Vote.

BURDENSOME LOCAL LIMITATIONS

III.1. Require local boards of health to file a copy of bylaws/regulations in excess of Title 5 to DEP with an explanation of the need to exceed Title 5.

Recommendation: It is recommended that M.G.L. c. 111, section 31 be amended. Under the amendment the local board of health would be required to identify the local conditions which exist or reasons for exceeding such minimum requirements must specify the scientific, technological or administrative need to support the change in the regulations. Second, the board of health would have to file the regulation and supporting information with the DEP within thirty (30) days in order for the regulation to become effective. The statute should take effect one year after the date of enactment. There needs to be additional discussions and debate with the stakeholders and as part of the legislative process on whether or not to make this requirement retroactive. During the one year between enactment and the effective date of the amendment, DEP should issue guidance to boards of health indicating that in its opinion the above types of regulations do not, on their face, appear to be based on science. Boards would be advised to examine their regulations and if they contain these types of condition they should obtain the necessary scientific documentation, if they haven't already done so, or eliminate them. DEP should collaborate with the Massachusetts Association of Health Boards (MAHB) and the Massachusetts Health Officers Association on providing guidance and training to local boards of health to assist them in improving their local regulations and practices and complying with the new requirements.

Dissenting Views: The Minority report opposed this recommendation citing the lack of empirical data to support the recommendation and supporting the authority of Boards of Health to implement Title 5. Other written comments opposed this recommendation citing infringement of home rule authority, and need for discussion of pros and cons of regulations in terms of objectives they seek to address.

Commission Vote: The Commission rejected this recommendation and asked DHCD to draft an alternative that would require DEP approval of bylaws more stringent than Title 5. See III.2 below.

III.2. Require DEP review and approval of local bylaws in excess of Title 5
(This recommendation is an alternative to the rejected III.1 recommendation, and would require Boards of Health to submit documentation of the need to exceed the requirements of Title 5 to DEP for approval.)

Commission Recommendation: It is recommended that MGL Chapter 111, Section 31, be amended to require that Boards of Health document the local conditions, or the technological, scientific or administrative reasons, that make it necessary to pass local regulations that exceed the minimum requirements contained in Title 5. Further, it is recommended that Boards of Health be required to submit proposed regulations and supporting documentation to DEP *according to a defined set of regulatory standards [Commission amendment]* for review and *approval* prior to their becoming effective. The recommended statutory change should take effect one year after enactment. During the one year period, DEP should issue guidance materials to all boards advising them of the types of regulations which on their face, do not appear to be based on valid local conditions, or technological, scientific or administrative reasons. Upon the effective date of the statutory change, board regulations for which no supporting documentation has been received, reviewed and approved by DEP would no longer be in effect. Finally, it is recommended that DEP be provided with sufficient resources to carry out the responsibilities required by the statutory change.
Dissenting Views: DEP opposed this recommendation citing concern that DEP approval of a particular local bylaw would be interpreted as setting a new statewide regulation, with a potential for increased difficulty in development
Commission Vote and Amendment: The Commission voted 5:5 on this recommendation. Then an amendment was proposed during the meeting to insert "according to a defined set of regulatory standards" after the word DEP in the second sentence. The Commission adopted the amended version with a vote of 9:1. Then a second amendment was proposed to strike the word "approval" from the second sentence. The Commission rejected this amendment with a vote of 3:7.

PROHIBITIONS ON ALTERNATIVE SYSTEMS AND SHARED SYSTEMS

III.3. DHCD and DEP should work collaboratively on the implementation of alternative technologies and shared systems.

Recommendation: DEP and DHCD should build on past collaborative efforts to identify other ways in which the two agencies can collaborate on the implementation of alternative technologies and shared systems. These efforts should include, at a minimum, an evaluation on how these systems are performing and whether there are ways to simplify the procedures.
Lead: DEP

Cost: Minimal
Dissenting Views: The Charles River Watershed Association noted that limits to innovate and alternative technologies and prohibitions to shared or community systems may have much to do with the infrastructure within a community and the ability to oversee and maintain such facilities.
Commission Vote: Passed Unanimously

TECHNICAL EDUCATION

III.4. Fund an update of the DeFeo-Wait Report that addresses the deficiencies identified by the subcommittee and collection of literature from other relevant sources. *Much of the science used in developing the 1995 revisions to Title 5 was based on the Defeo-Wait Report. That report is now over 10 years old and while it was very comprehensive, there have been advancements in science as well as significant experience gained by DEP as a result of implementing Title 5.*

Recommendation: The Commission recommends funding an update to the DeFeo-Wait Report *that addresses the deficiencies identified by the subcommittee* [Commission Amendment] and collection of literature from the other states and relevant sources. An advisory group should be created by DEP to assist in compiling existing science and as a forum for technical discussions on updated scientific discussions. *The advisory committee shall recommend when the report needs updating* [Commission Amendment]. Lead: DEP, Cost: Consulting contract less than $100,000
Dissenting Views: The Environmental League of Massachusetts noted that not all parties agree that the DeFeo, Wait, and Associates Report was comprehensive.
Commission Vote and Amendment: The Commission unanimously passed the original text of this recommendation. The Commission then proposed amending the recommendation by inserting " that addresses the deficiencies identified by the subcommittee" after the word Report in the first sentence, and by inserting "The advisory committee shall recommend when the report needs updating" after the second sentence of the recommendation. The Commission's amendment was passed unanimously.

III.5. Publish a guidance document similar to the DEP Stormwater Guidance document that addresses the technical questions associated with Title 5 and provides the science and literature that addresses related issues.

Recommendation: A guidance document similar to the DEP Stormwater Guidance document should be published that addresses the technical questions associated with Title 5 and provides the science and literature that address these issues. The Advisory Committee would oversee the update and assist in the presentation of the science and literature. Lead: DEP, Cost: Contract for training for approximately $100,000

Dissenting Views: The Environmental League of Massachusetts suggested that any guidance document for Title 5 implementation makes clear that more stringent local bylaws are allowed.
Commission Vote: Passed unanimously

III.6. Develop a process for education of local boards of health to accompany publication of a guidance document, as well as any amendment to the board of health enabling statute.

Recommendation: A process for education of local boards of health should be developed to accompany publication of a guidance document, as well as any amendment to the board of health enabling statute. Lead: DEP, Cost: Contract for training for approximately $100,000
Dissenting Views: None
Commission Vote: Passed Unanimously

ACCESS TO RESOURCES

III.7. Employ circuit riders for assisting local boards of health and their agents in implementing Title 5.

Recommendation: The Commission recommends funding for the use of circuit riders for assisting local boards of health and their agents in implementing Title 5.
Lead: DEP, Cost: Five FTEs per year for four circuit riders and one coordinator.
Dissenting Views: None
Commission Vote and Amendment: Passed Unanimously

CROSS-BOARD TRAINING

III.8. Fund programs for cross-board training on general Title 5 for conservation commissions, planning and zoning boards, and boards of selectmen.

Recommendation: The Commission recommends funding to develop programs for cross-board training on general Title 5 for conservation commissions, planning and zoning boards, and boards of selectmen. Lead: DEP, Cost: Consulting contract less than $100,000
Dissenting Views: None
Commission Vote and Amendment: Passed Unanimously

III.9. Expand existing efforts, such as the Local Capacity Building Partnership and ongoing work of DEP and DHCD to provide assistance to local boards.

Recommendation: The Commission recommends expanding existing efforts, such as the Local Capacity Building Partnership and ongoing work of DEP and DHCD to provide assistance to local boards. Lead: DHCD
Dissenting Views: None
Commission Vote and Amendment: Passed Unanimously

INTEGRATED WASTEWATER MANAGEMENT

III.10. Develop guidance for use by communities on the role of typical on-site systems, shared and alternative systems and septage management districts as part of integrated solutions to wastewater management.

Recommendation: The Comprehensive Water Resources Management Guidance currently being developed by DEP for use by communities should include guidance on the role of typical on-site systems, shared and alternative systems and septage management districts as part of integrated solutions to wastewater management. The guidance should include examples of successes that have occurred and samples of acceptable legal instruments that are often required. Lead: DEP, Cost: Minimal
Dissenting Views: None
Commission Vote: Passed Unanimously

B HORIZON

III.11. In order to eliminate a barrier to new housing construction, the same type of permeable subsoils (B Horizons) that are allowed in the remediation of existing systems should be allowed in the construction of new systems.

Recommendation: DEP should develop a policy to allow for the use of B horizons, that are sufficiently permeable, in new soil absorption systems. Lead: DEP, Cost: Minimal
Dissenting Views: None
Commission Vote: Passed Unanimously

NITROGEN SENSITIVE AREAS

III.12. Title 5 contains a provision requiring additional treatment in nitrogen sensitive areas. As a result of conducting scientific evaluations, communities are allowed to designate additional nitrogen sensitive areas. However, the regulations do not specify the nature of the scientific evaluation required to designate areas as nitrogen sensitive. In order to consistently apply this provision, DEP should develop a guidance document on the scientific procedures for designating an area as nitrogen sensitive.

Recommendation: DEP should develop a guidance document on the nature and extent of the scientific evaluations necessary to designate an area to be nitrogen sensitive as well as the procedures necessary to adopt such a designation. Lead: DEP, Cost: Consulting contract less than $100,000
Dissenting Views: None
Commission Vote: Passed Unanimously

CHANGE IN MAXIMUM PERCOLATION RATE

III.13. In order to allow more participation in its demonstration program, to evaluate slower percolation rates, DEP should streamline the application process.

Recommendation: DEP should streamline the application procedure for applicants wishing construct septic systems where the percolation rate is between 31-60 minutes per inch, provide a better information packet and outreach component to explain the application procedure to developers and lending institutions, reduce the perceived risks involved, revisit the monitoring requirements and allow at least 20 but not more then 50 applications per year for two to three years. At the end of two to three years DEP should present the results of the monitoring information it has gathered to a group of stakeholders and determine if the implementation of slower percolation rates under the general provisions of Title 5 should be allowed. Lead: DEP
Cost: Two additional FTEs to review additional applications and review monitoring results.
Dissenting Views: The Minority Report and the Environmental League of Massachusetts objected to this recommendation of allowing 50 applicants per year for slower-than-30-minute percolation rates and the elimination of the fee. They noted the current application procedure did not seem particularly onerous, and opposed reducing the list of requirements. They also noted their belief that the logical reason for lack of applications is the increased cost associated with yearly monitoring, and the delay caused by review of the application and proposed plans.
Commission Vote: Failed by a vote of 1:6. However, an alternative version was proposed and adopted by the Commission. See III.14 below.

III.14. DEP should modify its regulations to provide for the implementation of slower percolation rates, not more than 60 minutes per inch, under the general provisions of Title 5.

Commission Recommendation: DEP should modify its regulations to provide for the implementation of slower percolation rates, not more than 60 minutes per inch, under the general provisions of Title 5.
Dissenting Views: Some subcommittee members voiced concern of the impacts of opening so much land for development on the ground water supply.

Commission Vote: This recommendation was proposed by the Commission as an alternative to the recommendation above (III.13). The Commission adopted this recommendation with a vote of 6:1.

III.15. In order to better understand the impact of allowing a slower percolation rate, DEP, in cooperation with the Massachusetts Association of Health Boards (MAHB) and the Massachusetts Health Officers Association (MHOA), should gather and review information from local boards on their experience with low percolation rate systems installed for remedial purposes.

Recommendation: DEP, in cooperation with the MAHB and MHOA, should gather and review information from local boards on their experience with low percolation rate systems installed for remedial purposes. ~~DEP should incorporate the results of this effort into its presentation on the above monitoring program~~. Lead: DEP, Cost: Minimal contracts with MHAB and MHOA.
Dissenting Views: None
Commission Amendment and Vote: The Commission proposed amending this recommendation by striking "DEP should incorporate the results of this effort into its presentation on the above monitoring program." The Commission passed this recommendation with the Commission's amendment with a vote of 8:1.

TRAINING FOR PROFESSIONALS

III.16. In anticipation of a revision to Title 5 that will accommodate up to 60 minutes per inch percolation rates, DEP should implement a training program for the certification of Soil Evaluators, system designers and contractors for the design and installation of septic systems in slower soils.

Recommendation: DEP should implement a training program for the certification of Soil Evaluators, system designers and contractors for the design and installation of septic systems in slower soils, in anticipation of a revision to Title 5 that will accommodate up to 60 minutes per inch percolation rates.Lead: DEP, Cost: Two FTEs for two years and one FTE per year thereafter.
Dissenting Views:
Commission Vote: Passed Unanimously

IV. Recommendations of the Zoning Subcommittee

The Zoning Subcommittee proposed the following recommendations to the Commission. The recommendation of the Commission and an explanation of any minority or dissenting views follow each of the Zoning subcommittee's proposed recommendations. Two minority reports were submitted by members of the Zoning Subcommittee. The two minority reports are referred to as The First Minority Report (Broadrick Minority Report) and The Second Minority Report (Smolak Minority Report) as this is the order in which they were submitted. In Addition, The Department of Environmental Protection (DEP) and the Metropolitan Area Planning Council (MAPC) submitted written comments regarding the recommendations of the Zoning Subcommittee. Copies of The Zoning Subcommittee Report, both minority reports and the written comments are included in appendices J, K, L, M, and N respectively.

MUNICAL COST BURDEN

IV.1. In order to defray municipal costs associated with new housing, reallocate portion of existing local aid and establish local aid impact fund.

Recommendation: The state should establish a comprehensive model for local aid which, on a community by community basis, assesses the impact of new housing. Such a model may reallocate some portion of existing aid and establish a state local aid impact fund to defray the true impact of new housing construction on cities and towns.
Dissenting Views: The First Minority Report (Broadrick Minority Report) did not support the re-allocation of local aid.
Commission Vote: Passed unanimously

DENSITY REGULATIONS

IV.2. Design housing programs that encourage communities to engage in friendly 40Bs and reward them by defraying municipal costs incurred by housing production.

Recommendation: The Commonwealth should encourage communities to use the 40B process as a way of increasing production of market housing as well as affordable housing. The Commonwealth should design programs that reward communities that use this process in a friendly manner by defraying the municipal costs incurred by increased housing production.
Dissenting Views: MAPC opposed this recommendation on the basis that developers currently use the comprehensive permit process to circumvent local zoning.
Commission Vote: passed unanimously

IV.3. Identify ways to increase housing produced through housing programs

Recommendation: Examine all existing housing programs to evaluate their market demand and to determine if there are ways they can be revised to further increase housing production.
Dissenting Views: None
Commission Vote: Passed unanimously

IV.4. Support zoning for higher density housing near commercial & transit uses.

Recommendation: Encourage local adoption of zoning regulations that support higher density housing near commercial and transit uses.
Dissenting Views: None
Commission Vote: Passed unanimously

IV.5. Establish a committee to recommend programs, legislation, and planning tools that will increase housing production in the Commonwealth.

Recommendation: Establish a committee via legislation that includes local officials, developers, planners and housing advocates for the purpose of recommending programs, legislation and planning tools that will increase housing production in the Commonwealth. Such programs, legislation and planning tools should be available at local option so as to maintain local autonomy.
Dissenting Views: None
Commission Vote: Passed unanimously

IV.6. In order to discourage "sprawl development", encourage further study of density regulations.

Commission Recommendation: Encourage further study of density regulations.
Dissenting Views: None
Commission Vote: The Commission proposed this recommendation and it was passed unanimously.

GROWTH CONTROL BYLAWS

IV.7. In order to discourage the use of growth control bylaws to limit housing production, require municipal growth control by-laws to: a) identify a specific problem(s) and include a reasonable stated duration; and b) contain a strategic plan to address the problem(s) and be approved by DHCD. *This may require legislation to empower DHCD to do this. Currently, all town (not city) bylaws are reviewed by the Attorney General for conflict with existing statutes.*

Recommendation: Any municipal growth control by-law must: a) identify a specific problem(s) and include a reasonable stated duration; and b) contain a strategic plan to address the problem(s). The plan, which must be approved by DHCD, shall address the specific problem(s) and propose a timetable for solving the problem(s). Should the community seek to extend the bylaw for another duration, the community must revise its plan to explain the rationale
Dissenting Views: The First Minority Report (Broadrick Minority Report), and MAPC opposed citing erosion of local community control. The Second Minority Report (Smolak Minority Report) supported this recommendation, but noted there needs to be some mechanism to ensure that a municipality proposing growth controls does so in a reasonable manner and undertakes measures to resolve the problem within a reasonable amount of time.
Commission Vote: Passed unanimously

IV.8. Exempt dwelling units of two bedrooms or less from local growth control measures enacted.

Recommendation: Exempt dwelling units of two bedrooms or less from growth control measures enacted based on municipal finance concerns as there are likely to be few children living in these types of units, but they are vitally needed for young adults and seniors.
Dissenting Views: The First Minority Report (Broadrick Minority Report) opposed citing number of children likely to live in these units.
Commission Vote: Passed unanimously

MUNICIPAL FEES

IV.9. Amend Section 53G of Chapter 44 to allow developers a choice of review consultants, and to provide administrative appeal on the reasonableness of the scope of work to be performed by the consultant and the cost of such work. *Municipalities may require developers to pay consultants to perform design review on behalf of the town. Many times, the level of consultant time required by a community may exceed what is reasonably necessary to review a project. Moreover, some municipalities provide an applicant only one choice of review agent when at least four choices would be reasonable. Further, some municipalities charge permit fees that are well in excess of the reasonable cost in administering the permit program.*

Recommendation: Amend Section 53G of Chapter 44 to allow developers a choice of not fewer than four review consultants. To avoid the appearance of a conflict and using the Conflict of Interest Law, MGL, Chapter 268A, as a guide, it is recommended that the list cannot include an individual who has worked for the developer in the past year and that the selected consultant must agree not to work for the developer for at least one year after the conclusion of the review. In addition, Section 53G of Chapter 44 should provide an administrative appeal

to the city council or board of selectmen on the reasonableness of the scope of work to be performed by the consultant, and the reasonableness of the consultant costs to be expended on the review of a project.
Dissenting Views: The First Minority Report (Broadrick Minority Report) and MAPC opposed citing potential threat to local control.
Commission Vote: Passed unanimously

IV.10. Amend Section 53G of Chapter 44 to authorize conservation commissions to impose reasonable fees for the employment of outside consultants.

Recommendation: If the recommendation above to allow developers choice in review consultants is enacted by the Legislature, then Section 53G of Chapter 44 should also authorize conservation commissions to impose reasonable fees for the employment of outside consultants.
Dissenting Views: The First Minority Report (Broadrick Minority Report) and MAPC opposed citing potential threat to local control.
Commission Vote: Passed unanimously

IV.11. In order to create some uniform standards, DHCD should develop a model outside consultant review bylaw that can be readily adapted by a municipality.

Recommendation: DHCD should develop a model outside consultant review bylaw that can be readily adapted by a municipality.
Dissenting Views: MAPC opposed citing potential threat to local control.
Commission Vote: Passed unanimously

IV.12. Revise local permit fee structure to reflect the reasonable costs of permit program administration and require communities to provide a rationale for local permit fees.

Recommendation: Revise local permit fee structure to reflect the reasonable costs of permit program administration, to prevent them from being used as a mechanism to generate revenue in excess of the costs of administration for a particular board, commission or department. Communities should be required to provide a rationale for the fees charged, demonstrating the relationship between such fees and the cost of providing the particular service.
Dissenting Views: None
Commission Vote: Passed unanimously

SUBDIVISION CONTROL REGULATIONS

IV.13. Excessive road and infrastructure design and construction standards add substantial cost and create a significant barrier to creation of housing. Establish working group of stakeholders to recommend design and construction standards for roadways.

Recommendation: Establish a working group of stake holders, including developers, municipal officials, environmental planners and engineering consultants to recommend design and construction standards for roadways. This committee should also prepare a guidebook containing the suggested standards for distribution to cities and towns.
Dissenting Views: None
Commission Vote: Passed Unanimously

IV.14. Communities that substantially adopt the suggested construction standards as an action will earn a point toward E.O. 418 housing certification.

Recommendation: The Department of Housing and Community Development shall include substantial adoption of the suggested construction standards as an action that can be used by a community to qualify toward obtaining housing certification pursuant to Executive Order 418.
Dissenting Views: None
Commission Vote: Passed unanimously

LOCAL WETLAND PROTECTION BYLAWS

IV.15. A significant barrier to housing development is related to how wetlands are regulated in the Commonwealth. Require DEP approval of local wetlands regulations more stringent than the state regulations.

Recommendation: The State Wetlands Act should be the primary authority for the regulation of Wetlands in the Commonwealth. A municipality should have the ability to enact more stringent regulations if based on science and approved by the DEP.
Dissenting Views: DEP and MAPC opposed the original recommendation citing separate home rule authority.
Commission Vote: The Commission passed this recommendation 7:2, however the Commission also adopted the amendment proposed in the Smolak Minority Report. See IV.16 below.

IV.16. Establish a wetlands bylaw review process requiring local conservation commissions (or municipalities) to provide the DEP with copies of proposed local bylaws, including generally-recognized scientific justification for their enactment, and the unique local conditions meriting a deviation from the uniform code, prior to bylaw enactment. *Wetlands are regulated both under the State Wetlands Act and local wetlands bylaws enacted pursuant to the State Wetlands Act. Some local wetlands bylaws have introduced certain "no-build" and "non-disturbance" areas located either within a wetlands resource area buffer zone or beyond the buffer zone and in upland resource areas in excess of*

what may be necessary for environmental protection. In addition, some local wetlands bylaws include stormwater management guidelines in excess of the DEP Stormwater Management Guidelines.

Commission Amendment: Require that the State Wetlands Protection Act and Regulations serve as a uniform code. Proposed local wetlands bylaws, which are more stringent than standards described under the State Wetlands Act and Regulations shall be based on generally recognized scientific principles and include regulation of subject matter defined in the State Wetlands Act and Regulations. In order to enforce these requirements, establish a wetlands bylaw review process which would require local conservation commissions (or municipalities), prior to bylaw enactment, to provide the DEP with copies of proposed local bylaws, including generally-recognized scientific justification for their enactment, and the unique local conditions meriting a deviation from the uniform code. The Department of Environmental Protection, in turn, should be charged with reviewing the proposed bylaw to ensure that such bylaws are consistent with the state regulatory requirements, are scientifically justified and are based upon unique local circumstances. Such review procedure should be instituted regardless of whether the local wetlands bylaw is enacted under home rule authority or otherwise. Provide additional resources to implement this recommendation.
Dissenting Views: This was an amendment proposed by The Second Minority Report (Smolak Minority Report) to the previous recommendation. The First Minority Report (Broadrick Minority Report) noted there is no need for DEP to have final say over local bylaws, DEP opposed noting separate home rule authority and concern that DEP approval of stricter regulations for one community would be interpreted as a new higher standard for all communities.
Commission Vote: The Commission passed 6:3

IV.17. In order to streamline the permitting process, combine dual wetland bylaw appeal process

Recommendation: In communities where local wetlands bylaws have been enacted, the current dual appeal process should be combined by creating a consolidated appeal process to be administered by DEP.
Dissenting Views: DEP opposed citing need to determine for further analysis.
Commission Vote: Due to concerns raised regarding the legality of the recommendation the Commission rejected this recommendation with a vote of 1:5 and enacted an amendment. See IV.18

IV.18. Conduct further analysis to determine whether a statutory mechanism can be created to combine the appeals process, to create a uniform standard of review, and to create uniform appeal periods.

Commission Amendment: Conduct further analysis to determine whether a statutory mechanism can be created to combine the appeals process, to create a uniform standard of review, and to create uniform appeal periods. We all

recognize the problem and the barrier it creates to housing creation, but the recommended solution to this problem will require much more substantive analysis.

Dissenting Views: None

Commission Vote: This recommendation was proposed by the Commission in response to a similar one proposed in the Smolak Minority Report. It was unanimously passed by the Commission

APPEALS PROCESS

IV.19. Mandate the court to impose on non- municipal plaintiffs the requirement to post a surety or cash bond in a sum between $2,000 and $15,000. *It is very inexpensive for communities and abutters to appeal subdivision approvals and tie up housing projects for years, yet costly for developers to litigate arbitrary decisions by boards. Currently the appeals process provides a powerful tool to anti-housing interests, since arbitrary and frivolous appeals can be lodged with little or no basis, cost or risk. This recommendation seeks to balance this appeals process by reducing the number of unwarranted appeals.*

Recommendation: Amend Section 17 of Chapter 40A to mandate the court to impose on non- municipal plaintiffs the requirement to post a surety or cash bond in a sum between $2,000 and $15,000 to secure the payment and award of court costs to the applicant in appeals of decisions approving special permits when the court determines the appellant acted in bad faith or with malice in making the appeal to the court.

Dissenting Views: The First Minority Report (Broadrick Minority Report) and MAPC opposed citing erosion of public process and negative impact on those with smaller financial resources.

Commission Vote: Passed Unanimously

IV.20. Amend Section 81BB to provide the applicant with the right to file an immediate, special motion to dismiss an appeal of an approval of a special permit and /or definitive subdivision plan approval if the applicant feels it can demonstrate that the appellant acted in bad faith or with malice in making the appeal to the court. *Under current law appeals of special permit approval can take up to one to three years for a final decision. Only the largest building companies have the cash flow to support the costs for these suits. This recommendation seeks to reduce the misuse of the appeals process and improve the efficiency with which genuine issues are resolved.*

Recommendation: In addition, or as an alternative, to requiring appellants to post a surety or cash bond, Chapter 40A, Section 17 and Chapter 41, amend Section 81BB to provide the applicant with the right to file an immediate, special motion to dismiss an appeal of an approval of a special permit and /or definitive subdivision plan approval if the applicant feels it can demonstrate that the appellant acted in bad faith or with malice in making the appeal to the court. In such circumstances when the court grants such special motion to dismiss based upon its findings of bad faith or malice, the court shall award the

applicant both costs and reasonable attorneys fees including those costs and fees incurred for the special motion and any related discovery matters.
Dissenting Views: The First Minority Report (Broadrick Minority Report) and MAPC opposed.
Commission Vote: Passed unanimously

IV.21. Enact Senate Bill No. 810 of 2001

Recommendation: Legislature should enact, and the Governor should support, Senate Bill No. 810 of 2001, amending MGL, Chapter 183 to give precedence to any civil action or proceeding involving real estate permits or any similar legislation that would expedite litigation involving residential construction.
Dissenting Views: The First Minority Report (Broadrick Minority Report) and MAPC opposed.
Commission Vote: Passed unanimously

DENSITY BONUS REGULATIONS

IV.22. DHCD should develop a model affordable housing density bonus bylaw package.

Recommendation: In order to encourage the use of the density bonus incentive to create additional units of affordable housing without having to go through the Chapter 40B process, DHCD should develop a model affordable housing density bonus bylaw package which includes: a model inclusionary housing bylaw, a model affordable housing restriction, recommended marketing and sales practices, recommended process for managing the affordable units, and a step-by-step guide for the developer and municipality which describes the process for establishing and maintaining affordable units.
Dissenting Views: None
Commission Vote: Passed unanimously

IV.23. Amend The Zoning Act, to specifically allow municipalities to enact zoning provisions permitting housing density bonuses as a matter of right.

Recommendation: Amend C. 40A, The Zoning Act, to specifically allow municipalities to enact zoning provisions permitting housing density bonuses as a matter of right.
Opposing Views: None
Commission Vote: Passed unanimously

MIXED USE DEVELOPMENT PROJECTS

IV.24. Create incentives for companies looking to relocate to the Commonwealth and/or looking to undertake mixed-use developments which create housing to complement the commercial development.

Recommendation: The Commonwealth should provide incentives to companies looking to relocate to the Commonwealth and/or looking to mixed-

use development which creates housing to complement the commercial development. Such incentives could include enhanced tax increment financing which could be expanded to include housing creation as part of a mixed use development package. Other financing incentives which link commercial development incentives with housing creation could expand housing opportunities, and result in the creation of a revenue neutral project. Such incentives could be targeted for developments which locate in existing commercial/industrial areas as well as areas located adjacent to mass transit corridors.
Dissenting Views: MAPC opposed noting a pre-emption of local regulations.
Commission Vote: Passed unanimously

IV.25. Allow the abandoned building tax credit to be used to encourage the redevelopment of urbanized blighted areas into new neighborhoods.

Recommendation: Allow the abandoned building tax credit to be used to encourage the redevelopment of urbanized blighted areas into new neighborhoods.
Dissenting Views: None
Commission Vote: Passed unanimously

BROWNFIELDS GRANT, LOAN, AND TAX PROGRAMS

IV.26. There are many good financing grant and tax incentive programs for commercial development on brownfields. Where brownfields are suitable for residential development, authorize such housing projects as eligible for state brownfields programs and related incentives to redevelop urbanized areas into housing for all income levels.

Recommendation: Where brownfields are suitable for residential development, authorize such housing projects as eligible for state brownfields programs and related incentives to redevelop urbanized areas into housing for all income levels. For example, subsidized environmental insurance can provide incentives for redevelopment of housing and the cleanup of hazardous materials. The Brownfields Tax Credit and Municipal Tax Abatement programs would also provide incentives to both remediate contamination and create additional housing opportunities.
Dissenting Views: None
Commission Vote: Passed unanimously

URBAN REDEVELOPMENT CORPORATION

IV.27. Create an incentive for more urban reinvestment by amending Chapter 121A the statute that regulates urban renewal development to increase the return on investment from a maximum of 8% to mirror the amount allowed under other programs.

Recommendation: Amend Chapter 121A to increase the return on investment from a maximum of 8% to mirror the amount allowed under certain programs under Chapter 40B (i.e., 20% of development costs for non-rentals, and 10% of equity for rental housing).
Dissenting Views: None
Commission Vote: Passed unanimously

REGIONAL HOUSING SUPPLY PLANNING

IV.28. Examine the applicability of regulatory tools, such as those of the Cape Cod Commission, as a way to direct housing production to areas of greatest need, while protecting natural resources and assuring an adequate public transportation network and infrastructure for the housing to be built.

Recommendation: In addition to supporting the planning efforts supported by Executive Order 418, the Commonwealth should examine the applicability of regulatory tools, as a way to direct housing production to areas of greatest need, while protecting natural resources and assuring an adequate public transportation network and infrastructure for the housing to be built. *The Commission further recommended that the Regional Planning Agencies (RPAs) be used to develop tools to help communities plan for and create increased housing supply. Such tools should not add further regulatory barriers.*

Dissenting Views: MAPC noted the need to encourage the use of planning tools with the help of Regional Planning Agencies.
Commission Vote and Ammendment: The recommendation was passed unanimously. The Commission proposed amending the recommendation by adding "The Commission further recommended that the Regional Planning Agencies (RPAs) be used to develop tools to help communities plan for and create increased housing supply. Such tools should not add further regulatory barriers. " The amendment was unanimously passed.