HILL LAW

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The Honorable John Cronin, Senate Chair
The Honorable Lori Ehrlich, House Chair
Joint Committee on Municipalities and Regional Government
State House
Boston, MA 02133

RE: H.2198, Support for An Act Relative to the Preservation of Wetlands and Water Resources in Chapter 40B Applications

Dear Chair Cronin and Chair Ehrlich:

The undersigned attorneys at Hill Law are writing to request that the Joint Committee on Municipalities and Regional Government report a favorable recommendation for H.2198. In addition to the oral testimony provided by our panel[1] at the July 27, 2021 hearing, we respectfully submit these comments for your consideration.

By way of introduction, Hill Law is a boutique law firm specializing in land use, municipal, and environmental law.[2] We regularly represent municipalities and private clients in matters concerning development projects. Our attorneys are experts in Massachusetts zoning and planning law, the Subdivision Control Law, the state Wetlands Protection Act, Title 5 wastewater law, and M.G.L. Chapter 40B, s. 20-23 ("Chapter 40B"). Based on our experience in these practice areas, we have realized that the current Chapter 40B law has resulted in the unintended consequence of steering mixed-income housing projects towards sensitive sites near

[1] The following individuals testified on behalf of our panel at the July 27th hearing: Daniel Hill, Esq. and Dennis Murphy, Esq. of Hill Law; Luke Legere, Esq. of McGregor & Legere, P.C.; Scott Horsley, hydrologist; Patrick C. Garner, wetlands scientist; Steve Gang, Chair of Manchester's Conservation Commission; Dorothy McGlincy, Executive Director of the Massachusetts Association of Conservation Commissions; Heather Miller, Esq., General Counsel and Policy Director of the Charles River Watershed Association; Patrice Murphy, Director of the Manchester Essex Land Trust; and Emily Molden, Director of the Nantucket Land Council.

[2] Our advocacy for H.2198 is not at the behest of any particular client, but rather reflects our own professional and reasoned opinions.

wetlands and water resource areas, to the detriment of those natural resources. H.2198 would solve this problem by removing the current financial incentive to locate Chapter 40B projects on environmentally sensitive land. This would preserve the wetland and water resource protection regulations that local officials have adopted for sound reasons, such as protecting drinking water supplies, minimizing flood damage, and preserving natural resources. H.2198 would otherwise have no effect on the Chapter 40B program – projects would simply be steered towards more appropriate sites.

I. H.2198 would encourage appropriate siting of mixed-income housing projects, while also protecting wetlands and water resources.

Chapter 40B was enacted in 1969 to enable housing developers to obtain waivers from municipal bylaws and regulations that restricted multi-family housing, or otherwise made the development of affordable housing uneconomic. In return, developers must agree to set aside a certain percentage of units (typically 25%) as low- or moderate-income housing. If a municipality has not yet achieved the statutory minimum of 10% affordable housing units, any denial of waivers is presumed to be "inconsistent with local needs" and would likely be overturned through an appeal to the state Housing Appeals Committee. The waiver component of Chapter 40B is broad and captures all locally-adopted regulations, even those unrelated to density. This means that municipalities are compelled to waive wetland and water resource protection bylaws to accommodate Chapter 40B developments, notwithstanding the benefit those bylaws provide in protecting irreplaceable surface water and groundwater resources.

Notably, wetlands and water resource protection bylaws were not even contemplated in 1969 when Chapter 40B went into effect. The Massachusetts Wetlands Protection Act did not come into existence until 1972, and local wetlands bylaws have proliferated only in the last 10-20 years. However, under the current law, local wetlands and water resource protection bylaws are conflated with the zoning and density regulations that have historically, and more directly, frustrated affordable housing production. There is a material difference between blanket zoning restrictions prohibiting multi-family housing, and regulations that prevent septic systems and other pollution sources (including PFAS) from contaminating surface and ground waters.

Environmentally-sensitive land containing wetlands and other water resources is typically inexpensive, because local regulations restrict what can be built there. This has meant that Chapter 40B developers have a financial incentive to purchase environmentally-sensitive land, and then obtain waivers from the very same environmental regulations that made the land cheap, so as to realize a windfall profit at the expense of environmental protection.

H.2198 would fix this problem by preserving local discretion to enforce wetlands or water resource protection bylaws in Chapter 40B developments. Specifically, the amendment shifts the legal presumption to Chapter 40B applicants to prove that a project will still protect the environment if it receives an applicable bylaw waiver. This shift will only occur in municipalities that have adopted bylaws that: (1) legitimately protect surface waters or groundwater; (2) have been approved by the Attorney General pursuant to G.L. c. 40, § 32; and (3) are enforced by the local conservation commission pursuant to G.L. c. 40, § 8C. Notably,

local zoning boards could still grant waivers of the local wetlands and water resources bylaws if they determine that such waivers would not be detrimental to the environment. The difference between the current law and the proposed amendment is that local zoning boards would retain discretion to approve or deny waivers from wetlands and water source protection bylaws, regardless of the municipality's status under Chapter 40B. H.2198 would also remedy the unintended consequence of Chapter 40B projects being steered towards inexpensive, "wet" land. Not only does this protect the environment, it also ensures that affordable housing isn't relegated to suboptimal sites. H.2198 is a common-sense and logical solution that would allow developers to obtain waivers for appropriately sited projects, while fixing a narrow problem with the current law.

II. The current Chapter 40B law prevents local governments from adequately protecting important wetlands and water resources, ignoring local water protection needs.

Stormwater runoff from development is the primary source of surface water and groundwater pollution in Massachusetts.[3] Construction within upland buffer zones to wetlands causes adverse impacts to water quality and quantities, flood storage capacity, storm damage resilience, wildlife habitat and diversity, the ability of wetlands to sequester and store carbon, and climate change resilience. Pollution from stormwater and wastewater systems associated with residential and commercial development contaminates our drinking water and causes algae blooms that choke the ecosystems of our ponds, streams and estuaries. Wetlands provide vital filtration to attenuate these pollutants.

As has been addressed in numerous letters of supportive testimony, the Massachusetts Wetland Protection Act ("WPA") and its associated regulations at 310 CMR 10.00 *et seq.* do not adequately protect buffer zones to wetland resource areas across the Commonwealth. The WPA model applies a one-size-fits-all approach which is not strong enough in many regions of the state to adequately protect water resources. For example, under the WPA, work in the 100-foot buffer zone to Bordering Vegetated Wetlands is often permitted, and vernal pools and Isolated Land Subject to Flooding do not have regulated upland buffer zones. As a result, construction and related activities are allowed in close proximity to these wetlands under state law. In response to such shortcomings, many municipalities have adopted local wetlands protection bylaws governed by G.L. c. 40, § 32 to enhance protection for buffer zones, based on their specific community needs. Although the WPA may adequately protect certain areas of the Commonwealth, such as our urban centers or the mountainous regions, uniform state-wide amendments are not the solution. For example, Worcester does not have the same concerns with storm surges as coastal communities, making stricter regulation of coastal wetlands (like marshes and estuaries) more appropriate on a local basis. Municipalities should be encouraged to tailor their environmental bylaws to serve their unique needs.

Similarly, state regulations at 310 CMR 22.00 *et seq.* governing water resource protection are also often inadequate to protect drinking water supplies and underground aquifers, which are

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[3] Massachusetts Rivers Alliance, *Water Pollution*, https://www.massriversalliance.org/water-pollution.

increasingly vulnerable to contamination as surrounding land is developed with septic systems and stormwater infiltration systems. In fact, according to the Massachusetts Board of Health's (MBOH) Drinking Water Guidebook, the DEP "recommends that each town and city adopt protective land use controls for all wellhead and surface water supply protection areas in the community" because, "as a rule, preventing a water supply from becoming polluted is far easier and cheaper than cleaning up a contaminated supply after the fact." These local regulations to protect drinking water should not be bypassed, as occurs under the current law.

For wastewater, 310 CMR 15.00—also known as Title 5— also lacks important protections such that a septic system from a high-density housing development could contaminate the drinking water well on neighboring property *and still be in compliance with Title 5*. Title 5 setback requirements are lacking in that they do not differentiate between a septic system serving one house with four bedrooms and an apartment complex with 90 bedrooms.[4] Local water resource protection bylaws, such as aquifer protection zones, are often created to close such gaps in state regulations. Again, municipalities should be encouraged to address these issues through local bylaws, which can focus on a community-specific need. For example, towns on Cape Cod have a significant interest in groundwater protection due to reliance on the sole-source aquifer, and therefore may have stricter water resource protection requirements than towns served by the Massachusetts Water Resources Authority.

This summer's unpredictable weather and violent storms have served as a sobering reminder that municipalities need to act more aggressively on climate change resiliency efforts to address extremely wet and hot summers, sea level rise, increased natural disasters, and other potential future environmental problems. In the face of these threats, more municipalities are trying to fortify and build community resilience through local wetland and water resource protection bylaws and ordinances, including bylaws that protect flood storage capacity. As discussed above, it also makes sense that these preparations should be handled at the municipal level, because there is a high likelihood that the inhabitants of Cape Cod, Hull, and Nahant will have different sets of needs in the coming years than those of Pittsfield or West Boylston, for example. Rather than trying to perfect and rely on an outdated, one-size-fits-all regulatory model for the entire state, regulations such as the Wetland Protection Act should be considered as a floor providing a base level of protection, that municipalities can supplement with enforceable wetlands and water resource protection bylaws that apply equally to all housing developments.

The critical need for this amendment is shown by the unanimous support H.2198 has obtained from the wetlands and water protection community, including supportive testimony submitted by:

Association to Preserve Cape Cod;
Nantucket Land Council;
Vineyard Conservation Society;
Massachusetts Association of Conservation Commissions;

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[4] See 310 CMR 15.203, "System Sewage Flow Design Criteria," page 31, effective September 9, 2016, (mass.gov).

Trustees of the Reservations;
Mass Audubon;
Massachusetts Water Works Association;
Mystic River Watershed Association;
Blackstone River Watershed Association;
Charles River Watershed Association;
Ipswich River Watershed Association;
Jones River Watershed Association;
Merrimack River Watershed Council;
Nashua River Watershed Alliance;
Neponset River Watershed Association;
North & South Rivers Watershed Association;
OARS (representing the Sudbury, Assabet, and Concord Rivers); and
Taunton River Watershed Alliance.

We are not aware of any political opposition to H.2198.

For the reasons detailed above, we respectfully urge the Committee to report favorably on H.2198.

Sincerely yours,

/s/ Daniel C. Hill

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